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IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

IN AND FOR TETON COUNTY, WYOMING

DANIELLE JOHNSON, et al., Plaintiffs, v. STATE OF WYOMING, et al., Defendants.	)	Case No. 18853

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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COME NOW Plaintiffs, by and through undersigned counsel, in support of their *Motion for Summary Judgment*, hereby state as follows:

INTRODUCTION AND DISPOSITION REQUESTED

Since the state's inception, all Wyomingites have had the fundamental right to be left alone by the government absent a compelling need, narrowly drawn. This is especially true in their private affairs. Every woman in Wyoming enjoys these fundamental rights. These rights include equality and uniform operation of the law, privacy, bodily integrity, conscience and to make health care decisions about intimate matters and the composition of her family.

These fundamental rights are now jeopardized by efforts of the state to deprive Wyoming women of their right to control their bodies, their families and their health care. On July 27, 2022, HB 0092 ("Wyoming Trigger Ban") became effective, banning all abortions, subject only to certain vague exceptions. That same day, this Court entered a TRO, and subsequently entered a preliminary injunction, enjoining enforcement of the Wyoming Trigger Ban statute. *See* Order Granting Motion for Preliminary Injunction (Aug. 10, 2022), *Johnson v. Wyoming*, Civil Action No. 18732 ("PI Order"). Among other things, the Court found that Plaintiffs had established a likelihood of success on the merits of three constitutional claims: the right of Wyomingites to make their own health care decisions under article 1, section 38 ("Section 38"); equal political rights under article 1, section 3; and vagueness.

In apparent response to the Court's PI Order, the Wyoming legislature passed a new bill banning abortion, HB 0152, which became effective on or about March 17, 2023 ("Criminal Abortion Ban"). Although the Criminal Abortion Ban attempts to cure some of the defects in the Trigger Ban identified in the Court's PI Order, it has fallen far short of doing so. To the contrary, the new provisions in the statute only serve to reinforce the Court's prior rulings and further make explicit that the primary motivation behind the law is to impose a particular religious viewpoint—

that life begins at conception—on all Wyoming citizens.

On March 22, 2023, this Court entered a temporary restraining order against enforcement of the Criminal Abortion Ban. In an order dated April 17, 2023, the Court found Plaintiffs had demonstrated a likelihood of success on their claim that the Criminal Abortion Ban violates Section 38, that they would suffer irreparable injury without a TRO and that the balance of harms and public interest supported issuance of a TRO ("Abortion Ban TRO Order").

In addition to the Criminal Abortion Ban, the legislature also enacted SF 0109 banning use of medication for abortions ("Criminal Medication Ban"). SF 0109 was signed by the Governor on March 17, 2023, and was to become effective on July 1, 2023. However, on June 22, the Court issued a temporary restraining order against the Medication Ban.

The Criminal Medication Ban suffers the same defects as the Trigger Ban and the Criminal Abortion Ban. In addition, the provisions of the Criminal Medication Ban conflict with the Criminal Abortion Ban, such that it is possible an abortion could be permissible under the Criminal Abortion Ban, but use of medication for such a legal abortion would be prohibited under the Criminal Medication Ban. Such a result will impose even greater irreparable injury on Plaintiffs and other Wyoming citizens while furthering no conceivable governmental interest.

Plaintiffs have put forward extensive factual showings that the abortion statutes violate multiple constitutional provisions, including testimony of the Plaintiffs and experts, along with supporting documentation. The State has not attempted to rebut any of this showing, instead taking the position that there are no material fact issues in this matter. Because there are no factual disputes, this case is ripe for summary judgment. For the reasons set forth below, this Court should grant Plaintiffs summary judgment, issue a declaration that the Criminal Abortion Ban and the Criminal Medication Ban violate the constitutional rights of Plaintiffs and other Wyoming citizens

and permanently enjoin Defendants from enforcing the Criminal Abortion Ban and the Criminal Medication Ban.

BACKGROUND

In the 2022 legislative session, the Wyoming State Legislature adopted HB 0092, the Wyoming Trigger Ban, which amended the State's abortion law to prohibit abortion at any point during a woman's pregnancy. H.R. 92, 66th Leg., Budget Sess., Ch. 88 (Wyo. 2022). HB 0092 provided three limited exceptions for situations in which (1) an abortion is necessary to protect a woman's life or to prevent "a serious risk of . . . substantial and irreversible impairment of a major bodily function," (2) "the pregnancy is a result of incest as defined by W.S. § 6-4-402" or (3) a patient's pregnancy is the result of "sexual assault as defined by W.S. § 6-2-301." *Id.* § 1(a). Violating HB 0092 constituted a felony punishable by up to 14 years in prison. Wyo. Stat. § 35-6-110 (repealed 2023).

In the 2023 legislative session, HB 0152 was adopted, repealing the Wyoming Trigger Ban and replacing it with another abortion ban. H.R. 152, 67th Leg., Gen. Sess., Ch. 184 (Wyo. 2023). HB 0152 has somewhat different exceptions where (1) in a physician's reasonable medical judgment, an abortion is necessary to protect a woman's life or to prevent "[a] serious and permanent impairment of a life-sustaining organ," (2) the pregnancy is a result of sexual assault or incest that is reported to a law enforcement agency, or (3) one of a number of enumerated complications exist, including ectopic pregnancy, molar pregnancy, lethal fetal anomaly or fetal demise, as defined by the statute. Wyo. Stat. §§ 35-6-122(a)(i) & 124(a)(iv). In addition, the new statute contains provisions expressly prohibiting selective reduction in a multi-fetal pregnancy. Wyo. Stat. § 35-6-122(a)(i).

HB 0152 also includes an express statement of its intended purposes, as well as multiple provisions purporting to establish personhood from the moment of conception. Wyo. Stat. § 35-

6-121. Penalties for violation of the Criminal Abortion Ban include a fine of up to $20,000, imprisonment for up to five years and forfeiture of a physician's medical license. Wyo. Stat. §§ 35-6-125 & 126. The statute also provides civil remedies for compensatory and punitive damages against a physician who violates the act. Wyo. Stat. § 35-6-127.

Also during the 2023 legislative session, SF 0109, the Criminal Medication Ban, was passed, providing that "it shall be unlawful to prescribe, dispense, distribute, sell or use any drug for the purpose of procuring or performing an abortion on any person." S. 109, 67th Leg., Gen. Sess., Ch. 190 (Wyo. 2023).[1] The Criminal Medication Ban has yet a different set of exceptions for 1) certain types of contraceptives; 2) sexual assault and incest; 3) "natural miscarriage;" and 4) "[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment," but expressly excluding any such peril resulting from psychological or emotional conditions. Wyo. Stat. § 35-6-139(b).

Penalties for violating the Criminal Medication Ban include a prison term of up to six months and a fine of up to $9,000. Wyo. Stat. § 35-6-139(c). Although the statute exempts from prosecution "[a] woman upon whom a chemical abortion is performed or attempted," Wyo. Stat. § 35-6-139(d), it is unclear if this would apply to a woman who herself obtains or uses medication for an abortion.

Plaintiffs are Wyoming reproductive-aged women, licensed physicians, a clinic that provides reproductive health care services to pregnant patients and a Wyoming non-profit agency that ensures disadvantaged women may access abortion services. Ex. 1, Anthony at ¶ 1; Ex. 2, Hinkle at ¶ 1; Ex. 3, Lichtenfels at ¶¶ 1, 3; Ex. 4, Burkhart at ¶¶ 7, 9; Ex. 5, Johnson at ¶ 11; Ex. 6, Dow at ¶ 12. Unless this Court issues a permanent injunction, the Criminal Abortion Ban and

[1] The Criminal Medication Ban was originally codified as Wyoming Statute section 35-6-120 in SF 0109. *Id.*

Criminal Medication Ban will strip Wyoming women of their rights and their access to safe and legal abortion, forcing pregnant women to carry unwanted pregnancies to term against their will, to remain pregnant until they can travel out of state at great cost to themselves and their families, or to attempt to self-manage their abortions outside the medical system. Ex. 1, Anthony at ¶¶ 34–36; Ex. 2, Hinkle at ¶¶ 10, 12; Ex. 3, Lichtenfels at ¶¶ 22–26.

In addition, physicians and health care providers will lose the right to continue offering necessary and evidence-based health care services to their patients. Ex. 1, Anthony at ¶ 55; Ex. 2, Hinkle at ¶¶ 9–10, 34–36. Even where abortion may be permissible under the Criminal Abortion Ban, it could be criminal to use medication under the Medication Ban, regardless of whether medication is a superior medical option to a surgical abortion. *Id.* This will force women to unnecessarily undergo a more invasive procedure that may be more difficult or even impossible to access. *See, e.g.*, Ex. 7, Moayedi at ¶¶ 27–30.

LEGAL STANDARD

The standard for summary judgment under Rule 56 of the Wyoming Rules of Civil Procedure is "well established." *O'Donnell v. Blue Cross Blue Shield of Wyo*., 2003 WY 112, ¶ 9, 76 P.3d 308, 311 (Wyo. 2003). "Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law." *Id.* (citation omitted). "A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense that has been asserted by the parties." *Knori v. State ex rel. Dep't of Health, Off. of Medicaid*, 2005 WY 48, ¶ 8, 109 P.3d 905, 908 (Wyo. 2005) (citation omitted). Here, the State has not attempted to rebut any of the Plaintiffs' factual showing, with the result that there are no genuine issues of material fact requiring a trial.

Plaintiffs challenge the constitutionality of the Criminal Abortion Ban and Criminal

Medication Ban on multiple grounds. The Wyoming Supreme Court has provided the analysis for such claims involving fundamental rights.

> The general rule is that one who alleges unconstitutionality bears a heavy burden and must clearly and exactly show the unconstitutionality beyond any reasonable doubt. However, **that rule does not apply where a citizen's fundamental constitutional right**, such as free speech, **is involved. The strong presumptions in favor of constitutionality are inverted, the burden then is on the governmental entity to justify the validity of the [statute], and this Court has a duty to declare legislative enactments invalid if they transgress that constitutional provision."**

Miller v. City of Laramie, 880 P.2d 594, 597 (Wyo. 1994) (emphasis added) (internal citations omitted). "A fundamental right is a right which the constitution explicitly or implicitly guarantees." *Mills v. Reynolds*, 837 P.2d 48, 53 (Wyo. 1992).

Here, Plaintiffs raise a host of claims involving fundamental rights, including, among others, equal protection, establishment of religion, free exercise of religion, due process, control of health care decisions and unenumerated fundamental rights. The burden therefore falls to the State to show that the laws pass constitutional muster. And because Plaintiffs' claims involve fundamental rights, the State must satisfy the exacting requirements of strict scrutiny. *See Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 885 (Wyo. 1995). Strict scrutiny requires the State to show how the proposed regulation is narrowly tailored to achieve a compelling state interest. *See Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333-36 (Wyo. 1980).

But even if the Court employs the rational basis test, the statutes cannot survive scrutiny because the statutes do not further any of the State's asserted interests, and in most cases affirmatively undermine them. Accordingly, the Criminal Abortion Ban and Criminal Medication Ban are not related to a legitimate government interest. *See Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988) (finding medical malpractice statute was not a "reasonable and effective" means of

protecting health of Wyoming citizens).

As remedies for these constitutional violations, Plaintiffs seek declaratory and injunctive relief—both facially and as applied to Plaintiffs.

Any person "whose rights, status or other legal relations are affected by the Wyoming Constitution or by a statute . . . may have any question of construction or validity arising under the instrument determined and obtain a declaration of rights, status or other legal relations." Wyo. Stat. § 1-37-103 (the "Declaratory Judgment Act"). "[T]he challenger must be involved in a justiciable controversy before declaratory relief will be granted. A justiciable controversy is defined as a controversy fit for judicial resolution." *Maxfield v. State*, 2013 WY 14, ¶ 14, 294 P.3d 895, 899 (Wyo. 2013) (quoting *Carnahan v. Lewis*, 2012 WY 45, ¶ 17, 273 P.3d 1065, 1071 (Wyo. 2012)) (internal citations omitted). The elements required to establish a "justiciable controversy" under the Declaratory Judgment Act are:

> 1. The parties have existing and genuine, as distinguished from theoretical, rights or interests.
>
> 2. The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.
>
> 3. It must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them.
>
> 4. The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.

Id. Plaintiffs "may seek declaratory relief before actual harm occurs if [they] ha[ve] a reasonable apprehension of that harm occurring." *United States v. Colo. Sup. Ct.*, 87 F.3d 1161, 1166 (10th Cir. 1996); *Isaacson v. Horne*, 716 F.3d 1213, 1230 n.15 (9th Cir. 2013) ("That the statute has not

yet been applied to any of the plaintiffs does not preclude them from bringing a pre-enforcement, as-applied challenge.").

"A court will issue an injunction when the threatened harm is irreparable and there is no adequate remedy at law. An injury is irreparable when it is unique and money as future compensation cannot atone." *Tavern, LLC v. Town of Alpine*, 2017 WY 56, ¶ 36, 395 P.3d 167, 177 (Wyo. 2017) (citations omitted).

Moreover, "the Wyoming Supreme Court has recognized that injunctive relief can be sought to obtain preventative relief. . . . In Wyoming, an ***impending injury*** is sufficient to obtain injunctive relief." Abortion Ban TRO Order at ¶ 57 (emphasis added) (citing *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, 714 P.2d 328 (Wyo. 1986); *Reno Livestock Corp. v. Sun Oil Co. (Del.)*, 638 P.2d 147, 153 (Wyo. 1981)). This applies especially to abortion: "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

As demonstrated below, the statutory terms and the undisputed facts establish that the Criminal Abortion Ban and Criminal Medication Ban violate numerous provisions of the Wyoming Constitution and will result in irreparable injury to Plaintiffs and other Wyoming women and physicians, and there is no adequate remedy at law. Accordingly, there are no genuine issues of material fact requiring a trial, and Plaintiffs are entitled to summary judgment on their claims for declaratory and injunctive relief.

ARGUMENT

I. WITHOUT A PERMANENT INJUNCTION, WYOMING'S CRIMINAL ABORTION BANS WILL CAUSE IRREPARABLE HARM TO PLAINTIFFS, THEIR PATIENTS, THEIR CLIENTS, AND OTHER WYOMINGITES.

Wyoming's Criminal Abortion Ban and Medication Ban will irreparably harm each of the Plaintiffs, other Wyomingites whose interests they represent and all other similarly situated

Wyomingites, and there is no adequate remedy at law. In its prior orders, the Court has noted that irreparable injury is "harm for which there can be no adequate remedy at law." Abortion Ban TRO Order at ¶ 54 (citing *CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp.*, 2009 WY 113, ¶ 10, 215 P.3d 1054, 1058 (Wyo. 2009)). The Court went on to observe that "[a]n injury is irreparable where monetary compensation cannot atone for it." Abortion Ban TRO Order at ¶ 54 (citing *Rialto Theatre, Inc.*, 714 P.2d at 332).

Deprivation of constitutional rights is, *per se*, irreparable injury. "The 10th Circuit has repeatedly held that the loss of constitutional rights, even for a short period of time, unquestionably constitutes irreparable injury. . . ." Abortion Ban TRO Order at ¶ 58 (citing *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189–90 (10th Cir. 2003)); *see also Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019) ("Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury."); *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (citation omitted)).

The Court has already found that each of the Plaintiffs will suffer irreparable injury in the absence of injunctive relief. Abortion Ban TRO Order at ¶¶ 59–62. In particular, the Court found that Plaintiffs Johnson and Dow both desire to have additional children while residing in Wyoming and that when they become pregnant, if the abortion statutes remain in effect, "their constitutional right to make their own health care decisions will be denied for the entire duration of their pregnancy." *Id.* at ¶ 59. As the Court noted, "[a] plaintiff cannot place her pregnancy on pause until a final judgment is entered by this Court." *Id.* The same is true for all other Wyoming women who are or may become pregnant.

With respect to Drs. Hinkle and Anthony, the Court found they would suffer irreparable

injury because they would be subject to criminal prosecution and loss of their medical licenses "in the event of misapplying the allegedly unclear exceptions when treating a patient." Abortion Ban TRO Order at ¶ 60. Any other Wyoming physician who cares for pregnant women will likewise face this irreparable injury. And Plaintiffs Chelsea's Fund and Circle of Hope established irreparable injury because the abortion statutes would drain their organizational finances, undermine the services they provide, and result in loss of goodwill. *Id.* at ¶ 61. All of these findings are amply supported by the record.

And to the extent necessary, Drs. Hinkle and Anthony, along with Chelsea's Fund and Circle of Hope, have standing to assert claims not only on their own behalf, but on behalf of all Wyoming women who may seek abortion care. *Aid for Women v. Foulston*, 441 F.3d 1101, 1112 (10th Cir. 2006) ("Physicians have . . . been allowed to assert their patients' constitutional right to an abortion."); *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (noting that courts have "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations"), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

A. The Criminal Abortion Ban Will Cause Irreparable Injury

If a permanent injunction is not entered by this Court, the Wyoming Criminal Abortion Ban will have a catastrophic impact on Plaintiffs and many other Wyomingites. The Ban will force many Wyomingites seeking abortions to carry pregnancies to term against their will, with all of the physical, emotional and financial costs that entails. Ex. 1, Anthony at ¶¶ 5, 28–36; Ex. 2, Hinkle at ¶¶ 13–30; Ex. 3, Lichtenfels at ¶¶ 17–28.

Even Wyomingites who are ultimately able to obtain an abortion—either because they have been able to scrape together the resources to travel out of state or because they meet one of the law's narrow and vague exceptions—will suffer irreparable harm due to the delays and undue

barriers in seeking care. *E.g.*, Ex. 1, Anthony at ¶¶ 34–36; Ex. 2, Hinkle at ¶¶ 10, 12; Ex. 3, Lichtenfels at ¶¶ 22–26. Critically, Drs. Anthony and Hinkle, along with other physicians, will suffer harms that cannot possibly be financially compensated, including the serious risk of imprisonment and loss of licensure which would bar them from practicing medicine anywhere in the country. Ex. 1, Anthony at ¶¶ 3–4, 40, 55; Ex. 2, Hinkle at ¶¶ 10–11, 52; Ex. 4, Burkhart at ¶ 11. There is no adequate remedy at law, and these harms can only be avoided through issuance of an injunction.

1. Plaintiffs and Wyomingites Will Suffer Irreparable Harm from Forced Pregnancy and Parenting

The consequences of Wyoming's Criminal Abortion Ban extend beyond the deprivation of access to time-sensitive medical care. If the Ban goes into effect, Wyomingites will be forced to remain pregnant against their will. Many will ultimately be forced to carry their pregnancies to term. These patients will suffer a range of irreparable physical, mental and economic consequences, and there is no monetary remedy that can address the impact of forced pregnancy on health and bodily autonomy.

Ms. Johnson, Ms. Dow and similarly situated Wyomingites will face clear irreparable harm unless a permanent injunction is entered because the Abortion Ban will strip them of the right to make their own health care decisions in future pregnancies. Ms. Johnson was pregnant at the time this court enjoined the Wyoming Trigger Ban, and she intends to have additional children in the State of Wyoming, subject to personal and private family-planning decisions made by her family in consultation with her physician. Ex. 5, Johnson at ¶¶ 11–14. Likewise, Ms. Dow intends to become pregnant in Wyoming after her upcoming wedding and will seriously consider leaving the state if her health care decisions during pregnancy are not hers to make. Ex. 6, Dow at ¶¶ 12–16.

Moreover, Ms. Dow practices Judaism, as she has done her entire life, and believes

(consistent with Jewish doctrine) that abortion is permitted, and even required, to protect the mental and physical wellbeing of the mother, because life does not begin until birth. Ex. 6, Dow at ¶¶ 8–9. Ms. Johnson and Ms. Dow affirmatively resist the State's imposition of the legislators' religious values into their family planning decisions and their private consultations with their physicians and spiritual advisors. Ex. 5, Johnson at ¶¶ 11–17; Ex. 6, Dow at ¶¶ 8–17.

Plaintiffs Drs. Anthony and Hinkle are OB/GYN physicians licensed and practicing in Wyoming who will be unable to prevent these irreparable harms to Wyoming women if the Ban is in effect. If they or other physicians attempt to do so, including by providing medical care that is consistent with the evidence-based standard of care, they face potential felony prosecution and loss of licensure which would render them unable to practice medicine across the country. Ex. 1, Anthony at ¶ 55; Ex. 2, Hinkle at ¶¶ 9–10, 34–36. Losing the ability to practice medicine is undoubtedly an irreparable harm to Plaintiffs and other physicians. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (finding that loss of livelihood constitutes irreparable harm).

And Plaintiffs Chelsea's Fund and Circle of Hope are organizations that exist to facilitate or provide medical care to pregnant women in Wyoming that will now be unable to provide such care, thus losing patients and goodwill in their communities. Ex. 3, Lichtenfels at ¶¶ 4–6, 42–44; Ex. 4, Burkhart at ¶¶ 7, 11–14, 16; *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (explaining "[a] threat to trade or business viability may constitute irreparable harm"); *Int'l Snowmobile Mfrs. Ass'n*, 304 F. Supp. 2d at 1287 ("'Loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm." (citation omitted)); Abortion Ban TRO Order at ¶ 54.

2. Pregnancy Is a Significant Medical Condition that the Abortion Ban Forces on Wyomingites

"Even in an uncomplicated pregnancy, an individual experiences a wide range of physiological challenges." Ex. 2, Hinkle at ¶ 13. Pregnant women experience a dramatic increase in blood volume, a faster heart rate, increased production of clotting factors, breathing changes, digestive complications, substantial weight gain and a growing uterus. Ex. 2, Hinkle at ¶¶ 13–14; *see also* Ex. 1, Anthony at ¶¶ 28, 31. "These and other changes put pregnant patients at greater risk of blood clots, nausea, hypertensive disorders and anemia (among other complications)." Ex. 2, Hinkle at ¶ 13.

Pregnancy can also aggravate preexisting health conditions, including hypertension and other cardiac diseases, diabetes, kidney disease, autoimmune disorders, obesity, asthma and other pulmonary diseases. Ex. 2, Hinkle at ¶ 14; *see also* Ex. 1, Anthony at ¶ 28. Pregnancy may also "lead to the development of new and serious health conditions as well, such as hyperemesis gravidarum, preeclampsia, deep-vein thrombosis and gestational diabetes." Ex. 2, Hinkle at ¶ 14; *see also* Ex. 7, Moayedi at ¶ 55. Further, pregnancy can worsen mental health conditions. Ex. 1, Anthony at ¶ 29; Ex. 2, Hinkle at ¶ 15. Some people with a history of mental illness experience a recurrence of their illness during pregnancy. Ex. 1, Anthony at ¶ 29; Ex. 2, Hinkle at ¶ 15.

Mental health risks can be higher for patients with unintended pregnancies, which make up 31.2% of the pregnancies in Wyoming (a percentage that is higher among racial minorities). Ex. 2, Hinkle at ¶ 15. These individuals "face physical and emotional changes and risks that they did not choose to take on." *Id.* There is no exception in the Abortion Ban that permits an abortion to preserve the mental health of the mother. Nor is an abortion permitted to preserve the physical well-being of the mother unless there is a "substantial risk of death," or a "serious and permanent impairment of a life-sustaining organ." Wyo. Stat. § 35-6-124(a)(i).

A number of pregnant patients also face an increased risk of intimate partner violence. Ex.

1, Anthony at ¶ 30; Ex. 2, Hinkle at ¶ 16. Indeed, homicide—most frequently caused by an intimate partner—has been identified as a leading cause of maternal mortality. Ex. 2, Hinkle at ¶ 16. Wyomingites who face domestic violence have no avenue to terminate an unintended pregnancy unless they meet the Ban's extremely vague exceptions, none of which allow a woman to choose abortion to protect herself from this trauma and violence. *See, e.g.*, Ex. 6, Dow at ¶ 11.

Labor and childbirth are also significant medical events with many risks. Ex. 1, Anthony at ¶ 31; Ex. 2, Hinkle at ¶ 17. The risk of mortality from pregnancy and childbirth is over 12 times greater than for legal pre-viability abortion. Ex. 1, Anthony at ¶ 31; Hinkle at ¶ 17. Labor complications "occur at a rate of over 500 per 1,000 hospital stays, and the vast majority of childbirth delivery stays have a complicating condition." Ex. 1, Anthony at ¶ 31; *see also* Ex. 2, Hinkle at ¶ 18. "Even a normal pregnancy with no comorbidities or complications can suddenly become life-threatening during labor and delivery." Ex. 1, Anthony at ¶ 31; *see also* Ex. 2, Hinkle at ¶ 19. Over 1,200 American women died from pregnancy and childbirth in 2021. Ex. 7, Moayedi at ¶ 53; *see also* Ex. 1, Anthony at Attachment H (CDC Maternal Mortality Rates in the United States, 2021) at Table.

Other unexpected adverse events include transfusion, ruptured uterus or liver, stroke, unexpected hysterectomy (the surgical removal of the uterus) and perineal laceration (the tearing of the tissue around the vagina and rectum), the most severe of which can result in long-term urinary and fecal incontinence and sexual dysfunction. Ex. 2, Hinkle at ¶¶ 19–20. Additionally, "[a]ny anesthesia or epidural administered during labor [can] also lead to additional risks, including severe headaches caused by the leakage of spinal fluid, infection, and nerve damage around the injection site." Ex. 2, Hinkle at ¶ 21. In Wyoming, more than one in five deliveries occur by cesarean section ("C-section"), rather than vaginally, requiring an open abdominal

surgery which carries significant risks of hemorrhage, infection, blood clots and injury to internal organs. Ex. 2, Hinkle at ¶ 22.

The Abortion Ban requires pregnant individuals to face and endure these risks—an irreparable injury that only an injunction can prevent.

3. Pregnancy Often Presents Medical Complications that Threaten the Mother's (and Fetus's) Long-Term Well-being

As shown by Plaintiff Dr. Hinkle, approximately 20% of her existing prenatal patients are high-risk, and if the abortion statutes go into effect, she will not be able to provide the evidence-based care needed *when* her patients develop significant complications. Ex. 2, Hinkle at ¶ 32, 35–36. This is because the Abortion Ban specifically limits the ability of a physician, like Drs. Anthony and Hinkle and the staff at Circle of Hope, to intervene and provide evidence-based medical care until the patient is at "substantial risk of death" or of "the serious and permanent impairment of a life-sustaining organ of a pregnant woman." Wyo. Stat. § 35-6-124(a)(i). Not only is this exception exceptionally vague, but the provider must also "make[] 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." *Id.*

The terms "substantial risk" and "serious impairment of a life-sustaining organ" are not commonly used in the medical community, and they do not provide physicians any guidance to know when they can legally perform an abortion (or other medical care) to preserve an individual's long term physical well-being. Ex. 7, Moayedi at ¶¶ 8–9; Ex. 1, Anthony at ¶¶ 23–24; Ex. 2, Hinkle at ¶ 35. Under the Abortion Ban, Wyoming women have no ability to choose abortion in Wyoming to preserve their own physical well-being, unless a hospital determines that the vague and narrowly carved exceptions are present.

Early medical intervention in potentially fatal situations is a hallmark of ethical and

effective medical care. Forcing Wyoming physicians to withhold medical care until the last possible moment impermissibly interferes with ethical physician conduct and the physician-patient relationship. Moreover, requiring patients to delay treatment until their life is in danger deprives them of the ability to participate in their own medical decision-making—and the problem is worse in Wyoming than elsewhere, because Wyoming lacks many of the emergency medical resources that would improve the odds for pregnant patients in life-threatening situations. Ex. 7, Moayedi at ¶ 13.

Additionally, some of Drs. Anthony's and Hinkle's patients develop fetal anomalies. Ex. 1, Anthony at ¶¶ 22, 38; Ex. 2, Hinkle at ¶ 10. Fetal abnormalities have varied outcomes, and it is often impossible to say with any certainty that those abnormalities will result in the fetus's death within "hours" of being born, which is required to meet the Abortion Ban's very narrow exception. Ex. 7, Moayedi at ¶17; Ex. 1, Anthony at ¶¶ 4, 22, 38; Ex. 2, Hinkle at ¶¶ 10, 34. A definition of "lethal" that is measured in hours will essentially ban *all* abortions because no physician could possibly certify the exact time a newborn will die. Ex. 7, Moayedi at ¶ 17; Ex. 1, Anthony at ¶¶ 4, 22, 38; Ex. 2, Hinkle at ¶ 10. For instance, the lethal anomaly skeletal dysplasia is inconsistent with life, but a fetus can live days after birth. Ex. 2, Hinkle ¶ 27. As a result, patients who experience lethal fetal defects will also be denied the evidence-based care these physicians are required to provide.

4. The Abortion Ban Forces Irreparable Costs on Pregnant Women in Addition to the Health Risks.

In addition to these physical and mental injuries, Wyoming's Criminal Abortion Ban also threatens irreparable harm by dictating one of the most personal and consequential decisions a person will make in a lifetime: whether to become or remain pregnant. In this way, the statute will have an impact on the composition of a person's existing family that cannot be compensated

by future monetary damages. Ex. 1, Anthony at ¶¶ 14, 32; Ex. 2, Hinkle at ¶¶ 24–26.

Wyomingites have a range of views on the morality of abortion, which depend not only on their unique circumstances, but also on varying religious and spiritual views about when life begins. Ex. 1, Anthony at ¶¶ 8, 14; Ex. 6, Dow at ¶¶ 7–10. For instance, Plaintiff Dow is a member of the Jewish faith and believes, in accordance with Jewish doctrine, that life does ***not*** begin at conception, but rather that life begins at first breath, and that the life and well-being of the mother takes precedence over the unborn fetus. Ex. 6, Dow at ¶¶ 7–10. If the Abortion Ban goes into effect, it will have the immediate and irreparable result of Ms. Dow living and being ruled by a law premised on a distinctly Christian religious doctrine. This deprivation of her constitutional right to practice her own religion could not be remedied. *Reed v. Bryant*, 719 F. App'x 771, 780 (10th Cir. 2017) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[.]" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Given the severity of the infringement on her liberties, Ms. Dow and her fiancé will seriously reevaluate their residency in Wyoming, potentially moving out of the state if the Abortion Ban is effective. Ex. 6, Dow at ¶ 16.

"Women who seek, but are denied, an abortion are, when compared to those who are able to access abortion, more likely to lower their future goals, and less likely to be able to exit abusive relationships." Ex. 1, Anthony at ¶ 33. "Their existing children are also more likely to suffer measurable reductions in achievement of child developmental milestones and an increased chance of living in poverty." *Id.* As compared to women who received an abortion, women denied an abortion are also less likely to be employed full-time and more likely to raise children alone, to receive public assistance and to lack the financial resources to meet their basic living needs. *Id.*

The unquantifiable economic impact of forced pregnancy, childbirth and parenting will

also have dramatic, negative effects on Wyoming families' financial stability. Ex. 1, Anthony at ¶¶ 32–36. Some side effects of pregnancy render patients unable to work, or unable to work the same number of hours as they otherwise would. Ex. 2, Hinkle at ¶ 24; *see also* Ex. 1, Anthony at ¶¶ 32–33. "[P]regnancy-related discrimination can also result in lower earnings for women both during pregnancy and over time." Ex. 2, Hinkle at ¶ 24. Further, "Wyoming does not require employers to provide paid family leave, meaning that for many pregnant Wyomingites, time away from work to recover from pregnancy and childbirth or to care for a newborn is unpaid." Ex. 1, Anthony at ¶ 32.

"[P]regnancy-related health care and childbirth are also some of the [costliest] hospital-based health services, particularly for complicated or at-risk pregnancies," Ex. 1, Anthony at ¶ 32, and result in significant out-of-pocket expenses, Ex. 2, Hinkle at ¶¶ 25–26. These costs will impact a patient's existing children. Ex. 1, Anthony at ¶ 33.

Pregnancy and parenting are profoundly consequential events in Wyomingites' lives, and being denied an abortion has long-term, negative effects on an individual's physical and mental health, their economic stability and the well-being of their family, including existing children. This results in an irreparable harm to women of child-bearing age in Wyoming generally and to Plaintiffs Johnson and Dow specifically. Allowing the Abortion Ban to go into effect will deny them their fundamental rights.

B. The Criminal Medication Ban Will Cause Irreparable Injury.

Declarations submitted by Plaintiffs in support of this motion show that they and other Wyomingites will also suffer irreparable injury from the Criminal Medication Ban.

First, as with the Criminal Abortion Ban, because their constitutionally protected right to evidence-based medical care under Section 38 is violated as a result of the Wyoming Medication Abortion Ban, Plaintiffs have demonstrated that irreparable harm is established without the need

for a further showing. *See supra* Part I.A.

Second, this Court has already found that when Ms. Johnson and Ms. Dow become pregnant, the loss of "their constitutional right to make their own healthcare decisions" would "constitute[] an impending future injury that is irreparable." Abortion Ban TRO Order at ¶ 59. The Medication Ban would prevent Ms. Johnson, Ms. Dow and similarly situated Wyomingites from receiving medication to terminate a pregnancy, even when that pregnancy would impose a severe burden on their physical and emotional health, their well-being, their families, their careers, their right to make health care decisions and their finances. *See id.* at ¶ 50.

For example, Ms. Johnson and Ms. Dow would both wish to terminate a pregnancy in the event that they were pregnant with a fetus that had lethal defects. Ex. 5, Johnson at ¶ 16; Ex. 6, Dow at ¶ 17. The Medication Ban would prevent the use of medication to terminate such a pregnancy, regardless of whether Ms. Johnson or Ms. Dow's physician determined that the use of medication in this instance was safer, less expensive or otherwise preferable to a surgical abortion.

Furthermore, abortion medication is a necessary component of some surgical abortions. Ex. 2, Hinkle at ¶¶ 41, 45–46. In such cases, the Medication Ban will either prevent a surgical abortion altogether, or will require the abortion to proceed without medically necessary medication, with the result that women will unnecessarily be at risk. *Id.* Because the Ban strips Ms. Johnson, Ms. Dow and other Wyoming women of the right to make their own health care decisions and receive evidence-based medical care in connection with their future pregnancies, the Medication Ban will cause them to be irreparably harmed.

Third, Dr. Anthony, Dr. Hinkle and other physicians will risk criminal prosecution and permanent loss of their medical license if they continue to provide evidence-based medical care to their patients after the Medication Ban has gone into effect. Ex. 1, Anthony at ¶¶ 47, 55; Ex. 2,

Hinkle at ¶ 52. As Dr. Hinkle explains, the Ban's extremely broad language prohibiting the use of *any* medication to induce or facilitate an abortion means that even medically indicated inductions of a nonviable fetus, using basic obstetric medication, such as Pitocin and Misoprostol, could be criminal. Ex. 2, Hinkle at ¶ 38. Moreover, for some patients, surgical abortions are not medically appropriate or feasible, and medication abortion is the medically indicated treatment. Ex. 7, Moayedi at ¶¶ 27–30. In such cases, physicians could not perform, and women could not receive, necessary medical care.

For Dr. Anthony, prescribing abortion medications for first-trimester elective abortions during the first 11 weeks of pregnancy is a common part of the evidence-based medical care she provides. Ex. 1, Anthony at ¶ 16. In fact, medication abortions accounted for all abortion procedures that took place in Wyoming in 2021 and 2022. *See id.* at ¶ 12; Ex. 11, Modlin at Attachment F (2021 ITOP Report); *id.* at Attachment G (2022 ITOP Report). For those patients desiring or requiring a first-trimester abortion, this safe, convenient and less expensive option of a medication abortion will be unavailable to them under this law, unless Dr. Anthony and other providers are willing to risk their livelihood and freedom to provide it. Just as with the Criminal Abortion Ban, "[l]oss of customers" and threats to the "viability" of Plaintiffs' and other physicians' businesses—due to a potential loss of their ability to practice medicine in the United States following criminal prosecution—satisfies the element of irreparable harm. *Int'l Snowmobile Mfrs. Ass'n*, 304 F. Supp. 2d at 1287 (citations omitted); *see also* Ex. 2, Hinkle at ¶¶ 8–9, 54; Ex. 1, Anthony at ¶¶ 21, 47, 55.

Fourth, the Medication Ban will expose Circle of Hope and Chelsea's Fund to the same organizational harms and loss of goodwill that this Court found constituted irreparable harm in connection with the Criminal Abortion Ban. *See* Abortion Ban TRO Order at ¶ 61.

If the Medication Ban is not enjoined, at least half of the abortion care Circle of Hope exists to provide will be illegal in the State of Wyoming. Ex. 4, Burkhart at ¶ 9, 14. The Ban will also greatly increase Circle of Hope's operation costs because each surgical abortion (that might have been accomplished through the use of medication) requires Circle of Hope to unnecessarily expend resources, such as costs for additional facilities, equipment and staff.[2] *Id.* at ¶¶ 11–15. Furthermore, the Medication Ban is so broadly drafted it may prevent abortion providers such as Circle of Hope from using medications (such as Misoprostol) during surgical abortion procedures. *Id.* at ¶ 17. As a result, Circle of Hope will lose patients and goodwill in the community. *Id.* at ¶¶ 13–14.

Chelsea's Fund will likewise suffer irreparable harm due to the increased expenses required to accomplish the organization's mission of providing assistance to Wyoming residents who could not otherwise afford an abortion. Ex. 3, Lichtenfels at ¶¶ 41–42. Because of the shortage of surgical abortion providers in Wyoming, the Medication Ban will require Chelsea's Fund clients to travel further and wait longer for abortion care that they could otherwise obtain through a convenient, safe and less expensive prescription. *Id.* at ¶¶ 29–36. The Ban will significantly increase the resources Chelsea's Fund must expend in order to provide support to the same number of clients it currently serves due to the increased cost of each abortion. *Id.* at ¶ 41. These expenses and logistical difficulties will be exacerbated by the fact that many other nearby states have banned abortion, resulting in increased demand for and delay in obtaining appointments for abortions in the states where they are still available. *Id.* at ¶ 40.

"A threat to trade or business viability," like the threats faced by Circle of Hope and

[2] By forcing women to obtain a more expensive procedure, the Ban also places an unnecessary financial burden on women who seek and are eligible for medication abortions in Wyoming. *See* Ex. 1, Anthony at ¶ 49; Ex. 2, Hinkle at ¶ 40.

Chelsea's Fund, "may constitute irreparable harm," particularly when these businesses relied on prior regulations in making business decisions. *Tri-State Generation & Transmission Ass'n*, 805 F.2d at 356. If the Medication Ban is not enjoined, Circle of Hope and Chelsea's Fund will lose goodwill, patients and clients, and the Medication Ban will prevent both organizations from continuing to provide health care-related services to pregnant women in Wyoming, which is the purpose for which both organizations exist. Ex. 4, Burkhart at ¶¶ 7–10; Ex. 3, Lichtenfels at ¶¶ 3–6; 42–43.

Fifth, Wyomingites at large will be harmed by this law. The Medication Ban attacks the primary way that Wyomingites access abortion care—through medication—and with fewer exceptions than the Criminal Abortion Ban. Wyoming is a rural state and the availability of convenient and discrete health care options for obtaining an abortion is critical. *See, e.g.*, Ex. 3, Lichtenfels at ¶¶ 31–32.

The result of this law and its narrowly drawn exceptions is to deprive Wyomingites of the ability to make health care decisions, and private family planning decisions, during their pregnancies. For instance, the Medication Ban will make it significantly harder for physicians like Drs. Hinkle and Anthony to provide abortion care when medically indicated because they, the hospital where the patient is treated and the pharmacy providing the medication will have no way to evaluate whether the patient is insufficient "peril" to permit the use of medication to terminate the pregnancy and save their life. Ex. 2, Hinkle at ¶¶ 47, 51; Ex. 1, Anthony at ¶ 51.

Even setting aside the troubling attempts to legislate contrary to standard medical care, the Medication Ban will again result in forced childbirth for Wyomingites and deprivation of the freedom and liberties that Wyomingites have enjoyed for decades. Each of the Plaintiffs, as well as similarly situated Wyomingites, will therefore suffer immediate, irreparable harms if the

Medication Ban is not enjoined. The Court should find that the Medication Ban gives rise to irreparable harm warranting an injunction.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CONSTITUTIONAL CLAIMS

Wyoming's Criminal Abortion Ban and Criminal Medication Ban run afoul of numerous rights guaranteed by the Wyoming Constitution. While Plaintiffs' complaint alleges multiple constitutional claims, for purposes of this motion, we focus on six: 1) the constitutional right of Wyoming citizens to make their own health care decisions free from undue government infringement; 2) the constitutional prohibition on vague criminal statutes that do not provide sufficient notice to regulated parties of what conduct is prohibited; 3) the constitutional prohibition on establishment of religion; 4) the constitutional right to free exercise of religion; 5) the constitutional right to equal protection; and 6) the constitutional protection of unenumerated rights.

A. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 38—health care.

Article I, section 38 of the Wyoming Constitution provides:

> (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***.

(emphases added).

This section explicitly protects and holds fundamental every adult's right to "make his or her own health care decisions," subject only to the State's power to enact restrictions that are reasonable and necessary to protect the public health and welfare ***and*** that do not unduly infringe

on Wyomingites' rights. The Criminal Abortion Ban and Criminal Medication Ban violate Section 38, both facially and as applied to the individual Plaintiffs.

1. Abortion Is Health Care Under Section 38

In interpreting constitutional provisions, a reviewing court undertakes the same analysis that it uses to interpret statutes. *Powers v. State*, 2014 WY 15, ¶ 9, 318 P.3d 300, 303–04 (Wyo. 2014). To determine the intent of a provision, the Court should look first to the plain and ordinary meaning of the words and phrases used in the law. *See id.* ("[W]e look first to the plain and unambiguous language to discern [the] intent" of the framers." (citations omitted)).

The Court undertook just such an analysis in granting a TRO against the Criminal Abortion Ban and found that the plain meaning of "health care" includes abortion. *See* Abortion Ban TRO Order at ¶¶ 33, 39–41. In reaching this decision the Court relied on the common definition of health care as "the services provided, usually by medical professionals, to maintain and restore health." *Id.* at ¶ 33. The Court further found that the evidence submitted by Plaintiffs established that "abortions are utilized by medical professionals to restore and maintain the health of their patients." *Id.* at ¶ 39.

The medical community considers both surgical and medication abortion to fall within the ambit of essential health care:

> The fact is, abortion is an essential component of women's health care. The American College of Obstetricians and Gynecologists (ACOG), with over 57,000 members, maintains the highest standards of clinical practice and continuing education for the nation's women's health physicians. Abortion care is included in medical training, clinical practice, and continuing medical education.

Ex. 1, Anthony at Attachment A (Am. Coll. Obstetricians & Gynecologists Facts Are Important Webpage).

Government agencies agree. According to the United States Department of Health and Human Services ("HHS"), "[r]eproductive health care, including access to birth control and safe

and legal abortion care, is an essential part of your health and well-being" and "[m]edication abortion has been approved by the FDA since 2000 as a safe and effective option." Ex. 1, Anthony at Attachment C (Dep't of Health & Human Servs. "Know Your Rights" Press Release). According to the World Health Organization ("WHO"), "comprehensive abortion care services" entail "simple and common health-care procedure[s]" that are "evidence-based" and "fundamental" to "good health." Ex. 1, Anthony at Attachment D (WHO Abortion Webpage).

On their face, both statutes plainly regulate health care. The Criminal Medication Ban refers to abortion as "medical treatment," and the statute directly regulates the medical profession, concerns the use of prescription medication and references "medical testing," "medical guidelines" and "medical judgment." Wyo. Stat. § 35-6-139(b). As the Court previously found, the Criminal Abortion Ban likewise contains numerous provisions directly referencing health care, including various medical conditions, medical treatment, medical judgment and medication. Abortion Ban TRO Order at ¶ 39.

Under the Wyoming Health Care Decisions Act, "health care" is defined as "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." Wyo. Stat. § 35-22-402(a)(viii). Plainly, abortion is a treatment, service or procedure to maintain or otherwise affect an individual's physical or mental condition. In its annual reports on abortion services, the Wyoming Department of Health describes abortions as either "surgical" or "medical." Ex. 11, Modlin at Attachment F (2021 ITOP Report); *id.* at Attachment G (2022 ITOP Report).

Even the definitions of "health care" and "health" referenced by the State unambiguously encompass abortion. In its opposition to Plaintiffs' motion for a temporary restraining order on the Medication Ban, the State cited the Black's Law Dictionary definition of "health care" as

"efforts made to maintain or restore health," and the Merriam-Webster definition of "health" as "the condition of being sound in body, mind, or spirit." *See* State Defendants' Response to Motion for TRO (May 25, 2023) at 17–18. It is beyond credible dispute that abortion is an "effort[] made to maintain or restore" "the condition of being sound in body, mind or spirit."

Even if we accept the State's overly restrictive view of health care as addressing only physical pain or illness, there is no question that termination of a pregnancy meets this definition. Pregnancy causes a multitude of physical health conditions ranging from morning sickness to significant changes in organs and bodily functions, to a variety of serious medical conditions, to permanent disability and death. Ex. 1, Anthony at ¶¶ 28–31; Ex. 2, Hinkle at ¶¶ 12–22; Ex. 7, Moayedi at ¶¶ 53, 55.

As the New Mexico Supreme Court has commented:

> We also note that some physical characteristics, such as the ability to become pregnant, may have profound health consequences. For example, there is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus.

New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 855 (NM 1998). Under any definition, abortion qualifies as health care.

In adopting the Wyoming Criminal Abortion Ban, the legislature nonetheless attempted to usurp the Court's role in interpreting the Wyoming Constitution by specifying that "[r]egarding article I, section 38 of the Wyoming constitution, abortion as defined in this act is not health care." Wyo. Stat. § 35-6-121(a)(iv). But in our constitutional system, legislation is subordinate to the Constitution, not the other way around. The legislature can no more amend the Constitution through a statute than it can adopt a statute that is contrary to the Constitution. *Witzenburger v.*

State ex rel. Wyo. Cmty. Dev. Auth., 575 P.2d 1100, 1124 (Wyo. 1978) (the "[S]tate constitution is not a grant but a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State.").

And in matters of interpretation of the Constitution, the courts have the last word, not the legislature. *V-1 Oil Co. v. State*, 934 P.2d 740, 743 (Wyo. 1997) ("Whether a statute is contrary to a constitutional prohibition or restriction is to be determined by the judiciary."). While courts undoubtedly may consider the legislature's views on interpretation of the Constitution, such views should be accorded no weight where, as here, they directly contradict the unambiguous language of the Constitution.

It was the Wyoming voters, and not the legislature, that adopted Section 38. As the Court found in its preliminary injunction order in the prior case involving the Trigger Ban, "[a] court is not at liberty to assume that the Wyoming voters who adopted Article 1, Section 38 did not understand the force of language in the provision." PI Order at ¶ 32. The Court went on to observe that, when Section 38 was adopted, Wyoming women enjoyed an unfettered statutory right to pre-viability abortion, and therefore abortion was within the scope of health care generally available at the time. *Id.*

2. The Criminal Abortion Ban Violates Section 38

Because abortion unambiguously is health care under Section 38, the legislature may only 1) "determine reasonable and necessary restrictions . . . to protect the public health and welfare" that 2) do not result in "undue governmental infringement" of the right of Wyomingites to make their own abortion-related decisions. Wyo. Const. art. I, § 38. On their face, the challenged statutes do not satisfy either of these constitutional requirements.

The State has incorrectly attempted to equate these limitations with the rational basis test, under which legislation must be "related to a legitimate government interest." *Hardison v. State,*

2022 WY 45, ¶ 10, 507 P.3d 36, 40 (Wyo. 2022); *see also Hoem*, 756 P.2d at 783. This test bears no resemblance to the much more exacting requirements of Section 38: that a statute be reasonable and necessary to protect public health and welfare ***and*** not unduly infringe on the right of Wyoming citizens to control their own health care. Wyo. Const. art. I, § 38.

The language of Section 38 more closely aligns with the strict scrutiny test, under which the State must show that the statute furthers a compelling state interest in the least intrusive means available. *Ailport v. Ailport*, 2022 WY 43, ¶¶ 7–8, 507 P.3d 427, 433 (Wyo. 2022). A statute that is "necessary" to protect the public health and welfare would surely further a compelling state interest, while avoiding "undue infringement" of the right to control health care is akin to the least intrusive means available to further that state interest. While the Court should reject the State's attempt to rewrite Section 38, in the end, it makes no difference, because the Criminal Abortion Ban and Medication Ban cannot survive any level of scrutiny.

Contrary to the State's repeated arguments in this matter, under the rational basis test, it is not sufficient for the State to simply declare that the abortion statutes are in the public interest. As the Wyoming Supreme Court has commented, the bare constitutional minimum requires that "[i]n order that a statute may be valid, . . . the means adopted must be reasonable and not arbitrary, and must be appropriate for the accomplishment of the end in view; in other words, there must be a substantial connection between the purpose in view and the actual provisions of the law." *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938). As demonstrated below, there is no connection—much less a substantial one—between the State's asserted interests and the actual provisions of the abortion statutes.

a. The Criminal Abortion Ban Is Not Reasonable and Necessary to Protect Public Health and Welfare

The Criminal Abortion Ban itself attempts to articulate the specific interests that it

purportedly furthers:

> 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).

Wyo. Stat. § 35-6-121(a)(vi).

The statute quotes these purported state interests from the section of the majority opinion in *Dobbs* finding that Mississippi's asserted state interests were legitimate under the ***due process clause*** of the ***United States*** Constitution and within the context of a ban on abortion after 15 weeks of gestation. The State's reliance on *Dobbs* is unavailing given the obvious distinguishing factors—here, the State is asserting the above-referenced interests under ***the Wyoming*** Constitution in the context of a ban on abortion from conception.[3]

In its discovery responses, the State also asserts that the statute furthers governmental interests in respect for human life and the rights conferred to all Wyoming citizens under the constitution. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 2). It is unclear how these asserted interests differ from those specified in the statute itself. In any event, the language of the statute and the undisputed facts establish that the Criminal Abortion Ban does not further any of the state's asserted interests and, in fact, affirmatively undermines most of them.

i. The Criminal Abortion Ban Is Not Reasonable and Necessary to Protect Prenatal Life

The protection of prenatal life is undoubtedly a legitimate and compelling basis to regulate

[3] For example, the reference in *Dobbs* to allegedly "gruesome or barbaric medical procedures" concerned an abortion method used after 15 weeks of gestational age, which was used by the Mississippi as one justification for banning abortion after 15 weeks. 142 S. Ct. at 2242, 2284. This claimed state interest therefore has no application to the Wyoming Criminal Abortion Ban, which applies at conception.

health care. However, to withstand scrutiny under Section 38, the statute must be reasonable and necessary to protect prenatal life ***and*** must not unduly infringe upon a woman's right to make health care decisions. The Abortion Ban does not satisfy either requirement.

As this Court noted, the Trigger Ban's failure to include any exception for fatal fetal abnormalities undercut the State's claim that the statute was intended to protect potential life. PI Order at ¶ 37. In apparent response to the Court's prior ruling, the legislature included an exception in the Abortion Ban for "lethal fetal anomal[ies]." Wyo. Stat. § 35-6-124(a)(iv). But this exception does not apply to all fatal fetal abnormalities—it only applies to those that have a "substantial likelihood" of resulting in death within "hours" of birth, and not to those that may result in death within days or weeks of birth. Wyo. Stat. § 35-6-122(a)(vi). However, it is impossible for a physician to determine whether a fetal abnormality would result in death within hours, as opposed to within days, of birth. Ex. 7, Moayedi at ¶ 17; Ex. 1, Anthony at ¶¶ 4, 22, 38; Ex. 2, Hinkle at ¶¶ 10, 27, 34.

Because it will not be possible (or ethically or professionally sound) for physicians to determine whether a lethal fetal abnormality falls within the statutory definition, no lethal fetal abnormalities that could result in death after birth will qualify for this exception as a practical matter. As a result, the purported exception for lethal fetal abnormalities is illusory, and the statute continues to effectively ban abortion for multiple fetal abnormalities incompatible with life. Ex. 7, Moayedi at ¶ 17; Ex. 1, Anthony at ¶¶ 4, 22, 38; Ex. 2, Hinkle at ¶¶ 10, 27, 34. The Wyoming Criminal Abortion Ban's purported exception for "lethal fetal anomal[ies]" therefore does not in any way cure the disconnect between the stated purpose of preserving potential life and the terms of the statute.

Other provisions of the Wyoming Criminal Abortion Ban are also inconsistent with

preserving prenatal life. For example, the statute expressly includes within the definition of "abortion" (and therefore bans) the practice of multi-fetal reduction. Wyo. Stat. § 35-6-122(a)(i). Multi-fetal reduction is a procedure to remove one or more fetuses in a multi-fetal pregnancy (*i.e.*, a pregnancy involving three or more fetuses) in order to increase the chance that the remaining fetuses will survive. Ex. 7, Moayedi at ¶ 18. Prohibition of multi-fetal reduction therefore will result in ***reducing*** the protection for prenatal life. *Id.*

The narrowly drawn exceptions to the Abortion Ban also contradict the claim that the statute is intended to protect all prenatal life. Under the exception for the woman's health, abortion is only allowed where there is a substantial risk to a "life-sustaining organ." Wyo. Stat. § 35-6-124(a)(i). In listing the organs that the State claims are "life sustaining," the statute does not include any female reproductive organs, including the uterus and ovaries—without which prenatal life is not possible at all. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 7). Thus, a statute that purportedly is intended to protect prenatal life bars a woman from having an abortion to preserve organs that are necessary for her to generate prenatal life.

And the statute does not ban ***all*** elective abortions. Under the law, abortions remain legal in cases of sexual assault and incest. According to the State, a fetus that results from a sexual assault or incest does not represent prenatal life comparable to a fetus that results from consensual relations. *See* Ex. 11, Modlin at Attachment N (State's Response to RFA No. 6). Although ordered by the Court to do so, the State failed to explain its nonsensical position—no doubt because it has no explanation. *See id.* at Attachment M (State's Response to Interrogatory No. 22). Nor can the State possibly reconcile its position that all fetuses have the full constitutional rights of a person, while taking the position that whether a fetus is worthy of such protection turns on the actions of

third parties. If the state were truly concerned about protecting prenatal life (instead of political palatability), then it makes no sense to include these exceptions.

ii. The Criminal Abortion Ban Is Not Reasonable and Necessary to Protect Women

With respect to the health and safety of women, it is beyond credible dispute that abortion is far safer than childbirth. Ex. 7, Moayedi at ¶ 19. The risk of death associated with childbirth is an order of magnitude higher than the risk associated with abortions. *E.g.*, *id.*; Ex. 1, Anthony at ¶ 31; Ex. 2, Hinkle at ¶ 17. In fact, the risk of death from abortions is ten times lower than the odds of being struck by lightning. Ex. 7, Moayedi at ¶ 19. And it is undeniable that pregnancy carries with it serious risks of complication, both for pregnancy-related illnesses and injuries and for exacerbation of pre-existing illnesses. Ex. 1, Anthony at ¶¶ 28–31; Ex. 2, Hinkle at ¶¶ 17–23; Ex. 7, Moayedi at ¶ 55; *New Mexico Right to Choose/NARAL*, 975 P.2d at 855 ("[T]here is undisputed evidence . . . that carrying a pregnancy to term may aggravate pre-existing conditions . . . ."). After conducting an exhaustive study of the medical evidence, the National Academies of Sciences, Engineering & Medicine unequivocally found that legal abortions in the United States "whether by medication, aspiration, D&E, or induction—are safe and effective. Serious complications are rare." Ex. 1, Anthony at Attachment E (2018 Nat'l Acads. Sciences, Engineering, & Medicine Consensus Study Report) at 10, 77, 163–64.

Nor is there any credible argument that abortion in Wyoming has presented an unusual risk of harm for women. Under Wyoming law, the state office of vital records services maintains and publishes statistics for all abortions performed in Wyoming. Wyo. Stat. §§ 35-6-131 & 132. This includes, among other things, statistics on the numbers, timing and types of abortion procedures performed, as well as any complications associated with abortions. Wyo. Stat. § 35-6-131(a). In the last two years for which reports are publicly available (2021 and 2022), zero patient

complications were reported for all abortions in the state. Ex. 11, Modlin at Attachment F (2021 ITOP Report); *id.* at Attachment G (2022 ITOP Report).

Banning abortion and forcing women to give birth—as the Abortion Ban does—therefore lead to greater maternal mortality and morbidity. Moreover, as described in the expert declaration of Dr. Ghazaleh Moayedi, and discussed in greater detail below, the vagueness of the exceptions in abortion bans similar to the Criminal Abortion Ban is resulting in delay and/or denial of necessary health care to women on a daily basis. Ex. 7, Moayedi at ¶¶ 9–14. Dr. Anthony has already treated a patient who was denied necessary medical care because of the Abortion Ban and OB/GYN medical students are reluctant to practice in Wyoming because of the new abortion laws. Ex. 1, Anthony at ¶¶ 41, 44. This shows that the statute will harm—not further—the health and safety of women.

The State nonetheless takes the position that some abortions are "medically unnecessary," and therefore the State must ban nearly all of them to protect women. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 2). The State does not explain what it means by "medically unnecessary." From a medical perspective, there is no such thing as "medically unnecessary" abortions because the medical profession considers all abortion care to be essential health care for women. *See* Ex. 7, Moayedi at ¶¶ 33, 49–52. Given that pregnancy and childbirth carry much higher risks to a woman's health than abortion, there is no circumstance where a woman will not obtain a medical benefit from an abortion. *Id.*

On its face, the Abortion Ban does not seek to protect a woman's health or safety in any circumstance unless there is a "substantial risk of death" or of "permanent impairment of a life-sustaining organ." And the State readily admits that the Abortion Ban does not permit abortion to protect women against substantial risk of death from mental health conditions—the leading cause

of pregnancy-related death. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory Nos. 11-12); Ex. 7, Moayedi at ¶¶ 38–39. Once again, the statute affirmatively undermines the State's asserted purpose of protecting women's health.

Even if the State could show that abortions present some health risks to women, banning abortions is not ***reasonable and necessary*** to protect women. ***All*** medical procedures carry risk. These risks will vary based on a multitude of factors unique to each patient and their circumstances. It is the role of the physician to assess these risks and advise women on them, as well as the benefits of, and alternatives to, a particular medical treatment. *See* Ex. 7, Moayedi at ¶ 45; Ex. 4, Burkhart at ¶ 17. Fully informed of the risks, benefits and alternatives, it is then for a woman to decide the best course of action for her. Ex. 7, Moayedi at ¶ 45. This is a fundamental aspect of the physician-patient relationship and the essence of a right to make one's own health care decisions. *Id.* By adopting a one-size-fits-all approach to dictating what medical procedures it claims pose too great a risk, the legislature usurps both the physician's role and the woman's choice in a fashion that cannot possibly account for every woman's particular circumstances and needs.

Research has not revealed any other statute or regulation purporting to prohibit a particular medical procedure on the grounds that it is necessary to protect patients from risk. For example, certain elective cosmetic surgery procedures have mortality rates more than ten times higher than abortions, yet we are not aware of any effort by the Wyoming legislature to restrict access to such procedures.[4] As a matter of law, the Criminal Abortion Ban cannot be reasonable and necessary

[4] According to the United States Centers for Disease Control and Prevention ("CDC"), the mortality rate for abortions is 0.43 per 100,000. Katherine Kortsmit, et al., *Abortion Surveillance — United States, 2020*, CDC, Nov. 25, 2022, at 6, https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm?s_cid=ss7110a1_w, attached as Ex. 1, Anthony at Attachment F. By contrast, the mortality rate for buttock augmentation is 1 per 20,000 (or 5 per 100,000). Rod J. Rohrich, et al., *Assessing Cosmetic Surgery Safety: The Evolving Data,* Plast Reconstr. Surg. Glob. Open, May 2020, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7572219, attached as Ex. 1, Anthony at Attachment G.

to protect women.

iii. The Criminal Abortion Ban Is Not Reasonable and Necessary to Protect the Integrity of the Medical Profession

The Wyoming Criminal Abortion Ban likewise undermines the integrity of the medical profession. The State asserts that the Abortion Ban will protect the medical profession by preventing "medically unnecessary" abortions. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 2). This argument is contrary to the undisputed evidence.

As discussed above, from a medical perspective, there is no such thing as "medically unnecessary" abortions. *See* Ex. 7, Moayedi at ¶¶ 33, 49–52. Dr. Moayedi describes circumstances where the Abortion Ban appears to prohibit abortions that are medically indicated. *Id.* at ¶¶ 10-12, 15–18, 55; *see also* Ex. 1, Anthony at ¶ 42. Prohibiting physicians from providing such medically indicated care compels them to violate their ethical duties—the precise opposite of the State's asserted interest.

The medical profession has emphatically rejected the State's claim. According to the American College of Obstetricians and Gynecologists, "[a]bortion bans and other restrictions violate long-established and widely accepted medical ethical principles of beneficence, nonmaleficence, and respect for patient autonomy." Ex. 1, Anthony at Attachment B (Am. Coll. of Obstetricians & Gynecologists Fact Sheet). As a result, "[r]estrictive laws on abortion place physicians in an ethical dilemma of choosing between their obligation to provide the best available medical care and substantial legal (sometimes criminal) penalties." *Id.*

These statements are consistent with Dr. Moayedi's observations in her own practice and the findings of her research, which show that similar abortion bans in other states are putting physicians in the untenable position of risking criminal liability for complying with their professional standard of care. Ex. 7, Moayedi at ¶¶ 9–14. Under Wyoming law, a physician is

subject to discipline, including revocation of their license, for "[p]racticing medicine below the applicable standard of care." Wyo. Stat. § 33-26-402(a)(xxii), (a)(xxvii)(B). The abortion statutes therefore compel medical professionals to engage in legally sanctionable conduct.

And if performing a particular abortion is not consistent with the applicable medical standard of care, then there is nothing that requires a physician to perform it. The statute therefore does nothing to protect physicians and can only cause them to violate their oath. Once again, the actual impact of the Criminal Abortion Bans is the opposite of its stated purpose.

iv. The Criminal Abortion Ban Is Not Reasonable and Necessary to Accomplish the State's Other Asserted Purposes

The State's claim that denying women control over their own health care somehow prevents discrimination on the basis of race, sex or disability is patently absurd. Precisely the opposite is true, as this Court found in its prior ruling. PI Order at ¶¶ 39–41. The only evidence before the Court is that Wyoming women seek abortion care to protect their physical, mental, financial and other well-being. *See* Ex. 1, Anthony at ¶¶ 13–14; Ex. 2, Hinkle at ¶ 6; Ex. 6, Dow at ¶¶ 8–17; Ex. 5, Johnson at ¶¶ 15–16; Ex. 3, Lichtenfels at ¶ 10. There is absolutely no evidence that Wyoming women have used abortion as a tool of discrimination.

More to the point, if the State genuinely wished to ban abortions that were discriminatory, it presumably would have adopted legislation to prohibit such abortions, as other states have done. *See* Guttmacher Institute, Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly, https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly (last visited Sept. 11, 2023). Instead, the State chose to broadly ban abortions entirely unrelated to gender, race or disability. The State does not and cannot explain how an anti-discrimination purpose is furthered by banning abortions required to protect a woman from potentially fatal mental health conditions, serious but non-fatal physical injuries, or socio-

economic impacts.

With respect to "mitigation of fetal pain," the scientific literature is clear that a fetus does not experience pain. Ex. 7, Moayedi at ¶ 20; Ex. 2, Hinkle at ¶ 34. The State has offered no evidence to the contrary. And even if such pain did exist, once again the statute does not prohibit all abortions and therefore does not mitigate all alleged fetal pain.

The claim that the statute is intended to prevent "particularly gruesome or barbaric medical procedures" is nonsensical. Medical procedures such as abortions are common and not obviously different from any number of invasive treatments. The language that the Criminal Abortion Ban quotes from the *Dobbs* opinion referencing "gruesome" and "barbaric" procedures related to a specific type of abortion procedure that is only used in later-term abortions after 15 weeks. *Dobbs,* 142 S. Ct. at 2242, 2284. By contrast, the Criminal Abortion Ban prohibits abortions from conception and therefore applies principally to other types of abortion procedures—*i.e.*, medication abortions. The assertion that taking a series of pills is "gruesome" strains credulity. And once again, the statute does not ban all abortions, only some. The same supposedly gruesome and barbaric procedure is used in legal abortions as would be used in prohibited abortions. If the State really is claiming that abortion is gruesome or barbaric, then it makes no sense to ban only some.

With respect to the State's newly asserted interest in "respect for human life," this appears to be duplicative of its claim that the statute is intended to protect prenatal life and/or women's health. For the reasons above, the statute does not further—and affirmatively undermines—this asserted interest. As demonstrated above and below, the Abortion Ban likewise violates—rather than protects—rights conferred on Wyoming women by the Wyoming Constitution. To the extent the State claims that a fertilized egg has the full rights of a person under the Wyoming Constitution,

it has failed to offer any legal authority for this proposition. And, as noted above, it is not for the legislature to say what the Constitution means.

b. The Criminal Abortion Ban Unduly Infringes on the Constitutional Right of Women to Make Their Own Health Care Decisions

Most importantly, the evidence shows that the Criminal Abortion Ban will result in undue governmental infringement of the right of Wyoming women to control their own health care, in violation of Section 38. Although the statute is directed to some—but not all—elective abortions, it sweeps within its prohibition necessary, appropriate and ethical medical care that does not involve elective abortions. This is because medical procedures and medications used for elective abortions are also used in numerous other circumstances.

One example of these circumstances is pre-viability rupture of the amniotic sac. As described by Dr. Moayedi, pre-viability rupture is associated with multiple maternal morbidities, which increase in risk the longer treatment is delayed. Ex. 7, Moayedi at ¶¶ 11–12. While nearly all cases of pre-viability rupture result in death of the fetus, hospitals and physicians in states with abortion bans often delay treatment because of uncertainty whether these conditions qualify for the limited statutory exceptions. *Id.* The Criminal Abortion Ban contains no exception for pre-viability membrane rupture and therefore places women with the condition at serious risk of unnecessary injury. This is a particular concern in Wyoming, which does not have facilities offering the highest level of care for women experiencing pregnancy complications. *Id.* at ¶13.

Although the Criminal Abortion Ban attempts to address some—but far from all—pregnancy complications, even those efforts fall far short. For example, the definitions for ectopic and molar pregnancies do not include all of those conditions, with the result that some ectopic and molar pregnancies are not included in the exception to the ban. Ex. 7, Moayedi at ¶¶ 15–16. Delaying treatment for such conditions until a woman is at imminent risk of serious injury or death

increases maternal morbidity and mortality, yet that is exactly what the Criminal Abortion Ban requires. *Id.*

One need only read the news to know that women are experiencing dangerous and traumatic delays in, or outright denial of, necessary medical care every day because of vaguely worded abortion bans.[5] Dr. Moayedi describes such a case from her own practice in Texas, which has an abortion ban with exception language that is very similar to the Wyoming law, including use of such phrases as "serious risk of substantial impairment of a major bodily function" and "medical emergencies."[6] In that case, a pregnant woman required an immediate abortion to prevent deterioration of her heart function and eventual death, but the hospital required that treatment be delayed because of concern that the woman's condition was not yet severe enough to qualify for the vague exception to Texas's abortion ban. Ex. 7, Moayedi at ¶ 10.

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[5] *See, e.g.*, Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion*, Clinics Doctors Say, N.Y. Times, (Sept. 10, 2022), https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html; Bridget Grumet, *'It's Barbaric,' Says Austin Woman Denied Care As Pregnancy Unraveled*, Austin American-Stateman (Oct. 23, 2022), https://www.statesman.com/story/news/columns/2022/10/23/opinion-texas-abortion-laws-force-women-to-be-near-death-for-care/69577810007/; *Louisiana Anti-Abortion Group Calls on Doctors to Stop Denying Care Exempted by Ban*, The Guardian (Feb. 26, 2023), https://www.theguardian.com/world/2023/feb/26/louisiana-abortion-ban-miscarriage-treatments; Reese Oxner & María Méndez, *Texas Hospitals Are Putting Pregnant Patients at Risk by Denying Care out of Fear of Abortion Laws, Medical Group Says*, Texas Tribune (July 15, 2022), https://www.texastribune.org/2022/07/15/texas-hospitals-abortion-laws/; Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care, Miscarriages, Ectopic Pregnancies, and Other Common Complications are Now Scrutinized*, Washington Post (July 16, 2022), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/; Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get An Abortion*, CNN (Nov. 16, 2022), https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html; Susan Szuch, *She Had 'a Baby Dying Inside' Her. Under Missouri's Abortion Ban, Doctors Could Do Nothing*, USA Today (Oct. 15, 2022), https://www.usatoday.com/story/news/nation/2022/10/15/missouri-abortion-ban-pregnancy-complications/10496559002/.

[6] Texas House Bill 1280 prohibits all abortions, with an exception where "in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that placed the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." Ex. 11, Modlin at Attachment B (Tex. Health & Safety Code § 170A.002(b)(2)). Texas Senate Bill 8 bans abortions after detection of a fetal heartbeat, except in "medical emergenc[ies]." *Id.* at Attachment A (Tex. Health & Safety Code §§ 171.204(a) & 171.205(a)).

Because of this ambiguity in the exception for the woman's health, a Texas court recently granted a temporary injunction, finding that the statutory language did not provide sufficient guidance for physicians to determine whether they could provide abortions where pregnancy posed a risk of infection, or where continuing a pregnancy was otherwise unsafe for a woman. Ex. 11, Modlin at Attachment C (8/4/23 Temporary Injunction Order in *Zurawski v. Texas*). Specifically, the Court found that each of the plaintiffs "experienced emergent medical conditions during their pregnancies that risked the [plaintiffs'] lives and/or health . . . and required abortion care, but that [plaintiffs] were delayed or denied access to abortion care because of widespread uncertainty regarding physicians' level of discretion under the medical exception to Texas's abortion bans." *Id.* at 3.

Nor is the experience of plaintiffs in the *Zurawski* case unique. Dr. Moayedi has participated in research published in the New England Journal of Medicine showing how abortion bans with vague exceptions have a "chilling effect on a broad range of health care professionals, adversely affecting patient care and endangering people's lives." Ex. 7, Moayedi at ¶ 11 (internal quotations omitted). Clinicians interviewed in that study described situations where critical care was delayed to pregnant women because of concerns that they were not yet sick enough to fall within the law's exceptions. *Id.*

Another scientific study showed that the application of Texas's abortion ban and its vague exceptions resulted in a doubling of maternal morbidity compared with prior to the ban. Ex. 7, Moayedi at ¶ 12. "One patient's care was delayed for over three months, forcing her to remain pregnant after rupture of membranes at 19 weeks until 32 weeks of pregnancy, only to then undergo a cesarean section—and the infant died within one day." *Id.* That study found a 24% increase in maternal morbidity from the Texas abortion ban. *Id.*

Although abortion bans have only recently come into effect, there is now a wealth of evidence that they have a severe and detrimental impact on delivery of necessary health care to pregnant women, including those whose pregnancy was very much desired. There is no reason to believe that the impact of the Wyoming Criminal Abortion Ban would be different.

In fact, the Wyoming abortion statutes are already impairing access to necessary health care. Dr. Anthony reports that health care providers are declining to treat pregnant women for fear of potential criminal liability, exacerbating a pre-existing shortage of OB/GYN care. Ex. 1, Anthony at ¶ 42. She recently had to perform emergency surgery on a woman who was denied care in multiple locations throughout the state. *Id.* Not surprisingly, some OB/GYN medical students are declining to return to Wyoming to practice medicine. *Id.* at ¶ 44. The inevitable impact of the Wyoming abortion statutes will be to delay or deny necessary care for women. *Id.* at ¶¶ 24–25, 47–48; Ex. 2, Hinkle at ¶¶ 9, 35, 43–46, 48, 51.

The Abortion Ban also unduly infringes on the rights of survivors of sexual assault and incest. Although the statute expressly permits these victims to access abortion up to viability, it requires these victims, or their parent or guardian, to report the assault or incest to a law enforcement agency and provide a copy of the report to the physician. Wyo. Stat. § 35-6-124(a)(iii). This requirement imposes unreasonable, ambiguous and potentially insurmountable obstacles to the exercise of this right.

First, the Abortion Ban does not specify what type of "report" must be made, what information the report must include, or to which specific agency it must be made. As detailed by expert Michael Blonigen, not only does the statute fail to provide sufficient guidance to determine when a report meets the statutory requirement, but law enforcement agencies are prohibited by law from releasing any reports that identify the victim of a sexual assault. Ex. 8, Blonigen ¶¶ 23–24.

Moreover, reports of sexual offenses are often incomplete or not in writing. *Id.* at ¶ 25. It therefore is entirely unclear how a victim could meet the requirement for a report, and even less clear how a physician will determine whether the report is adequate.

Second, it is well-established that sexual crimes are heavily underreported. Ex. 8, Blonigen at ¶ 25. According to the U.S. Department of Justice, nearly 80% of rapes and sexual assaults are not reported to the police. Ex. 11, Modlin at Attachment H (2021 DOJ Criminal Victimization Survey) at Table 4. And victims of these crimes are often unable or unwilling to inform their physicians of the circumstances that led to their pregnancy. Ex. 1, Anthony at ¶ 39. Requiring a formal report is therefore unreasonable and unnecessary, and appears calculated to prevent those with a right to an abortion under the statute from accessing such care.

Third, the treatment of such victims who are minors is egregious. These victims cannot even exercise their rights by filing a police report themselves. Instead, the statute requires their parent or guardian to make the report. It is unclear whether the statute requires one parent or both parents to file the report. *See* Ex. 8, Blonigen at ¶¶ 26–28. And in cases where one of the parents is the perpetrator of the crime, the statute would require them to report themselves to the police—a patently absurd requirement. There is no provision for appointment of a guardian *ad litem* in such circumstances, effectively nullifying the victim's rights. *Id.* at ¶ 28.

The Wyoming Criminal Abortion Ban also interferes with a woman's right to control her own health care in other ways that the Court observed with respect to the similar Wyoming Trigger Ban:

> It provides no exceptions for the period of time when a fetus is not viable. It provides no exceptions for the risk of death associated with psychological or emotional conditions of the pregnant woman. Further, the statute provides no exceptions for a pregnant woman who is diagnosed with a significant substance abuse disorder.

PI Order at ¶ 36. The newly enacted Abortion Ban has done nothing to address these concerns previously identified by the Court.

The Criminal Abortion Ban undermines, rather than furthers, its stated purposes and severely interferes with necessary and appropriate medical care for Wyoming women. As such, the statute is not a "reasonable and necessary restriction[]," Wyo. Const. art. I, § 38, on a woman's right to control her own health care ***and*** contravenes the legislature's duty to avoid undue government infringement of this right. The Criminal Abortion Ban therefore is directly contrary to article I, section 38 of the Wyoming Constitution.

3. Wyoming's Criminal Medication Ban Violates Section 38

There is no conceivable basis for the State to assert that the Criminal Medication Ban is reasonable and necessary to protect public health and safety. To the extent abortion is itself illegal, the ban on abortion medication is entirely superfluous. Indeed, the State has taken the position that the Medication Ban never applies to abortions that are legal under the Abortion Ban. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 20). Thus, according to the State, in the event the Court upholds the abortion statutes, the Medication Ban will never apply to any abortions and therefore cannot be necessary for any purpose.

Of course, the State's contention ignores the plain language of the statutes, which have materially different exceptions. Given that the Medication Ban has fewer and narrower exceptions, it is apparent that some abortions could be legal under the Abortion Ban but still subject to the Medication Ban. There is no legitimate government interest in forcing women to undergo a surgical abortion when a medication abortion is the preferred course for medical or other reasons.

Virtually all abortions in Wyoming are through medication. Ex. 11, Modlin at Attachment F (2021 ITOP Report); *id.* at Attachment G (2022 ITOP Report). Banning medication abortion therefore creates the real prospect that, because of the Medication Ban, Wyoming women will not

be able to obtain abortions that are otherwise legal. Such a result could not possibly further any governmental interest because the legislature has already declared that some abortions should be available under the Criminal Abortion Ban.

The state cannot plausibly assert that the Medication Ban protects life in the form of a developing fetus. The Criminal Medication Ban does not purport to ban any abortions and therefore it does not preserve any prenatal life. Moreover, it has no exception for lethal fetal abnormalities incompatible with life, and therefore applies to fetuses that have no potential for life.

And any assertion that the Medication Ban is necessary to protect women is simply absurd. To the extent the Medication Ban applies to abortions that are otherwise legal, it would require women to undergo more invasive surgical abortions, even where a medication abortion is the preferred course. There are many reasons why patients prefer medication abortion to surgical abortion, including logistics, cost, comfort and convenience. Ex. 7, Moayedi at ¶ 26; Anthony at ¶ 16; Burkhart at ¶ 15.

Apart from patient preference, there are also a variety of pregnancy complications for which medication abortion is necessary because surgical abortion would be difficult or dangerous. Ex. 8, Moayedi at ¶¶ 27–30. Dr. Moayedi provides examples of such situations, including 1) where a patient is allergic to anesthetic medications used during surgical abortions; 2) patients with abnormalities of the uterus or cervix; 3) patients with seizure disorders; and 4) where surgical abortion could be traumatic to survivors of sexual violence. *Id.* In such cases, medication abortion is medically indicated, but the Medication Ban makes no provision for these circumstances.

In addition, abortion medication is used during surgical abortions to reduce risks to women. Ex. 2, Hinkle at ¶¶ 41, 45–46. Forcing women to undergo surgical abortions without medication would therefore ***increase*** health risks. And as noted above, no complications have been reported

from medication abortions in Wyoming. Ex. 11, Modlin at Attachment F (2021 ITOP Report); *id.* at Attachment G (2022 ITOP Report).

Moreover, the Criminal Medication Ban explicitly does not permit medication abortions that are necessary to prevent death or serious injury to women due to mental or emotional conditions. Wyo. Stat. § 35-6-139(b)(iii). This is despite the fact that mental health conditions are the leading cause of pregnancy-related death in the United States. Ex. 7, Moayedi at ¶¶ 38–39. And the statute does not include an exception for ectopic and molar pregnancies, which are potentially life-threatening to women. Ex. 2, Hinkle at ¶ 45; Ex. 7, Moayedi at ¶ 43. The Medication Ban therefore by its express terms does not protect the health of women.

The Criminal Medication Ban will also harm women in other ways. As with the Criminal Abortion Ban, the exception for a woman's health is impossibly vague. That exception applies to "[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment . . . ." Wyo Stat. § 35-6-139(b)(iii). The terms used in this exception have no medical definition or meaning and therefore it is impossible for health care professionals to know when the exception applies. Ex. 7, Moayedi at ¶ 34; Ex. 2, Hinkle at ¶¶ 47, 51; Ex. 1, Anthony at ¶¶ 47, 51.

As Dr. Moayedi explains, and as a Texas court has held, hospitals in Texas, which has similarly vague exceptions to its abortion bans have denied or delayed necessary medical care, causing avoidable injury to women. Ex. 7, Moayedi at ¶ 35; Ex. 11, Modlin at Attachment C (8/4/23 Temporary Injunction Order in *Zurawski v. Texas*). As with the Criminal Abortion Ban, the ambiguous terms of the Medication Ban will undoubtedly cause delay and denial of necessary treatment. Ex. 1, Anthony at ¶¶ 47–48; Ex. 2, Hinkle at ¶¶ 43, 44, 46, 51. Other vague, non-medical terms such as "chemical abortion" are also bound to cause confusion among health care

providers. Ex. 7, Moayedi at ¶ 21. Remarkably, the Medication Ban does not even define "pregnancy" in understandable, medical terms. *Id.* at ¶ 42.

Moreover, the Medication Ban applies to pharmacies that dispense or sell abortion medication. Wyo. Stat. § 35-6-139(a). Before filling a prescription for medication capable of inducing an abortion, a pharmacist therefore must determine whether the medication is intended to be used for an abortion as opposed to some other purpose and, if an abortion, whether a statutory exception applies. A pharmacist plainly has no way of making these determinations. Pharmacists are already refusing to fill prescriptions for these medications, even when necessary for non-elective abortions. Ex. 7, Moayedi at ¶ 31. These features of the Medication Ban will also cause further confusion, delay and denial of necessary care. Ex. 1, Anthony at ¶¶ 43, 48.

The exemptions—or lack thereof—to the Criminal Medication Ban further demonstrate its arbitrary nature. For example, there is no conceivable reason to allow medication abortion for pregnancies resulting from sexual assault or incest, but to prohibit medication abortion in cases of lethal fetal anomalies. The same is true for ectopic and molar pregnancies, which, unlike the Criminal Abortion Ban, are not exempted from the Criminal Medication Ban.

The ban also undermines medical ethics because physicians will no longer be free to use the most appropriate method of abortion for a particular patient, and the statute will force physicians to perform surgical abortions when a medication abortion is the more appropriate medical procedure.

And although the law purports to exclude contraception from the ban, the terms used in that exception are so vague that it could apply to commonly used forms of contraception such as IUDs and emergency contraception. Ex. 7, Moayedi at ¶ 41. The Medication Ban exempts contraceptives "administered before conception." Wyo. Stat. § 35-6-139(b)(i). As Dr. Moayedi

explains, this language could be construed in a manner that it does not cover contraceptives that result in the failure of a fertilized egg to implant in the uterus, which anti-abortion advocates claim are abortifacients. Ex. 7, Moayedi at ¶ 41; Ex. 11, Modlin at Attachment I (Student's For Life Webpage). In fact, the plaintiffs in *Burwell v. Hobby Lobby*, made precisely this claim—*i.e.*, that IUDs and emergency contraception acted after conception and therefore were equivalent to abortion. 573 U.S. 682, 701–02 (2014). The same argument can—and likely will—be used to claim that the Medication Ban prohibits these and other common types of birth control, thereby criminalizing a woman's basic family planning.[7]

In short, the Medication Ban is not related to any government interest, legitimate, compelling or otherwise, and therefore is neither reasonable nor necessary to protect public health, as required by Section 38. At the same time, the Criminal Medication Ban unduly infringes on women's right to control their own health care. Where a woman has a legal right to an abortion, the Medication Ban would dictate that she must undergo a surgical abortion without medication, even where a medication abortion is medically necessary and/or preferable in terms of cost or convenience. And if a woman does not have the time, resources or capability to travel for a surgical abortion, the Medication Ban could prevent a woman from obtaining a legal abortion.

4. The Court Should Overrule the State's Objection to Plaintiffs' Evidence

The State has objected to the evidence offered by the Plaintiffs to support their showing of a likelihood of success on the merits of their claim under Section 38. According to the State, this claim presents purely legal issues. Plaintiffs agree that, on their face, the Criminal Abortion Ban

[7] For example, the anti-abortion group Students For Life defines all oral contraceptives, hormonal contraceptives, emergency birth control and IUDs as "abortifacients" because they allegedly can lead to a fertilized egg failing to implant in the uterus. *Contraception*, Students for Life of America, https://studentsforlife.org/learn/contraception/ (last visited Sep. 11, 2023), attached as Ex. 11, Modlin at Attachment I.

and Criminal Medication Ban impermissibly infringe on the right of Wyoming citizens to control their own health care. Nonetheless, the evidence offered by Plaintiffs provides additional support for a finding that the bans are neither reasonable nor necessary and that they constitute undue infringement.

For example, evidence that the terms of the statutes will be difficult or impossible for physicians and pharmacists to apply and that laws with similarly vague terms have led to delays and denial of necessary medical treatment goes directly to the issue of undue infringement. Similarly, evidence that the Abortion Ban fails to properly define ectopic pregnancy, molar pregnancy and lethal fetal anomalies further demonstrates that the statutory restrictions are neither necessary nor reasonable. And evidence that most abortions in Wyoming are medication abortions and that abortion medication is both necessary for some abortions and used for a variety of medical treatments demonstrates that the Medication Ban is unreasonable, unnecessary and unduly infringes on women's right to make their own health care decisions. None of these facts is evident on the face of the statutes, but all are relevant to the question of whether the abortion statutes violate Section 38. Thus, while this evidence is not ***necessary*** to establish a violation of Section 38, it plainly is ***relevant*** to that claim.

In fact, courts routinely rely upon factual evidence in adjudicating facial challenges to legislation. The Tenth Circuit's decision in *Jane L. v. Bangerter* is especially instructive. 102 F.3d 1112 (10th Cir. 1996). That case involved a facial challenge to a Utah law restricting pre-viability abortions after 20 weeks gestational age. *Id.* at 1114. In evaluating this facial challenge, the Tenth Circuit applied the "undue burden" test that previously was controlling law under the U.S. Supreme Court's decision under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Id.* at 1115–16. The "undue burden" test is similar to the "unduly infringes" language of Section 38, as

both consider whether a law impermissibly infringes on an individual's right to health care (and, in *Casey*, abortion specifically). Under the *Casey* standard, a statute imposed an undue burden "if its purpose or effect [was] to place a substantial obstacle in the path of a woman seeking an abortion . . . ." 505 U.S. at 878.

In applying the undue burden test to plaintiffs' facial challenge to the Utah statute, the Tenth Circuit expressly found that extrinsic evidence was relevant to ***both*** the purpose and the effect of the statute. With respect to the purpose, the Court found that "[l]egislative purpose to accomplish a constitutionally forbidden result . . . may be gleaned both from the structure of the legislation and ***from examination of the process that led to its enactment***." *Bangerter*, 102 F.3d at 1116 (emphasis added) (citation omitted). Based on such evidence, the Court found that the Utah legislature's intent in enacting the statute was to ban pre-viability abortions, which at the time were constitutionally protected. *Id.* at 1117.

With respect to the statute's impact, the Tenth Circuit noted that "[l]egislation is measured for consistency with the Constitution ***by its impact on those whose conduct it affects***." *Bangerter*, 102 F.3d at 1117 (emphasis added). The Court therefore assessed the constitutionality of the statute in light of "its impact on the women upon whom it operates." *Id.* The Court went on to consider a declaration from the director of an abortion clinic discussing the impact of the Utah law on its patients. Based on this evidence, the Tenth Circuit found the Utah statute impermissibly impacted women and therefore imposed an undue burden in violation of the Constitution. *Id.* at 1117–18.

Although the Tenth Circuit's decision in *Bangerter* applied a legal standard that has been overruled, its analysis of the evidence that is relevant and necessary to evaluate facial constitutional claims on abortion restrictions remains good law. This analysis makes clear that in assessing facial

claims concerning the undue infringement of constitutional rights, courts may consider evidence of both the purpose and effect of legislation. This is precisely the kind of evidence that Plaintiffs offer in support of their claim that the abortion statutes unduly infringe upon the constitutional right of Wyoming women to make their own health care decisions.

Nor is the *Bangerter* case unusual in considering evidence in a facial challenge. Numerous other Tenth Circuit cases have done the same. *See, e.g.*, *United States v. Bolton*, 68 F.3d 396, 398–99 (10th Cir. 1995) (weighing evidence "establishing that the assets of a business engaged in interstate commerce were depleted" to uphold the constitutionality of criminal statute); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1234–35 (10th Cir. 2005) (weighing and rejecting defendant's evidence that a criminal statute would "deter crime or aid . . . investigation[s]"); *United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (finding a statutory permitting system "survives a facial challenge" based on defendant's testimonial evidence about the way the permitting system operates); *see also Midvale City Corp. v. Haltom*, 73 P.3d 334, 340 (Utah 2003) (rejecting facial challenge where plaintiff "offer[ed] no evidence that the purpose of the ordinance" was unconstitutional).

The Montana Supreme Court likewise considered a full evidentiary record in determining that a statute prohibiting physician assistants from performing abortions violated that state's constitutional right to privacy. *Armstrong v. State*, 989 P.2d 364, 384–87 (Mont. 1999). Specifically, the Court found that the evidence introduced at trial showed that the statute did not further any legitimate governmental interest. *Id.* at 385–86. Although the state claimed that the law was intended to "protect[] women's health," the court pointed to evidence that the plaintiff (who was a physician's assistant) had been certified by the state medical board to perform abortions, that there were riskier medical procedures that she remained authorized to perform, that

she had performed 3,000 abortions, that she had never been sued for malpractice and that the complication rate for her abortions was the same as for abortions performed by physicians. *Id.* In light of this evidentiary record, the Court found "[t]here is simply no evidence in the record of this case that [the challenged statute was] necessary to protect the life, health or safety of women in this State. Indeed, there [was] overwhelming evidence to the contrary . . . ." *Id.* at 387.

Just so, the overwhelming, uncontested evidence in this case shows that the Criminal Abortion Ban and Criminal Medication Ban do not further, and actually undermine, the State's asserted interests. Not only is this evidence admissible, but it conclusively demonstrates that the statutes cannot satisfy any constitutional test under Section 38.

B. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Are Void for Vagueness.

Both the Abortion Ban and the Medication Ban are so vague and ambiguous that it is impossible to determine the conduct to which the statutes apply. The State has argued that Plaintiffs may not bring a facial vagueness challenge to the Abortion Ban and Medication Ban, because only some, but not all, of the terms of those laws are vague. The State is incorrect in two respects. First, the vague provisions are central to the statutes and therefore the laws cannot be applied without them. Second, Plaintiffs' are also asserting an as-applied vagueness challenge.

1. Plaintiffs' Vagueness Claim Is Both Facial and "as Applied"

"A statute may be challenged for constitutional vagueness 'on its face' or 'as applied' to particular conduct." *Giles v. State,* 2004 WY 101, ¶ 15, 96 P.3d 1027, 1031–32 (Wyo. 2004) (citation omitted). Here, the abortion statutes are vague on their face because they reach "a substantial amount of constitutionally protected conduct" and they specify "no standard of conduct at all." *Id.* Plaintiffs therefore assert a facial vagueness claim.

A penal statute is unconstitutionally vague "as applied" where it fails to "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." *Griego v. State*, 761 P.2d 975 (Wyo. 1998) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983)). Plaintiffs' challenge is also "as applied" because as physicians, Drs. Hinkle and Anthony are charged by the statute with determining whether the vague terms in both statutes apply, but it is impossible to do so because key statutory provisions have no medical or commonsense meaning. Ex. 1, Anthony ¶¶ 23, 47, 51; Ex. 2, Hinkle ¶¶ 9, 28, 35, 47, 51; Ex. 7, Moayedi at ¶¶ 7–12, 34–37.

And Plaintiffs Dow and Johnson may need to invoke the exceptions in the future, but their physicians will be unable to determine if they are available. Plaintiffs therefore have a reasonable apprehension that they may be called upon to interpret language in the statutes that is impossibly vague.

2. The Abortion Ban and Medication Ban Are Unconstitutionally Vague

Application of the Abortion Ban and Medication Ban is not possible, because the following key terms have no discernable meaning:

- The exception to the Medication Ban for "[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment . . . ." Wyo. Stat. § 35-6-139(b)(iii).
- The terms "natural miscarriage" and "chemical abortion" in the Medication Ban. Wyo. Stat. § 35-6-139(b)(ii) & (d).
- The lack of guidance in the Medication Ban for how a physician or pharmacist is to determine that a pregnancy resulted from sexual assault or incest. Wyo. Stat. § 35-6-139(b)(iii).
- The exception to the Medication Ban for contraceptives "administered before conception or before pregnancy can be confirmed through conventional medical testing." Wyo. Stat. § 35-6-139(b)(i).

- The lack of guidance in the Abortion Ban and Medication Ban for how a pharmacist is to determine whether a particular prescription is for an abortion or whether the statute's exceptions apply.

- The Abortion Ban's exception for "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 . . . ." Wyo. Stat. § 35-6-124(a)(i).

- The Abortion Ban's definition of "[l]ethal fetal anomaly" as "a fetal condition diagnosed before birth and if the pregnancy results in a live birth there is a substantial likelihood of death of the child within hours of the child's birth." Wyo. Stat. § 35-6-122(a)(vi).

- The Abortion Ban's requirement for a physician to "make[] all reasonable medical efforts under the circumstances to preserve . . . the life of the unborn baby. . . ." Wyo. Stat. § 35-6-124(a)(i).

In assessing whether an abortion is permitted by the Criminal Abortion Ban, the physician is called upon to use "reasonable medical judgment" to determine whether it is "necessary . . . 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 . . . ." Wyo. Stat. § 35-6-124(a)(i). In applying this standard, a physician must interpret the following words and phrases: "necessary," "prevent the death," "substantial risk," "serious and permanent impairment," and "life-sustaining organ." As set forth in Dr. Moayedi's declaration, none of these is a medical term or phrase and there is no medical literature or guidance on how to apply them. Ex. 7, Moayedi at ¶¶ 7–10, 34–37; *see also* Ex. 1, Anthony ¶¶ 23, 47, 51; Ex. 2, Hinkle ¶¶ 9, 28, 35, 47, 51.

In its discovery responses, the State offers definitions for some of these terms that do nothing to clarify their meaning. According to the State, the phrase "substantial risk of death" means "the possibility of death is real or true and not imaginary or illusory." *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 3). This appears to come from the

dictionary definition of the word "substantial" as "not imaginary or illusory; real, true." *Substantial*, Merriam-Webster Dictionary (11th ed. 2023), https://www.merriam-webster.com/dictionary/substantial?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. As with the statutory language, none of these terms has a medical meaning and the State admits there is no medical guidance to assist physicians in applying them. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory Nos. 5 & 9); Ex. 7, Moayedi at ¶¶ 53–54.

Nor does this proffered definition do anything to clarify what level of risk is necessary to trigger the exception. Pregnancy itself carries a real risk of death. According to the Centers for Disease Control, in 2021 over 1,200 American women died from pregnancy or childbirth, for a mortality rate of over 0.03%. Ex. 1, Anthony at Attachment H (CDC Maternal Mortality Rates in the United States, 2021); Ex. 7, Moayedi at ¶ 53. This 0.03% risk of death is plainly "real" and "true," especially for the women involved. Taken literally, the State's definition therefore would apply to all pregnancies and allow abortion at any time up until birth. *See* Ex. 7, Moayedi at ¶ 53.

This plainly is not the intent of the Abortion Ban, as applying the State's definition would result in rendering the statute a nullity. But if 0.03% is not "substantial," what is? 0.3%? 3.0%? And most importantly, at what point is the woman's condition sufficiently dire to justify an exemption to the Abortion Ban? Must she be in need of immediate medical intervention, or is it sufficient that delay in treatment could lead to a greater risk of death? The State's discovery responses have clarified nothing and arguably have injected even more uncertainty into the definition of "substantial risk of death."

The same is true for the phrase "serious and permanent impairment of a life-sustaining organ." The State's discovery responses do not even attempt to clarify the meaning of "serious and permanent impairment." Beyond that, the State's suggested definition of "life-sustaining

organ" is contrary to both the statutory language and undisputed medical facts. According to the State, the term "life-sustaining organ" actually means "vital organ," which the State defines as "an organ a person needs to survive." *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 7). The State claims only five organs are "vital:" the brain, heart, lungs, kidneys and liver. But the State then immediately contradicts itself by acknowledging that a person can survive without one lung or one kidney. *Id.*

The State's attempt at clarification fails for several other reasons. First, there is no medical meaning for the terms "life-sustaining" or "vital." Ex. 7, Moayedi at ¶ 57. Moreover, the State fails to include in the definition of "vital organs" multiple organs that are necessary for survival, including the pancreas, skin, esophagus, and intestines. *Id.* at ¶¶ 60–63. And even some of the organs that the State does include in the definition of "vital" are not required for life, including the kidneys and heart. *Id.* at ¶¶ 58–59. In attempting to clarify the term "life-sustaining organ" the State has introduced even more ambiguity.

More to the point, the State seeks to rewrite the statute itself. The legislature did not use the term "vital organ," or specify five organs, but instead used the phrase "life-sustaining organ." The term "life-sustaining" is defined by Merriam-Webster's dictionary as "helping someone or something to stay alive; supporting or extending life." *Life-sustaining*, Merriam-Webster Dictionary (11th ed. 2023), https://www.merriam-webster.com/dictionary/life-sustaining. This is quite different from the State's definition of "vital organ." One could presumably argue that many organs other than the five named by the State help, support or extend life, including limbs, eyes, nose, and the reproductive organs. Once again, the State has clarified nothing.

And when asked to identify conditions that satisfied the requirement for a "substantial risk of death" or a "serious and permanent impairment of a life sustaining organ," the State could only

come up with two: preeclampsia and placental abruption. *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory Nos. 4 & 8). The State failed to include a multitude of other conditions that can lead to serious injury or death of a pregnant woman, such as pre-viability membrane rupture, pulmonary hypertension, placenta previa, cardiomyopathy, placenta accrete spectrum disorder, and various forms of cancer. Ex. 7, Moayedi at ¶ 55. Under the State's definition, physicians are left simply to guess whether these potentially fatal conditions fall within the exceptions to the Abortion Ban.

Similarly, the Criminal Medication Ban requires the physician to use "appropriate medical judgment" to determine whether abortion medication is "necessary to preserve the woman from an imminent peril that substantially endangers her life or health . . . ." Wyo. Stat. § 35-6-139(b)(iii). Applying this exception, the physician must divine the meaning of the terms "necessary to preserve," "imminent peril," "substantially endangers" and "health." Once again, none of these is a medical term and there is no medical guidance on how a physician should apply them to the circumstances of a particular patient. Ex. 7, Moayedi at ¶ 34.

As with the Abortion Ban, the State's efforts to explain the meaning of this language fails to clarify anything. The State claims that the exception for "imminent peril that substantially endangers her life or health," means "a real or true exposure to the risk of death or injury to the pregnant woman that is ready to take place." *See* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 15). Just like the language of the Abortion Ban, these terms have no medical meaning and the State admits there is no medical guidance to apply them. Ex. 7, Moayedi at ¶ 56; *see also* Ex. 11, Modlin at Attachment M (State's Response to Interrogatory No. 15).

Nor is there any non-medical meaning to this combination of phrases. What is a "real or

true exposure to the risk of death or injury?" And what does it mean for such a risk to be "ready to take place?" It appears that the State has simply cobbled together fragments of the Merriam-Webster definitions for "substantial" (real or true), "imminent" (ready to take place), and "peril" (exposure to the risk of being injured).[8] Of course, Merriam-Webster provides no explanation for what all these terms mean when juxtaposed with each other in the context of a woman's health care. By mixing and matching unrelated dictionary definitions, the State has created a Frankenstein's Monster of a definition that is even more incomprehensible than the statutory language.

Other terms in the statutes that may at first glance appear to be medically based are not. For example, the phrases "separation procedure" and "chemical abortion" are not defined in the statute and have no medical definition. Ex. 7, Moayedi at ¶¶ 7, 21. And the Abortion Ban defines a "[l]ethal fetal anomaly" as a condition for which "there is a substantial likelihood of death of the child within hours of the child's birth." Wyo. Stat. § 35-6-122(a)(vi). But it is impossible for a physician to determine in advance whether a fetus with a fatal anomaly will survive minutes, hours, days, or months following birth. Ex. 7, Moayedi at ¶ 17; *see also* Ex. 2, Hinkle at ¶¶ 10, 27, 34.

While both statutes purport to allow physicians to rely on "reasonable medical judgment" or "appropriate medical judgment," this is meaningless when it comes to applying terms that have no medical definition and for which there is no established medical guidance. As Dr. Moayedi explains, nothing in a physician's education, knowledge, experience or training equips her to interpret the vague exceptions to the abortion statutes. Ex. 7, Moayedi at ¶¶ 64–65.

[8] *Imminent*, Merriam-Webster Dictionary (11th ed. 2023), https://www.merriam-webster.com/dictionary/imminent?utm_campaign=sd&utm_medium=serp&utm_source=jsonld; *Peril*, Merriam-Webster Dictionary (11th ed. 2023), https://www.merriam-webster.com/dictionary/peril; *Substantial*, Merriam-Webster Dictionary (11th ed. 2023), https://www.merriam-webster.com/dictionary/substantial?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

And because the statutes purport to require the exercise of medical judgment, evidence of how physicians understand the terms is relevant to determining the vagueness claim. *See United States v. Richter*, 796 F.3d 1173, 1189 (10th Cir. 2015) ("[W]here a statute or regulation is aimed at a class of people with specialized knowledge, the specificity required by due process is measured by the common understanding of that group.") Moreover, "[w]hether a [statutory] term has . . . a technical meaning is a question of fact to be proved." *Powder River Coal Co. v. Wyo. Dep't of Revenue*, 2006 WY 137, ¶ 16, 145 P.3d 442, 448 (Wyo. 2006). The statutes provide no standard at all.

And pharmacists have no way to know whether the statutes or their exceptions apply when patients attempt to fill prescriptions for medications that could be used to terminate a pregnancy. Physicians and pharmacists are left to speculate on the meaning of these non-medical terms, at the risk of losing their licenses and going to jail. Predictably, physicians and pharmacists attempting to apply similar exceptions in other states' abortion bans have been unable to do so, with the result that women are deprived of necessary medical care. As noted above, Dr. Moayedi practices in Texas, which has a similar abortion ban with similarly vague terms. Through her own practice and her research, she has observed that health care providers often delay critical, necessary care because of uncertainty about the meaning and scope of these types of vague exceptions. Ex. 7, Moayedi at ¶¶ 9–14.

To the extent the State argues that these defects can be cured by severing the vague terms from the statutes, the Court should reject the argument. Severance is only available where the rest of the statute "can be given effect without the invalid provision." Wyo. Stat. § 8-1-103. "The question is whether the statute can be enforced even if the invalid portions are severed from the statute or whether 'the several parts are so interdependent that ***the main purpose of the law would***

fail by reason of the invalidity of a part.'" *Air Methods/Rocky Mountain Holdings, LLC v. State ex rel. Dep't of Workforce Servs.*, 2018 WY 128, ¶ 34, 432 P.3d 476, 486 (Wyo. 2018) (emphasis added) (citation omitted).

Here, the main purpose of the Abortion Ban and Medication Ban is to specify when abortions and medication abortions are permissible and when they are not. The vague terms of both statutes are central to this purpose, in that they describe exceptions to the general bans—*i.e.*, when a physician may legally perform an abortion or use medication for an abortion. Without these terms, all abortions would be prohibited at all times, which plainly is contrary to the purpose of the statutes which, on their face, are not intended to prohibit ***all*** abortions or ***all*** use of abortion medication. Accordingly, it is not possible to sever the vague terms without drastically altering the impact of the statutes.

Even if severance were possible, Plaintiffs would be entitled to declaratory and injunctive relief with respect to the vague statutory terms, as applied to them individually. Plaintiffs have no way to know what conduct is allowed and what conduct is proscribed by the statutes. The Criminal Abortion Ban and Criminal Medication Ban are textbook examples of unconstitutionally vague penal statutes.

C. Wyoming's Criminal Abortion Ban and Criminal Medication Ban violate Wyo. Const. article I, sections 18 & 19; article VII, section 12; article XXI, section 25—establishment of religion.

The obvious disconnect between the stated purposes of the Criminal Abortion Ban and its actual provisions, along with its vague and unworkable language lead to one of two conclusions: either the legislature was decidedly inartful in drafting the law or the statute has an actual, undisclosed purpose that is different from what it claims. The language of the statute itself points strongly to the latter conclusion: the actual purpose of the law is to impose on all Wyoming citizens the sectarian, religious viewpoint that life begins at conception.

Viewed in this light, it is simple to reconcile the seeming inconsistencies in the statute—because the purpose is to further a religious viewpoint that all abortions are the murder of an unborn human, the deprivation of essential medical care is a necessary side-effect of stopping all abortions, and the impossibility of applying the exceptions is a feature and not a bug. The Criminal Abortion Ban therefore violates the prohibition on establishment of religion.[9]

The Wyoming Supreme Court has held that the Wyoming Constitution "contains its own variation of the federal [E]stablishment [C]lause," even if its guarantee does not mimic the explicit language of the federal constitution. *In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d 728, 744 (Wyo. 2017). In particular, the Wyoming Constitution prohibits appropriations for sectarian or religious societies or institutions, and prohibits sectarianism. *Id.* (citing Wyo. Const. art. I, § 19 & art. VII, § 12). A federal court applying the Wyoming Constitution framed the prohibition on establishment of religion as follows: "[t]he fullest realization of true religious liberty requires that government neither engage in ***nor compel religious practices***, ***that it effect no favoritism among sects*** or between religion and non-religion, and ***that it work deterrence of no religious belief***." *Williams v. Eaton*, 333 F. Supp. 107, 115 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972) (emphases added).

This formulation of the Wyoming establishment clause is comparable to the test enunciated by the U.S. Supreme Court in *Larson v. Valente*, 456 U.S. 228, 255 (1982). Under that decision, if a law discriminates *among* religions, it can survive only if it is "closely fitted to the furtherance of any compelling governmental interest asserted." *Id*. A variation on this test is found in the Supreme Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). To pass this test, the government conduct (1) must have a secular purpose, (2) must have a principal or primary effect

[9] Plaintiffs' establishment claim is both facial and as applied to Plaintiffs Dow and Johnson.

that does not advance or inhibit religion ***and*** (3) cannot foster an excessive government entanglement with religion. *Id.* at 612–13. As an "offshoot" of the *Lemon* test, courts have also applied the endorsement test, under which courts must ask "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation omitted).

At the federal level, the U.S. Supreme Court recently has abandoned the *Lemon* and endorsement test. *Kennedy v. Bremerton Sch. Distr.*, 142 S. Ct. 2407, 2427 (2022). That decision adopted a new standard, holding that under the federal Establishment Clause, the government may not "make a religious observance ***compulsory***." *Id*. at 2429 (citation omitted) (emphasis added). For example, "[g]overnment 'may not coerce anyone to attend church,' nor may it force citizens to engage in a 'formal religious exercise'" as "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* (citations omitted).

Wyoming is not bound by this change in federal law. As the Wyoming Supreme Court noted in *In re Neely*, the Wyoming Constitution "can offer broader protection than the United States Constitution." 2017 WY 25, ¶ 39, 390 P.3d at 741. The provisions of the Wyoming Constitution closely align with the *Lemon* test. The first element of that test—that laws have a secular purpose—is consistent with the prohibition on sectarianism in article I, section 19 and article VII, section 12 of the Wyoming Constitution. The second element of the *Lemon* test—that the effect of the law must neither advance nor inhibit religion—parallels the prohibition on religious preferences in article I, section 18. The third element—that government must avoid excessive entanglement with religion—closely aligns with the requirement for "[p]erfect

toleration" of religious views in article XXI, section 25.

Consistent with the provisions of the Wyoming Constitution, this Court should apply something akin to the *Lemon* test in considering Plaintiffs' establishment claim. Nonetheless, even if the Court applies something similar to the "coercion" test from *Kennedy v. Bremerton School District*, the Wyoming Criminal Abortion Ban fails. It is hard to imagine a starker example of coercion than forcing women to carry a pregnancy to term against their will or forcing physicians to violate their professional duties on pain of losing their license and going to jail—all in an effort to advance the religious viewpoint of a handful of legislators.

And there can be little doubt that prohibiting abortions based on the religious belief that life begins at conception "make[s] a religious observance compulsory." *See Kennedy*, 142 S. Ct. at 2429 (citation omitted). In *Burwell*, the U.S. Supreme Court expressly found that compelling a business to provide health insurance for certain types of contraceptives would "require[] [plaintiffs to] engage in conduct that seriously violates their religious beliefs" that "life begins at conception." 573 U.S. at 720. If purchasing health insurance for contraceptives implicates religious observance, then so must forcing a woman to carry a fetus to term based on the religious viewpoint that life begins at conception.

"When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 335 (1987) ("*Lemon*'*s* 'purpose' requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."). While the Criminal Abortion

Ban purports to have secular purposes, as demonstrated above, there is a complete disconnect between the stated purposes of the statute and its actual terms.

Accordingly, the Court should look behind the legislature's statement of purpose to discern the true motivation for the statutes. *Santa Fe Indep. Sch. Dist.,* 530 U.S. at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (citation omitted)); *Edwards v. Aguillard*, 482 U.S. 578, 586–587 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

In undertaking these inquiries into the motivation behind a statute, courts routinely look to evidence of the circumstances surrounding adoption of the statute. The Establishment Clause analysis "does not end with the text of the statute at issue." *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In undertaking an "Establishment Clause analysis . . . an understanding of official objective" often "emerges from readily discoverable fact." *See McCreary Cnty*, 545 U.S. at 862; *see also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[T]he record . . . reveals that the enactment of [the challenged statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose." (emphasis in original).)

The case of *Epperson v. Arkansas* is instructive. There, the U.S. Supreme Court considered an Arkansas law banning the teaching of evolution. 393 U.S. 97 (1968). Although the Arkansas

anti-evolution law did not include a statement of religious purpose, the Court nonetheless found that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor of the twenties." *Id*., 393 U.S. at 98. After reviewing evidence of the historical setting underlying the Arkansas statute and similar laws in other states, the Court determined that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. . . . The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account," *id.* at 107–09.

In a similar case, the Supreme Court considered whether Louisiana's Creationism Act, which forbade teaching the theory of evolution in public schools, was "facially invalid as violative of the Establishment Clause." *Aguillard*, 482 U.S. at 580–81. The Court not only considered "the plain language" of the Act, but also "the legislative history and historical context of the Act, the specific sequence of events leading to the passage of the Act," as well as "correspondence [of] the Act's legislative sponsor" in holding that the Act violated the Establishment Clause. *Id.* at 595–97. As one federal district court observed,

> [T]he [United States] Supreme Court has consistently held not only that legislative history can and must be considered in ascertaining legislative purpose under *Lemon*, but also that statements by a measure's sponsors and chief proponents are strong indicia of such purpose. [A]lthough courts do not engage in "psychoanalysis of a drafter's heart of hearts," they routinely and properly look to individual legislators' public statements to determine legislative purpose.[]

Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 746 n.20 (M.D. Pa. 2005) (citations omitted).

Just as with the anti-evolution statutes at issue in *Epperson* and *Edwards*, it is apparent from the events leading to the passage of the Abortion Ban and Medication Ban, as well as statements of the sponsors and the historical context, that the real purpose of these laws is to

enshrine in state law the religious belief that life begins at conception. The religious motivation of the Wyoming Criminal Abortion Ban is evident from the very first provision, which explicitly adopts the religious viewpoint that life begins at conception: "The legislature finds that . . . [a]s 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." Wyo Stat. § 35-6-121(a)(i). The statute goes on to affirm that "[t]he legislature, in the exercise of its constitutional duties and power, has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception." Wyo. Stat. § 35-6-121(a)(v).

Elsewhere, the law defines "unborn baby" as "an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages from fertilization to full gestation and childbirth." Wyo Stat. § 35-6-122(a)(iv). It describes abortion as "the intentional termination of the life of an unborn baby," and asserts the legislature's duty to provide equal protection for "all human lives, including unborn babies from conception." Wyo Stat. § 35-6-121(a)(iv) & (v). In short, the legislature unambiguously declared that the entire basis for the Criminal Abortion Ban was its fundamental view that life begins at conception and that a fertilized egg is a person entitled to the full rights of Wyoming citizens. This is the only stated justification for beginning the abortion ban at conception.

While the Criminal Medication Ban does not include an explicit statement that life begins at conception, the structure of the statute implicitly flows from the same belief by tying the contraceptive exception to conception, Wyo. Stat. § 35-6-139(b)(i), and applying the medication ban to any pregnancy, which is defined as beginning at conception, Wyo. Stat. § 35-6-101(a)(vi).[10]

[10] This definition of pregnancy appears in the enrolled act, which designates it as Wyo. Stat. § 35-6-101(a)(vi). *See* Wyo. S. 109, ch, 190, § 2. However, the Abortion Ban simultaneously repealed the prior version of § 35-6-101,

By basing the Abortion Ban—and, by extension, the Medication Ban—on the view that life begins at conception, the legislature plainly endorsed a particular religious viewpoint, which it seeks to impose on all Wyomingites. The U.S. Supreme Court has recognized the religious roots of the view that life begins at conception. *See Burwell*, 573 U.S. at 702–703. As explained by the expert declaration of Professor Rebecca Peters, the religious view that life begins at conception developed quite recently and was not the view of Catholics until the 19th Century and of some Evangelical Christians until the late 20th Century. Ex. 9, Peters at ¶ 71.

This belief is distinct to certain religions and is not shared by many other religions, agnostic or secular groups. Ex. 9, Peters at ¶¶ 17, 65–83. Long-standing Jewish doctrine holds that life begins at birth, while Muslims believe that "ensoulment" of a fetus occurs at 120 days. *Id.* at ¶¶ 67–68. Other religions have other views. And among Christians, there is a stark disagreement between different denominations, and even within them, on the question of when life begins. *Id.* at ¶¶ 63, 71–72, 77.

And these views on when life begins directly inform the different religious beliefs surrounding abortion. Ex. 9, Peters at ¶¶ 65–83. Because many Catholics and Evangelicals believe life begins at conception, they often oppose abortion at any time and for any reason. *Id.* By contrast, Jews have long believed that the fetus only becomes a person during birth and before that time has a status different from a fully formed human being. *Id.* at ¶ 67; Ex. 10, Ruttenberg at ¶¶ 8–22. As a result, Jews believe that a pregnant woman's well-being always takes precedence over the fetus and therefore approve of abortion at any time prior to birth if necessary to protect the physical or mental well-being of the woman. Ex. 9, Peters at ¶ 67; Ex. 10, Ruttenberg at ¶¶ 23–

Wyo. H.R. 152, chp. 184, § 5, with the result that section 101 does not appear in the current version of Chapter 35. Presumably, the Legislature will correct this clerical error by renumbering the definitions included in the Medication Ban.

42.

It is undisputed that the belief that life begins at conception is not only distinct to certain religious denominations, it is also a distinctly religious viewpoint. Ex. 9, Peters at ¶¶ 17, 51–67. Not only does the State concede these points, it actually has urged the Court to take judicial notice of them. *See* State Defendants' Motion to Strike Plaintiffs' Expert Witnesses (Sept. 5, 2023), at 16. As eloquently explained in an amicus brief for the *Dobbs* case:

> The specific point at which life begins is thus a matter for theologians and philosophers to debate and for individuals to ponder. It is quintessentially a concern of religion, and one that each of us must resolve in accordance with conscience: 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

Brief for Americans United For Separation of Church and State et al. as Amicus Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), at 18, https://www.supremecourt.gov/DocketPDF/19/19-1392/192919/20210920115933561_19-1392%20bsacAmsUnitedSepChurchState.pdf (last visited Sep. 11, 2023).

For precisely these reasons, a Kentucky Circuit Court recently found a similar fetal personhood law to violate that state's establishment clause:

> Section 5 of the Kentucky Constitution protects both the free exercise of religion and prohibits the establishment of a state religion. The Six Week Ban infringes upon those rights as well, but primarily upon the prohibition on the establishment of religion. Defendants' witnesses at the July 6th hearing advocated for and agreed with what the General Assembly essentially established in these laws, independent fetal personhood. They argue that life begins at the very moment of fertilization and as such is entitled to full constitutional protection at that point. However, this is a distinctly Christian and Catholic belief. Other faiths hold a wide variety of views on when life begins and at what point a fetus should be recognized as an independent human being. While numerous faith traditions embrace the concept of "ensoulment," or the acquisition of personhood, there are myriad views on when and how this transformation occurs. The laws at issue here, adopt the view embraced by some, but not all, religious traditions, that life begins at the moment of conception.

> The General Assembly is not permitted to single out and endorse the doctrine of a favored faith for preferred treatment. By taking this approach, the bans fail to account for the diverse religious views of many Kentuckians whose faith leads them to take very different views of when life begins. There is nothing in our laws or history that allows for such theocratic based policymaking. Both the Trigger Ban and the Six Week Ban implicate the Establishment and Free Exercise Clauses by impermissibly establishing a distinctly Christian doctrine of the beginning of life, and by unduly interfering with the free exercise of other religions that do not share that same belief.
>
> All of these considerations together stand for the proposition that governmental intrusion into the fundamentally private sphere of self-determination as contemplated by these laws is to be prohibited.

EMW Women's Surgical Center, et al. v. Daniel Cameron, *et al.*, No. 22-CI-3225, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022) (Opinion & Order Granting Temporary Injunction at 15–16) (footnotes omitted), attached as Ex. 11, Modlin at Attachment D.

There is no secular legal tradition to support the Abortion Ban's declaration that a fertilized egg is a fully-formed human being. Historically, killing a fetus was a criminal offense distinct from homicide. *See Goodman v. State*, 601 P.2d 178, 184–85 & n.11 (Wyo. 1979). Not until two years ago—in 2021—did the legislature amend the homicide statutes to include killing a fetus in the definitions of first- and second-degree murder. S. 96, 66th Leg., Gen. Sess., Ch. 116 (Wyo. 2021), codified at Wyo. Stat. § 6-2-101(d) & 6-2-104(b). The only plausible motivation for the Abortion Ban is therefore the religious viewpoint that life begins at conception.

The history of recent anti-abortion legislation in Wyoming further demonstrates the religious motivation behind the laws. Representative Rachel Rodriguez-Williams describes herself as the "main sponsor" of the Criminal Abortion Ban. *See* Memorandum of Wyoming Legislators, Wyoming Secretary of State, and Right to Life Wyoming in Support of Motion to Intervene (Apr. 6, 2023) ("Intervention Brief") at 6–7. The Wyoming Trigger Ban—the direct predecessor to the Criminal Abortion Ban—was sponsored by Representatives Chip Neiman and Rachel Rodriguez-Williams. *Id.* On May 4, 2022, both of these legislators participated in a "Roe

v. Wade Trigger Bill Round Table" held by the Wyoming House Freedom Caucus. John Bear for Wyoming, *Roe v Wade Trigger Bill Round Table*, YouTube (May 4, 2022), https://www.youtube.com/watch?v=g98MntQumIY (last visited Sept. 11, 2023).

During this meeting, the legislators discussed to origins of the Wyoming Trigger Ban. Throughout their discussion, they repeatedly described the legislative effort in religious terms, making clear their view that the legislation was religiously inspired:

- "All of that is a team building effort and this this [sic] group that God has brought together." *Id.* at 00:33:99.
- "And so and now we've seen God move in a way that is just so phenomenal and that we've all been praying for and we've all been believing for." *Id.* at 00:09:13.
- "We're in a great place right now and I think that our Supreme Court justices definitely need prayer." *Id.* at 00:12:09.
- "[W]e are always discussing the weakness of bills. And there was one concern that you had when we, when this bill was moving forward, you mentioned it earlier. It really depends on exactly how the court handles this, and you also mentioned prayer. And so we tell the people about this, this is something specifically they need to be praying about as this decision becomes final." *Id.* at 00:46:23.
- "We have been praying every Thursday at 5 pm and the, the just the pro-life community and, and Casper 150 to 200 people at these prayer groups." *Id.* at 00:30:28.
- "A lot of prayer that went on before this went up before this, before God, and I think that they're there." *Id.* at 00:32:55.

At the Freedom Caucus meeting, Representative Chip Nieman discussed at length how the Trigger Ban statute was developed. In doing so, he uses language making it clear that he viewed the legislative effort as religiously inspired. Representative Nieman claims that he first got the idea for the Trigger Ban at the WallBuilder's Conference and that he wrote the statutory language with help from Pastor Jonathan Lange. *Id.* at 00:18:51. WallBuilders describes itself as a forum for developing model legislation that "address[es] public policy issues in a manner that honors our

Judeo-Christian heritage." Ex. 11, Modlin at Attachment J (WallBuilders Webpage). After returning from this conference, Representative Nieman described his next step as follows: "And so quite frankly, I mean I believe it was completely by the leading of the Holy Spirit is the first thing that come into my mind is you need to ask Rachel to see if she would be willing to carry this bill." *Roe v Wade Trigger Bill Round Table* Video at 00:22:25.

Representative Nieman later compliments Representative Rodriguez-Williams' legislative efforts in overtly religious terms: "Rachel had gone the extra mile to to [sic] put together such a wonderful argument and such as just a divinely inspired in my personal opinion, ability to be able to to [sic] pass into work this legislation. And so that's that is really it in a nutshell. . . . At the very end, I believe it was just a divinely ordered. . . . It was just awesome and it was just led by the Spirit and Rachel and her willingness to be able to to [sic] take on that piece of legislation and run with it is what carried the day." *Roe v Wade Trigger Bill Round Table* Video at 00:24:12.

The sponsors of the Wyoming Criminal Abortion Ban made their religious motivation explicit in the original draft of HB 0152. Ex. 11, Modlin at Attachment E (Original Draft of HB 0152). Section 35-6-121(a)(vi) of that draft bill provided that "[t]he provisions of article 1, sections 7, 18, 33, 34, and 36 and article 21, section 25 of the Wyoming constitution are also promoted and furthered by this act by recognizing that an unborn baby is a member of the human race." *See id.* Two of the referenced provisions—article I, section 18 and article XXI section 25—explicitly reference religion. Thus, the authors of the bill directly tied the viewpoint that life begins at conception to the provisions of the Wyoming Constitution addressing religion.

During debate, concerns were expressed that including this provision could make the bill subject to constitutional attack, and it was removed from the final law. House Judiciary Committee Hearing, February 1, 2023, Comments of Representative Barry Crago at 23:00 through 23:50,

https://m.youtube.com/watch?v=PaizsqUDoUA&list=PLOhkcX5d91No8QiqW5_bV4cv-NmKO3DQs&index=5 (last visited Sept. 12, 2023). But removal of the offending provision does nothing to diminish the admission by the bill's drafters that the motivation behind the law was primarily religious. Indeed, the Representative who expressed concerns about including the reference to religion in the bill's text did not dispute the religious motivation for the bill—he just objected to making that motivation explicit because it would "provide ammo" for a legal challenge. *Id.*

And the lead sponsors of Wyoming's abortion statutes have expressly tied their religious beliefs both to the notion that life begins at conception and their desire to ban abortions. On her official website, Representative Rachel Rodriguez-Williams lists her "core beliefs," which include the following statement: "I believe life is a gift from God and must be protected from conception to natural death." Ex. 11, Modlin at Attachment K (Representative Rodriguez Williams's Website).

Representative Chip Nieman was a co-sponsor of the Wyoming Trigger Ban, the precursor to the Abortion Ban. Representative Nieman has affirmed his "commitment" to "life," stating "I am a tireless advocate for life from conception to natural death. I believe all human life is precious and created with a specific purpose by God's Divine Hand." Ex. 11, Modlin at Attachment L (Representative Chip Neiman's Website). As noted above, such evidence of the religious motivations of the sponsors of legislation is relevant to determining the true purpose of a law.

But perhaps most telling is the fact that the State has been unable to articulate any non-sectarian basis for the two abortion bans. As demonstrated above, the statutes do not actually further any of the interests asserted by the State, and affirmatively undermine most. Simply put, there is no credible explanation for the motivation behind the laws other than the legislators'

religious beliefs. While Plaintiffs do not doubt the sincerity of the legislators' religious convictions and respect their viewpoint, the Constitution makes clear that they may not impose their religious views on others through the legislative process. This Court should find that the Criminal Abortion Ban and Criminal Medication Ban violate the prohibition on establishment of religion under the Wyoming Constitution.

D. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 18 and article XXI, section 25—Free Exercise of Religion.

Plaintiff Kathleen Dow has brought claims that the abortion statutes, as applied to her, violate the right to free exercise of religion. The Wyoming Constitution contains multiple provisions guaranteeing religious liberty. Article I, section 18 provides:

> The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, . . . 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.

Article XXI, 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."

In construing constitutional protections for religious liberty, the first step is to determine whether the Wyoming Constitution provides broader protections than the U.S. Constitution and therefore is "an independent source for recognizing and protecting . . . individual rights." *In re Neely*, 2017 WY 25, ¶ 39, 390 P.3d at 741 (citation omitted). The Wyoming Supreme Court previously has recognized that "[t]he Wyoming Constitution can offer 'broader protection than the United States Constitution.'" *Id.* (citation omitted). The Court also has found that there is "an articulable, reasonable, and reasoned argument for considering whether Wyoming Constitution, article 1, section 18 and article XXI, section 25 provide greater protection than does the United

States Constitution." *Id*. at ¶ 40, 390 P.3d 741–42.

In particular, the Supreme Court noted that the free exercise provisions of the Wyoming Constitution are "significantly broader than the similar provision[s] of the United States Constitution." *In re Neely*, 2017 WY 25, ¶¶ 40, 42, 390 P.3d at 742. The court also observed that "[c]ourts of other states with similar constitutional language have held that their state constitutions provided stronger protection than the federal constitution." *Id*. at ¶ 41, 390 P.3d 742 (citing *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174, 224 (Wash. 1992); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)).

The courts in those states have found more expansive free exercise protections under state constitutions based on a number of factors that apply with equal force to the Wyoming Constitution. First, on its face, the Wyoming free exercise provisions are broader than their federal counterparts. While the federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]" U.S. Const. amend. I, the Wyoming Constitution "forever guarantee[s]" "the free exercise and enjoyment of" religion and requires that "[p]erfect toleration of religious sentiment shall be secured," Wyo. Const. art. I, § 18 & art. XXI, § 25.

The Minnesota Supreme Court found similarly broad language in its state constitution to be "of a distinctively stronger character than the federal counterpart." *Hershberger*, 462 N.W. 2d at 397. While the federal Constitution provides that Congress may not "prohibit[]" the free exercise of religion, the Minnesota Constitution more broadly proscribes "interference" with or "infringement" of religious freedom. *Id*. As a result, a statute that stops short of "prohibiting" free exercise under the federal Constitution can still violate the state constitution. *Id*.

The Washington Supreme Court found similar provisions in its state constitution broader

than the U. S. Constitution:

> The language of our state constitution is significantly different and stronger than the federal constitution. The First Amendment limits government action that "prohibits" free exercise. Our state provision "absolutely" protects freedom of worship and bars conduct that merely "disturbs" another on the basis of religion. Any action that is not licentious or inconsistent with the "peace and safety" of the state is "guaranteed" protection.

First Covenant Church, 120 Wash. 2d at 224.

The Wyoming Constitution similarly goes beyond merely protecting against the prohibition of free exercise to affirmatively "guarantee[]" the free exercise and enjoyment of religion, prohibit molestation of a person based on her "mode of religious worship" and assure "perfect toleration of religious sentiment." Wyo. Const. art. I, § 18 & art. XXI, § 25. Article I, section 18 of the Wyoming Constitution also protects not only religious ***beliefs,*** but also "worship," "acts" and "practices." The Washington Supreme Court found that identical language in its state constitution "clearly protects both belief ***and conduct***," "as evidenced in the terms 'worship', 'acts', and 'practices.'" *First Covenant Church*, 120 Wash. 2d at 224 (emphasis added).

And the Wyoming Constitution itself limits the types of restrictions the state may impose to regulations concerning "acts of licentiousness" and "practices inconsistent with the peace or safety of the state." Wyo. Const. art. I, § 18. The Minnesota Supreme Court found identical language to significantly narrow the scope of permissible state action: "Rather than a blanket denial of a religious exemption whenever public safety is involved, only religious practices found to be *inconsistent* with public safety are denied an exemption." *Hershberger*, 462 N.W. 2d at 398 (emphasis in original).

Based on the plain language of its free exercise provisions, the Wyoming Constitution therefore offers broader protection than the federal constitution. As a result, in considering free exercise claims, Wyoming courts should apply a legal standard consistent with that applied by the

Minnesota and Washington Supreme Courts. The Washington Supreme Court has formulated the following test:

> State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion. A "compelling interest" is one that has a "clear justification . . . in the necessities of national or community life," that prevents a "clear and present, grave and immediate" danger to public health, peace, and welfare. The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.

First Covenant Church, 120 Wash. 2d at 226–27 (citations omitted). The Washington court emphasized that strict scrutiny is triggered whenever a statute "burdens" free exercise, either directly or indirectly: "A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article I, section 11, if it ***indirectly*** burdens the exercise of religion." *Id.* at 226 (emphasis added).

The Minnesota Supreme Court likewise has found that the right to free exercise is implicated where "sincere religious beliefs were ***burdened*** by" a statute. *Hershberger*, 462 N.W. 2d at 398 (emphasis added). In such cases, the state must demonstrate a compelling governmental interest and that there is no less restrictive alternative to accomplish this interest. *Id.* at 398–99.

This test, focusing on direct or indirect burden, is more exacting than the federal free exercise standard. Under the federal constitution, "a plaintiff may carry the burden of proving a free exercise violation . . . by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, 142 S. Ct. at 2421–22. "A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice,'" and will not qualify as "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions." *Id.* at 2422 (citations and quotation marks omitted). "Failing either the neutrality or general applicability test is sufficient to

trigger strict scrutiny." *Id*. However, under the federal Constitution, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Burwell*, 573 U.S. at 694 (citation omitted).

The federal standard—which requires a showing both that a statute burdens religious practice ***and*** that it lacks neutrality or general applicability—is therefore more restrictive than the Minnesota/Washington standard, which only requires a direct or indirect burden on religious practices. And while all of these standards trigger strict scrutiny, the state constitutional version of strict scrutiny requires the government to show not only that the law is narrowly tailored to a compelling governmental interest, but also that it is the least restrictive alternative to accomplish that purpose.

Consistent with the more expansive protections in the Wyoming constitution, Plaintiffs believe the court should apply the more expansive free exercise protections articulated by the Minnesota and Washington Supreme Courts. However, regardless of which standard the court chooses to apply, the Wyoming Criminal Abortion Ban runs afoul of the free exercise provisions of the Wyoming constitution. Under any of these tests, the ban triggers strict scrutiny and the state cannot satisfy its burden of showing the law furthers a compelling state interest in the least restrictive means available. *See Ailport*, 2022 WY 43, ¶¶ 7, 8, 507 P.3d at 433.

As an initial matter, the Wyoming Supreme Court has noted that "while the freedom to believe is absolute, the freedom to act cannot be." *In re Neely*, 2017 WY 25, ¶ 43, 390 P.3d at 742–43 (citation omitted). Thus, a statute directed to religious practice may be justified if it can survive strict scrutiny, while a statute directed to religious belief is per se unconstitutional without the need to engage in any balancing test. *See id.* at ¶ 16, 390 P.3d at 735. Here, there is no question that the Criminal Abortion Ban is squarely directed at religious belief. The very first provision of

that law declares as official state policy the belief that life begins at conception: "As a consequence of an unborn baby being a member of the species homo sapiens from conception . . . ." Wyo. Stat. § 35-6-121(a)(i).

This is a distinctly religious viewpoint that is not shared by all religions, including by the Judaism practiced by Plaintiff Kathleen Dow. Ex. 9, Peters at ¶ 67; Ex. 6, Dow at ¶¶ 7–10. In fact, the U.S. Supreme Court has expressly acknowledged the religious underpinnings of the belief that life begins at conception. *Burwell*, 573 U.S. at 700–702 (recognizing the Mennonite Church's belief that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it").

While religious practices—as opposed to beliefs—do not enjoy absolute protection, they nonetheless are protected against unwarranted government interference. As the U.S. Supreme Court has observed in construing the less expansive federal free exercise clause:

> The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in their daily life through "the performance of (or abstention from) physical acts."

Kennedy, 142 S. Ct. at 2421 (citation omitted).

And there can be no question that the act of obtaining an abortion because of one's religious beliefs is just such a religious practice. The U.S. Supreme Court has expressly found that a law requiring a company to provide health insurance coverage for certain contraceptives "'substantially burden[s]' the exercise of religion." *Burwell*, 573 U.S. at 719 (citation omitted). As that court explained:

> As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

Id. at 720. By the same reasoning, a law that prohibits Ms. Dow from obtaining an abortion dictated by her religious beliefs—which hold that life begins not at conception but at birth—constitutes a direct and substantial burden on her religious beliefs.

Plaintiff Kathleen Dow practices conservative Judaism. Consistent with her faith, Ms. Dow believes that life begins when a baby takes its first breath during childbirth. Ex. 6, Dow at ¶¶ 7–10. Ms. Dow's religious beliefs dictate that until birth, a pregnancy can be terminated—and at times must be terminated—to preserve the physical, emotional or other well-being of the woman. *Id.* at ¶¶ 8–10.

Ms. Dow's beliefs fall squarely within the mainstream of Jewish doctrine. As Rabbi Ruttenberg explains, "Jews do not believe life begins at conception, or that fetuses have any rights of 'personhood' at any point up until birth." Ex. 10, Ruttenberg at ¶ 41. In her expert declaration, Rabbi Ruttenberg traces the roots of the Jewish belief that life begins when a baby takes its first breath during childbirth—a belief that dates back not merely centuries, but ***millennia***. *Id.* at ¶¶ 23–42. These beliefs hold that for the first 40 days of gestation, an embryo or fetus has no technical status at all, and thereafter until birth is considered a part of the woman and not an independent being. *Id.* at ¶¶ 13–18.

Consistent with this doctrine, long-standing Jewish belief places the well-being of the woman above that of the fetus throughout the entire course of pregnancy and up to birth. Ex. 10, Ruttenberg at ¶¶ 23–42. As a result, abortion is always permitted—and at times mandated—to protect the well-being of the woman. Significantly, Jewish doctrine expressly authorizes abortion to protect the mental health of women, *id.* at ¶¶ 37–39, and calls for availability of abortion medication, *id.* at ¶¶ 26, 33–34. By declaring that life begins at conception and prohibiting abortion under circumstances where it would be acceptable or required under Jewish doctrine, the

Criminal Abortion Ban plainly burdens Ms. Dow's religious beliefs.[11]

Under the Wyoming constitution, this burden—by itself—triggers strict scrutiny. Even under federal law, this burden is sufficient to trigger strict scrutiny because the Criminal Abortion Ban is not "generally applicable." In particular, the ban provides a mechanism for individualized exceptions for sexual assault, incest and certain medical conditions.[12] By allowing such exceptions, but not allowing an exception for religious beliefs, the law triggers strict scrutiny under the U.S. Constitution as well. *Kennedy*, 142 S. Ct. at 2421–22.

For all the reasons described above, the Wyoming Criminal Abortion Ban cannot survive either rational basis or strict scrutiny because the statute affirmatively undermines—rather than furthers—its stated purposes and is not narrowly tailored to any of these alleged purposes. Given that the ban undeniably burdens Plaintiff Dow's religious beliefs without furthering a legitimate—much less compelling—state interest, the statute violates Ms. Dow's right to free exercise of religion under the Wyoming constitution.

E. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 3—Equal Protection.

The Wyoming Criminal Abortion Ban and Medication Ban discriminate on the basis of sex and therefore violate equal protection both facially and as applied to Plaintiffs Dow and Johnson. The Wyoming Constitution 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

[11] There can be no dispute that Ms. Dow's religious belief is sincerely held—a perquisite for a free exercise claim. *Int. of ASM v. State*, 2021 WY 109, ¶ 23, 496 P.3d 764, 769 (Wyo. 2021). Ms. Dow has attested to her personal beliefs, and these beliefs comport with centuries of established Jewish doctrine. *See* Ex. 6, Dow at ¶¶ 7–10; Ex. 10, Ruttenberg at ¶¶ 7–42. And because the sincerity of Ms. Dow's religious beliefs is subject to "judicial[] investigat[ion]," this evidence is plainly relevant and admissible. *Int. of ASM*, 2021 WY 109, ¶ 23; 496 P.3d at 769.

[12] Moreover, Wyoming law allows a woman to refuse a medically-necessary abortion based on religious beliefs, Wyo. Stat. § 35-1-201, but does not allow a comparable right to access a medically-necessary abortion based on religious beliefs.

> 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. I, § 3. Plaintiffs' privacy and liberty interests are equally enjoyed by all Wyomingites, regardless of *any factor* except individual competence. Wyo. Const. art. I, § 3. As the Wyoming Supreme Court explained:

> **"Equality**, which was forthrightly proclaimed in the Declaration of Independence, but left out of the original United States Constitution under the pressure of the slavery question, **is emphatically, if not repeatedly, set forth in the Wyoming Constitution**." Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment,* XXVI Land & Water L.Rev. 13, 21 (1991) (footnote omitted). *See also* Wyo. Const. art. 1, §§ 2 and 3; art. 3, § 27.
>
> While the federal equal protection test of strict scrutiny appears designed to protect against the distinctions of race and color referred to in the Fifteenth Amendment, the test fails to protect equally against distinctions that are not specifically referred to in the Fifteenth Amendment. *See City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 3254–55, 87 L.Ed.2d 313 (1985). **On the other hand, the Wyoming Constitution requires that laws affecting rights and privileges shall be without distinction of race, color, sex, or *any circumstance or condition whatsoever other than individual incompetency.*** *See* Wyo. Const. art. 1, sec. 3.
>
> . . .
>
> **Considering the state constitution's particular call for equal protection, the call to recognize basic rights, and notion that these particular protections are merely illustrative, the Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution.** *See Herschler,* 606 P.2d 310 and [*Nehring v. Russell*, 582 P.2d 67 (Wyo. 1978)].

Johnson v. State Hearing Examiner's Off., 838 P.2d 158, 164–66 (Wyo. 1992) (bold emphases added, italic emphasis in original) (footnote omitted).

As an initial matter, strict scrutiny should apply to the Court's review of the statute's constitutionality because this matter involves fundamental, enumerated rights under the Constitution. *Ailport*, 2022 WY 43, ¶¶ 7, 8, 507 P.3d at 433. The state therefore must show that

the statute furthers a compelling state interest in the least intrusive means available. *Id.* But even if the Court applies the rational-basis test, the Criminal Abortion Ban and Criminal Medication Ban fail that test because, as demonstrated above, they are, "beyond a reasonable doubt, not related to a legitimate government interest." *Hardison*, 2022 WY 45, ¶ 10, 507 P.3d at 40; *see also Hoem*, 756 P.2d at 783.

As the Supreme Court has decreed, "[e]qual protection 'mandates that all persons similarly situated shall be treated alike, both in the privileges conferred and in the liabilities imposed.'" *Allhusen,* 898 P.2d at 884 (citations omitted). In issuing a preliminary injunction in the prior case, this Court found that Plaintiffs were likely to prevail on their claim that the Wyoming Trigger Ban discriminated against women:

> The statute only restricts a health care procedure needed or elected by women. The statute restricts a woman's right to make their own health care decisions during pregnancy and discriminates against women on the basis of their sex. Discrimination on the basis of sex is explicitly prohibited under the Wyoming Constitution. The legislature cannot pass a discriminatory law on the basis of sex that restricts the constitutionally protected right to make one's own health care decisions. The statute dilutes the rights available to women in making decisions regarding their health care whether or not to give birth to a child.

PI Order at ¶ 41.

The same reasoning applies with equal force to the Wyoming Criminal Abortion Ban and Medication Ban. The statutes undeniably deprive women of control over their own health care and bodily autonomy. Even worse, the laws segregate women into opposing groups: those who are ***deserving*** of the right to access essential health care and those who are not. Plaintiffs challenge the state to identify any area where the state imposes similar limitations on men's access to health care. The conclusion, then, is inescapable that both statutes impermissibly discriminate on the basis of sex.

F. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Unenumerated Rights Under Wyo. Const. article I, sections 2, 7, and 36.

In addition to the enumerated rights addressed above, the abortion statutes also run afoul of several constitutional provisions protecting unenumerated rights. In particular, article I, section 2 recognizes the "inherent right to life, liberty and the pursuit of happiness;" article I, section 7 protects Wyoming citizens from "[a]bsolute, arbitrary power over the[ir] lives, liberty and property;" and article I, section 36 affirms that "[t]he enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

The Wyoming Supreme Court has long recognized the central importance of unenumerated rights—*i.e.*, natural rights—under the state's constitution. More than sixty years ago, Justice Blume provided an instructive history lesson on this topic. He explained that even without "exact wording" establishing the right to protect property, that "inherent and inalienable right" was not "nullified thereby." *Cross v. State*, 370 P.2d 371, 376 (Wyo. 1962); *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The people ought not to be presumed to part with rights so vital to their security and well being."). "The doctrine of natural and inherent rights to life, liberty and property," the Wyoming Supreme Court explained, is as old as the Renaissance and is "recognized by our constitution" and "part of the positive law of the land." *Cross*, 370 P.2d at 376 (quoting *State v. Langley*, 84 P.2d 767, 769–70 (Wyo. 1938)).

Among the most important natural rights is "the right to be let alone." *Howard v. Aspen Way Enters., Inc.*, 2017 WY 152, ¶ 22, 406 P.3d 1271, 1277 (Wyo. 2017) (citation omitted). As explained by the Wyoming Supreme Court:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They

> conferred, as against the government, *the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.*

Emp. Sec. Comm'n of Wyo. v. W. Gas Processors, Ltd., 786 P.2d 866, 873 & nn.10–11 (Wyo. 1990) (discussing both a federal and a Wyoming Constitutional right to privacy) (emphasis in original) (citations omitted).

Natural, unenumerated rights include the right to control the composition of one's family. Analysis of the Wyoming Constitution and case law also leads to the conclusion that "the right to associate with one's family is a fundamental liberty." *DS v. Dep't of Pub. Assistance & Soc. Servs.*, 607 P.2d 911, 918 (Wyo. 1980) (citing Wyo. Const. art. I, §§ 2, 6, 7, 36 and collecting cases).

The Kansas Supreme Court recently had occasion to consider whether a woman's right to access abortion care was protected by a provision in its state constitution guaranteeing "inalienable natural rights," including the rights to "life, liberty and the pursuit of happiness." *Hodes & Nauser, MDs v. Schmidt*, 440 P.3d 461, 472 (Kan. 2019). After conducting a lengthy review of the history of natural rights, including application of such rights under other state constitutions, the court found as follows:

> At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy. Few decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life. We conclude that the right to personal autonomy is firmly embedded within [the Kansas constitution's] natural rights guarantee and its included concepts of liberty and the pursuit of happiness.

Id. at 483.

Relying in part on similar holdings from other state supreme courts, the Kansas Supreme Court went on to find that the right to personal autonomy "includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to

make her own decisions regarding her body, health, family formation, and family life—decision that can include whether to continue a pregnancy." *Hodes*, 440 P.3d at 502. As the court further explained:

> At issue here is the inalienable right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions about medical treatment and family formation, including whether to bear or beget a child. For women, these decisions can include whether to continue a pregnancy.

Id. at 497–98.

The Montana Supreme Court likewise has held that natural rights—as embodied by that state's constitutional right to privacy—include "the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government; and, more narrowly, a woman's right to seek and obtain pre-viability abortion services." *Armstrong,* 989 P.2d at 376. As that court observed, the right to control one's own medical decisions is deeply rooted in our country's legal tradition:

> Recognition of these inherent rights to make medical judgments affecting one's bodily integrity and health and the right to choose and to refuse medical treatment are certainly not creatures of recent invention, however. Rather, like America's historical legal tradition acknowledging the fundamental common law right of self-determination, acceptance of the right to make personal medical decisions as inherent in personal autonomy is a long-standing and an integral part of this country's jurisprudence. Over a century ago, the Supreme Court Observed: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Eighty-five years ago, Justice Cardozo noted that, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." And, more recently, the Supreme Court has reaffirmed that the right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is "deeply rooted in this Nation's history and tradition."

Id. at 382–83 (citations omitted).

The decision to have a child (or not) is an intimate and life-altering decision. Pregnancy is physically, emotionally and financially demanding. The choice is different for everyone and there are countless factors that go into deciding whether and when to become a parent. For decades, these were decisions that Wyoming women made on their own, often in consultation with their loved ones and other trusted individuals, including health care providers and religious and spiritual advisors. By intruding on these most personal of decisions, the Wyoming legislature seeks to infringe upon the natural rights of all Wyoming women.

And because the unenumerated rights to bodily autonomy and family association are fundamental, the abortion statutes trigger strict scrutiny. *See Herschler*, 606 P.2d at 333 (finding strict scrutiny applies where a court determines that an unenumerated right concerns a "fundamental interest"); *DS*, 607 P.2d at 918 ("The right to associate with one's immediate family is a fundamental liberty protected by the state and federal constitutions."). As the Kansas Supreme Court remarked:

> Imposing a lower standard than strict scrutiny, . . . when the factual circumstances implicate the[] right[] [to personal autonomy] because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights.

Hodes, 440 P.3d at 498.

But as repeatedly noted above, in the end, the abortion statutes cannot satisfy any standard of review because the State cannot show that the laws relate to any legitimate governmental interest, much less that the laws are the least restrictive means of accomplishing a compelling governmental interest. The Court should declare the Criminal Abortion Ban and the Criminal Medication Ban unconstitutional and permanently enjoin their enforcement.

CONCLUSION

For the foregoing reasons, Plaintiffs have clearly demonstrated that there are no material issues of fact and Plaintiffs are entitled to summary judgment on their claims for declaratory relief and a permanent injunction enjoining and restraining Defendants and their officers, employees, servants, agents, appointees or successors from administering or enforcing Wyoming's Criminal Abortion Ban and Criminal Medication Ban against Plaintiffs and any other person.

WHEREFORE Plaintiffs request entry of a final judgment declaring that the Wyoming Criminal Abortion Ban and Criminal Medication Ban violate the Wyoming Constitution and entering a permanent injunction against enforcement of the Wyoming Criminal Abortion Ban and Criminal Medication Ban.

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Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that this 18th day of September 2023, a true and correct copy of the foregoing was served as follows:

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