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

DANIELLE JOHNSON; KATHLEEN DOW; GIOVANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D.; CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a Wellspring Health Access;	)	
Plaintiffs,	)	Civil Action No. 18853
v.	)	
STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming; MATTHEW CARR, Sheriff Teton County, Wyoming; and MICHELLE WEBER, Chief of Police, Town of Jackson, Wyoming,	)	
Defendants.	)	

MOTION TO STRIKE PLAINTIFFS' EXPERT WITNESSES and TO EXCLUDE THEIR TESTIMONY IN THIS CASE

On August 2, 2023, Plaintiffs, Danielle Johnson, Kathleen Dow, Giovannina Anthony, M.D., Rene R. Hinkle, M.D., Chelsea's Fund, and Circle of Hope Healthcare

d/b/a Wellspring Health Access, filed an expert witness designation with this Court. Defendants, State of Wyoming, Wyoming Governor Mark Gordon, and Wyoming Attorney General Bridget Hill, hereby move this Court to strike all of Plaintiffs' expert witnesses and to exclude their testimony in this case.

As required by U.R.D.C. 801(a)(7), undersigned counsel conferred with counsel for Plaintiffs via telephone on August 18, 2023, regarding the relief requested in this motion. Plaintiffs oppose the relief requested in this motion.

I. Legal Standard

Rule 702 of the Wyoming Rules of Evidence governs the admissibility of expert witnesses in a civil trial in Wyoming. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge **will help the trier of fact to understand the evidence or to determine a fact in issue**;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Wyo. R. Evid. 702 (emphasis added).

The Wyoming Supreme Court has adopted a two-part test from *Daubert v. Merrell Dow Pharmaceuticals*[1] "to aid Wyoming courts in determining whether to admit or exclude

[1] 509 U.S. 579, 592-93 (1995).

expert testimony." *Bean v. State*, 2016 WY 48, ¶ 23, 373 P.3d 372, 380 (Wyo. 2016). Under the *Daubert* test, the trial court first must "determine whether the methodology or technique used by the expert is reliable[,]" and then "must determine whether the proposed testimony 'fits' the particular case." *Id*. (citation omitted) (alteration added).

Proposed expert testimony "fits" the particular case if it "will assist the trier of fact in understanding or determining a fact in issue[.]" *Woods v. State*, 2017 WY 111, ¶ 17, 401 P.3d 962, 973 (Wyo. 2017) (citation omitted) (alteration added). The second part of the *Daubert* test "is a relevance standard." *Id.* The helpfulness standard in Rule 702(a) "means that the expert's opinion must relate to an issue that is actually in dispute[.]" *Id.* (citation omitted) (alteration added).

When applying the *Daubert* test, the trial court performs a "gatekeeper function" to assure both the reliability and relevance of proffered expert testimony. *Hoy v. DRM, Inc.*, 2005 WY 76, ¶13, 114 P.3d 1268, 1276 (Wyo. 2005). The decision to admit or reject expert testimony lies solely within the discretion of the trial court. *Seivewright v. State*, 7 P.3d 24, 29 (Wyo. 2000). Plaintiffs have the burden to show that the testimony of their proffered expert witnesses is admissible under Rule 702. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001).[2]

[2] The text of Wyoming Rule 702 is the same as Rule 702 in the Federal Rules of Evidence. *Compare* Wyo. R. Evid. 702 *with* Fed. R. Evid. 702. Therefore, federal case law interpreting Federal Rule 702 is "highly persuasive" in interpreting Wyoming Rule 702. *See Roberts v. Roberts*, 2023 WY 8, ¶ 8 n.3, 523 P.3d 894, 897 n.3 (Wyo. 2023) (explaining this rule of interpretation as it applies generally to the interpretation of the Wyoming Rules of Evidence).

II. Plaintiffs' Expert Witness Designation

In their expert designation, Plaintiffs designated four "Retained Experts." Plaintiffs describe the expected testimony of their retained experts as follows:

- Dr. Ghazaleh Moayedi – Plaintiffs have retained Dr. Moayedi "to offer experts opinions on the medical meaning (or lack thereof) of key terms in the abortion statutes and the impact of Wyoming's abortion statutes on physicians and women, as well as opinions on abortion, abortion medication, obstetrics and gynecology, and the impacts of laws restricting abortion." (Designation at 2).

- Professor Rebecca Peters – Plaintiffs have retained Professor Peters "to offer expert opinions on the religious origins and history of religious beliefs on when life begins and on abortion." (Designation at 2).

- Rabbi Danya Ruttenberg – Plaintiffs have retained Rabbi Ruttenberg "to offer expert opinions on the origins and history of Jewish beliefs on when life begins and abortion." (Designation at 3).

- Michael A. Blonigen – Plaintiffs have retained Mr. Blonigen "to offer expert opinions on the difficulties prosecutors would experience with enforcement of the abortion statute/bans." (Designation at 4).

In their designation, Plaintiffs also disclosed four non-retained expert witnesses. Plaintiffs describe the expected testimony of their non-retained experts as follows:

- Dr. Giovannina Anthony – Plaintiffs state that Dr. Anthony "may provide opinions on the medical meaning (or lack thereof) of key terms in the abortion statutes and

the impact of Wyoming's abortion statutes on her, as well as opinions on abortion, abortion medication, obstetrics and gynecology." (Designation at 4-5).

- Julie Burkhart – Plaintiffs states that Ms. Burkhart "may provide opinions on abortion services and the impact of Wyoming's abortion statutes on her organization, physicians, patients, and Wyoming women." (Designation at 5).

- Dr. Rene Hinkle – Plaintiffs state that Dr. Hinkle "may provide opinions on the medical meaning (or lack thereof) of key terms in the abortion statutes and the impact of Wyoming's abortion statutes on her, as well as opinions on abortion, abortion medication, obstetrics and gynecology." (Designation at 5).

- Christine Lichtenfels – Plaintiffs state that Ms. Lichtenfels "may provide opinions on abortion services and the impact of Wyoming's abortion statutes on her organization, physicians, patients, and Wyoming women." (Designation at 6).

III. The Retained Expert Witness Reports

1. Dr. Moayedi

Dr. Moayedi offers six opinions regarding the Life Act – the State Defendants paraphrase those opinions as follows: (a) healthcare providers cannot follow the Life Act because it does not use legitimate medical terminology; (b) the language in Wyo. Stat. Ann. § 35-6-124(a)(i) is too vague to allow physicians to exercise their medical judgment to prevent serious harm for women with pregnancy complications; (c) the Life Act is confusing because it has several material misstatements or misrepresentations about medical definitions; (d) the Life Act is "contradictory and unclear regarding multifetal reduction;" (e) abortion is both safe and significantly safer than childbirth; and (f) claims

that abortion should be banned to prevent fetal pain are not based on science. (Dr. Moayedi report at 4-17).

Dr. Moayedi offers five opinions regarding the chemical abortion statute – the State Defendants paraphrase those opinions as follows: (a) healthcare providers cannot follow the chemical abortion statute because it does not use legitimate medical terminology; (b) medication abortion is safe, common, and medically necessary; (c) the language in Wyo. Stat. Ann. § 35-6-139(b)(iii) is too vague to allow physicians to exercise their medical judgment to prevent serious harm for women with pregnancy complications; (d) the exception in Wyo. Stat. Ann. § 35-6-139(b)(iii) specially excludes the leading cause of maternal death; and (e) the chemical abortion statute is confusing because it has several material misstatements or misrepresentations about medical definitions. (Dr. Moayedi report at 18-32).

Dr. Moayedi also opines that banning abortion violates the four basic pillars of medical ethics. (Dr. Moayedi report at 32-34).

2. Professor Peters

In her report, Professor Peters states that she provides her opinions "as an expert in theology, ethics, and morality." (Peters report at ¶ 2). Professor Peters does not separately identify her opinions, but appears to offer the following three opinions: (a) that the Wyoming Legislature "seeks to codify sectarian Christian beliefs into law" (Peters report at ¶¶ 4; 79); (b) that the Life Act imposes a specific religious view of when life begins on everyone in Wyoming (Peters report at ¶ 78); and (c) the Life Act violates the ability of

some Wyoming residents to make the decision about whether to continue a pregnancy based upon their religious beliefs and commitments. (Peters report at ¶ 79).

3. Rabbi Ruttenberg

Rabbi Ruttenberg does not separately identify her opinions, but appears to offer the following three similar opinions: (a) the "fetal personhood ban is a violation of religious liberty" (Ruttenberg report at ¶ 2); (b) "abortion bans are a violation of Jewish freedom of religion" (Ruttenberg report at ¶ 41; *see also* Ruttenberg report at ¶ 50).; and (3) "[a]bortions bans—and, specifically, this abortion ban—also impedes the free exercise of the Jewish religion." (Ruttenberg report at ¶ 42).

4. Mr. Blonigen

In his report, Mr. Blonigen states that he reviewed the Life Act to determine: (a) whether the statutes provided adequate guidance to prosecutors; (b) whether a lack of guidance to prosecutors could lead to inconsistent prosecutions; and (c) the impact of the statutes on victims of sexual assault or incent.[3] (Blonigen report at 1).

Mr. Blonigen does not separately identify his opinions in his report, but he appears to offer the following three opinions: (a) the exception for pregnancies resulting from sexual assault or incest "will result in the failure to provide abortion care to significant numbers of victims of childhood sexual abuse" (Blonigen report at 8); (b) the standards governing the prosecution of crimes under the Life Act "are vague, incomplete and

[3] It appears that Mr. Blonigen limited his review to the Life Act. (*See* Blonigen report at 9) (limiting his opinions to the "2023 abortion act").

inconsistent" (Blonigen report at 9); and (c) the Life Act "leaves prosecutors, like healthcare providers and pregnant women, guessing at the scope and effect of the law." *Id.*

IV. Argument

This Court should exercise its gatekeeper authority under Rule 702 to strike all of the experts listed in Plaintiffs' expert witness designation and preclude them from testifying in this case, either in person or by written affidavit or written declaration. The proffered testimony of the experts listed in the designation is not admissible under Rule 702 because the testimony: (1) is not relevant to any issue before this Court in this case; (2) reflects opinions on ultimate issues of law; and (3) does not "fit" this case because the testimony will not help this Court to understand evidence in this case or to determine a fact in issue in this case.

A. The testimony of Plaintiffs' experts is not relevant to any issue before this Court in this case.

To be admissible under Rule 702, Plaintiffs must show that the proffered testimony of their experts "will help the trier of fact to understand the evidence or to determine a fact in issue[.]" Wyo. R. Evid. 702(a) (alteration added). Or, in other words, the expert testimony must "assist the trier of fact in understanding or determining a fact in issue[.]" *Woods*, ¶ 28, 401 P.3d at 973 (citation omitted) (alteration added).

None of the issues before this Court in this case present a fact issue that requires this Court to rely on help from expert testimony. To address the facial constitutional claims in this case, this Court must interpret the Life Act, the chemical abortion statute, and various provisions in the Wyoming Constitution. If this Court determines that the statutes

and constitutional provisions are unambiguous, then it should interpret them based on the plain meaning of the statutory or constitutional text. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (constitutional interpretation); *Solvay Chems., Inc. v. Wyo. Dep't of Revenue*, 2022 WY 124, ¶ 7, 517 P.3d 1146, 1149 (Wyo. 2022) (statutory interpretation).

If this Court concludes that a statute or constitutional provision is ambiguous, however, it then must look to legislative history and facts or information regarding "the mischief the provision was intended to cure, the historical setting surrounding its enactment, the public policy of the state, and other surrounding facts and circumstances" to discern the intent of a constitutional provision or statute. *See Saunders*, ¶ 23 n.3, 344 P.3d at 778 n.3 (legislative history); *Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006) (other surrounding facts and circumstances). The defined universe of facts or information this Court may consider are legislative facts. *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 2:12 (4th ed., July 2022 update) (describing "legislative facts" as "facts considered by a court in the course of making legal interpretations"); *Walker v. Karpan*, 726 P.2d 82, 86 (Wyo. 1986) (in the administrative law context, defining "legislative facts" as "facts which help the tribunal determine the content of law and of policy" and noting that such facts "are ordinarily general and do not concern the immediate parties") (citations omitted).

Legislative facts "are facts only in the sense that they provide premises in the process of legal reasoning. They are not that type of fact for which a trial is mandated." *Atlantic Richfield Co. v. State*, 705 P.2d 418, 428 (Alaska 1985). The only facts that might

be at issue in a facial challenge to the constitutionality of a statute are the defined universe of legislative facts identified in cases such as *Saunders* and *Solvay Chemicals*. That defined universe of facts does not include sworn opinion testimony from expert witnesses.

If this Court may consider legislative facts without holding a trial, then such facts cannot give rise to fact issues that require the help of expert testimony. In addition, none of the issues in the case involve "evidence," so expert testimony is not require to help this Court understand any evidence. Viewed objectively in light of the issues in this case, none of Plaintiffs' proffered expert witness testimony qualifies as relevant under Rule 702 because this Court does not need the testimony to assist in resolving any fact issue or in understanding evidence in the case. As a result, this Court should strike all of Plaintiffs' expert witnesses and exclude them from testifying in this case.

Although Plaintiffs insist that they are asserting as applied claims in this case, they have not conceded that the statutes may be constitutional as applied to others and also have not pleaded any facts to show how the Life Act or the chemical abortion statute is unconstitutional under particular circumstances only as applied to any specific Plaintiff. *See United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011) (explaining that an as applied challenge to the constitutionality of a statute "concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the *particular circumstances* of the case") (italics in original). They also have not asked this Court to enjoin the Life Act and the chemical abortion only as those statutes apply to a specific Plaintiff. *See Minn. Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013) (explaining that, under the remedy for a successful as applied challenge, "the statute may not be applied

to the challenger, but is otherwise enforceable") (citation omitted). Absent such distinguishing facts or a request for such relief, Plaintiffs' claims in this case are facial claims only. *Bucklew v. Precythe*, — U.S. —, —, 139 S.Ct. 1112, 1127 (2019) (explaining that "classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy") (cleaned up).

Regardless, none of the proffered expert testimony "fits" an as applied claim because none of the experts offer an opinion that would support an argument explaining how or why the Life Act or the chemical abortion statute may be unconstitutional as applied specifically to any Plaintiff.[4] For example, Plaintiffs say that Dr. Moayedi will provide opinions about "the impact of Wyoming's abortion statutes on physicians … and the impacts of laws restricting abortion." (Designation at 2) (ellipsis added). They also say that Dr. Anthony and Dr. Hinkle each will testify about "the impact of Wyoming's abortion statutes on her[.]" (Designation at 4-5) (alteration added). But none of the medical doctors will provide testimony that may be used explain how or why the Life Act or the chemical abortion statute may be unconstitutional only as applied to Dr. Anthony or Dr. Hinkle (as opposed to as applied to all physicians who perform abortions in Wyoming).

[4] In her expert report, Rabbi Ruttenberg does state that "[t]he plaintiff in this case" practices Conservative Judaism. (Ruttenberg report at ¶ 3). But, in the remainder of her report, she does not address how or why the Life Act or the chemical abortion statute applies unconstitutionally to "[t]he plaintiff in this case" differently than it would to any other similarly situated woman.

For the foregoing reasons, this Court should strike all of the individuals listed in Plaintiffs' expert witness designation and should exclude their testimony from this case.

B. The proffered testimony from Plaintiffs' retained expert witnesses should be excluded on several other grounds.

Apart from the proffered expert witness testimony being not relevant under Rule 702, this Court should strike the retained experts and exclude their testimony because the proffered testimony: (1) reflects opinions on ultimate issues of law; (2) does not "fit" this case because the testimony will not help this Court to understand evidence in this case or to determine a fact in issue in this case; or (3) exceeds the reasonable confines of the subject matter of the expert's stated area of expertise.

1. Dr. Moayedi

This Court should strike Dr. Moayedi as an expert witness and should exclude her testimony from this case for a number of reasons. Regarding her opinions related to the Life Act, Dr. Moayedi's opinions expressed in subsections II(A), II(B), II(C), and II(D) address whether the Life Act is unconstitutionally vague. (Moayedi report at 4, 5, 10, 15). Under Rule 702, "an expert witness may not give an opinion on ultimate issues of law." *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (collecting cases). Her opinions that the language used in the Life Act is "unclear," "too vague," confusing, and "contradictory and unclear" are based upon her interpretation of the statutory text. Statutory interpretation is an issue of law. *In re Gallagher*, 2011 WY 112, ¶ 8, 256 P.3d 522, 524 (Wyo. 2011). Accordingly, the opinions expressed in subsections II(A), II(B), II(C), and II(D) are not admissible under Rule 702 because they are opinions on an ultimate issue of law.

In subsection II(E), Dr. Moayedi also opines that abortion is safe. (Moayedi report at 15). This opinion is not relevant to the question of whether the Life Act is constitutional. In addition, to the extent that Plaintiffs seek to offer this opinion to show that the Life Act is not rationally related to a legitimate state interest or to show that the Life Act is not reasonable and necessary, those inquiries are questions of law. *See Good Neighbor Care Ctr., Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 404 (Minn. Ct. App. 1988) (stating that "[w]hether a statute is rationally related to a legitimate government purpose is a question of law") (alteration added); *Mendoza v. Garrett*, No. 3:18-cv-01634—HZ, 2019 WL 2251290, at *3 (D. Or. May 16, 2019) (same) (collecting cases). This opinion is therefore inadmissible under Rule 702 because it is an opinion on an ultimate issue of law.

In subsection II(F), Dr. Moayedi also opines that abortion should not be banned because of fetal pain because claims regarding fetal pain are not based on science. (Moayedi report at 16). This opinion appears to be directed at one of the interests identified in Wyo. Stat. Ann. § 35-6-121(a)(vi). This opinion is inadmissible under Rule 702 because it is an opinion on an ultimate issue of law. *See Good Neighbor Care Ctr.*, 428 N.W.2d at 404; *Mendoza v*, 2019 WL 2251290, at *3.

Regarding her opinions related to the chemical abortion statute, Dr. Moayedi's opinions expressed in subsections III(A), III(C), and III(E) address whether the chemical abortion statute is unconstitutionally vague. (Moayedi report at 18, 27, 30). Under Rule 702, "an expert witness may not give an opinion on ultimate issues of law." *Specht*, 853 F.2d at 808 (collecting cases). Her opinions that the language used in the chemical abortion statute is "unclear," "too vague," and confusing are based on her interpretation of the

statutory text. Statutory interpretation is an issue of law. *In re Gallagher*, ¶ 8, 256 P.3d at 524. Accordingly, the opinions expressed in subsections III(A), III(C), and III(E) are not admissible under Rule 702 because they are opinions on an ultimate issue of law.

In subsection III(B), Dr. Moayedi opines that medication abortion is safe, so the chemical abortion statute "denies the people of Wyoming access to lifesaving, quality healthcare." (Moayedi report at 19). This opinion is factually incorrect. The chemical abortion statute permits an abortion when the abortion is necessary to preserve the life or health of the pregnant woman. Wyo. Stat. Ann. § 35-6-139(b)(iii). The statute thus does not deny lifesaving medical treatment to a pregnant woman. Given the faulty factual premise of this opinion, it is inadmissible under Rule 702(b) because it is not based on sufficient facts. *See* Wyo. R. Evid. 702(b).

In subsection III(D), Dr. Moayedi opines that the exception language in the chemical abortion statute prevents "physicians from using their medical judgment to reduce maternal death in Wyoming." (Moayedi report at 28). In essence, she opines that she does not understand why excluding psychological and emotional conditions from the definition of "imminent peril" is necessary. (Moayedi report at 29). This opinion embodies a policy argument that is not relevant to the question of whether the chemical abortion statute is constitutional. And, to the extent that Plaintiffs seek to offer this opinion to show that the chemical abortion statute is not rationally related to a legitimate state interest or to show that the statute is not reasonable and necessary, those inquiries are questions of law. *See Good Neighbor Care Ctr.*, 428 N.W.2d at 404; *Mendoza*, 2019 WL 2251290, at *3. This

opinion is therefore inadmissible under Rule 702 because it is an opinion on an ultimate issue of law.

Apart from her opinions specifically directed at the Life Act or the chemical abortion statute, Dr. Moayedi opines that the Life Act and the chemical abortion statute violate the four basic pillars of medical ethics. (Moayedi report at 32). This opinion is inadmissible under Rule 702 because Dr. Moayedi is not qualified to offer an expert opinion on medical ethics. "An expert must stay within the reasonable confines of his or her subject area." *Millward v. Bd. of Cnty. Comm'rs of Teton Cnty.*, Case No. 17-CV-0117-SWS, 2018 WL 9371674, at *6 (D. Wyo. Oct. 19, 2018). Nothing in her expert report suggests that Dr. Moayedi is qualified to offer an expert opinion on medical ethics. (Moayedi report at § 1).

For the foregoing reasons, this Court should strike Dr. Moayedi as an expert witness and should exclude her testimony from this case.

2. Professor Peters

It is not exactly clear what purpose the testimony of Professor Peters is intended to serve. Plaintiffs say that she has been retained "to offer expert opinions on the religious origins and history of religious beliefs on when life begins and on abortion." (Designation at 2). Yet her specific opinions appear to be directed more to her views on the meaning of the Life Act. (Peters report at ¶¶ 78-79). Regardless, this Court should strike Professor Peters as an expert witness and should exclude her testimony from this case for two reasons.

First, to the extent that Professor Peters offers opinions on religious beliefs of when life begins and religious beliefs on abortion, those opinions are not admissible under Rule

702(a) because they will not help this Court to determine a fact in issue or to understand evidence in this case. It is well known that some of the major religious groups in this country have divergent views on abortion.[5] It is equally well known that some of the major religious groups have divergent views on when life begins.[6] Thus, this Court does not need the testimony of an expert witness to understand these facts. If this Court determines that the religious views on when life begins or religious views on abortion are material and relevant to deciding any issue in this case, this Court should take judicial notice of those facts as legislative facts. *See* Mueller & Kirkpatrick, *Federal Evidence* § 2:12 (explaining the role of legislative facts and judicial notice in addressing constitutional questions); *see also Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351, 1355 n.4 (Wyo. 1978) (explaining that a court make take judicial notice of legislative facts).

Second, to the extent that Professor Peters offers opinions on the meaning of the Life Act or the chemical abortion statute, her opinions reflect her interpretation of the Life Act or the chemical abortion statute. Statutory interpretation is an issue of law. *In re Gallagher*, ¶ 8, 256 P.3d at 524. Under Rule 702 "an expert witness may not give an opinion on ultimate issues of law." *Specht*, 853 F.2d at 808 (collecting cases). Accordingly, Professor Peters' opinions are not admissible under Rule 702 because they are opinions on an ultimate issue of law.

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[5] *See* https://www.pewresearch.org/short-reads/2016/06/21/where-major-religious-groups-stand-on-abortion/

[6] *See* https://www.pewresearch.org/religion/2013/01/16/religious-groups-official-positions-on-abortion/

For the foregoing reasons, this Court should strike Professor Peters as an expert witness and should exclude her testimony from this case.

3. Rabbi Ruttenberg

This Court should strike Rabbi Ruttenberg as an expert witness and should exclude her testimony from this case for three reasons. First, the opinions offered by Rabbi Ruttenberg are not admissible under Rule 702(b) because the opinions are not based upon sufficient facts or data. Rabbi Ruttenberg opines that "abortion bans are a violation of Jewish freedom of religion." (Ruttenberg report at ¶ 41; *see also* ¶¶ 42, 50). But nowhere in her report does she acknowledge that both the Life Act and the chemical abortion statute have exceptions that permit abortion. Rabbi Ruttenberg's opinions are therefore inadmissible under Rule 702(b) because they do not account for the full applicability of the Life Act and the chemical abortion statute.

Second, Rabbi Ruttenberg improperly gives an opinion on an ultimate question of law. She opines that the "fetal personhood ban is a violation of religious liberty[.]" (Ruttenberg report at ¶ 2) (alteration added). Similarly, she also opines that "abortion bans are a violation of Jewish freedom of religion." (Ruttenberg report at ¶ 41; *see also* ¶¶ 42, 50). These opinions pass judgment on whether the "fetal personhood ban" or a statute that bans abortion is constitutional. Under Rule 702, "an expert witness may not give an opinion on ultimate issues of law." *Specht*, 853 F.2d at 808 (collecting cases). "The question of the constitutionality of a statute is a question of law." *Cathcart v. Meyer*, 2004 WY 49, ¶ 7, 88 P.3d 1050, 1056 (Wyo. 2004). Accordingly, this opinion is not admissible under Rule 702 because it is an opinion on an ultimate issue of law.

Third, Rabbi Ruttenberg's proffered testimony is not admissible under Rule 702(a) because it will not help this Court to determine a fact in issue or to understand evidence in this case. To the extent that her opinions are viewed as simply stating that the Life Act and the chemical abortion statute conflict with Jewish religious doctrine, this Court does not need the testimony of an expert witness to understand this fact. It is well known that Conservative Judaism and Reform Judaism support abortion rights.[7] If this Court determines that the views of Jewish religion on abortion are material and relevant to deciding any issue in this case, this Court should take judicial notice of those facts as legislative facts. *See* Mueller & Kirkpatrick, *Federal Evidence* § 2:12 (explaining the role of legislative facts and judicial notice in addressing constitutional questions); *see also Mountain Fuel Supply Co.*, 578 P.2d at 1355 n.4 (explaining that a court make take judicial notice of legislative facts).

For the foregoing reasons, this Court should strike Rabbi Ruttenberg as an expert witness and should exclude her testimony from this case.

4. Mr. Blonigen

This Court should strike Mr. Blonigen as an expert witness and should exclude his testimony from this case for two reasons. First, "an expert witness may not give an opinion on ultimate issues of law." *Specht*, 853 F.2d at 808 (collecting cases). Mr. Blonigen opines that the standards governing the prosecution of crime under the Life Act "are vague, incomplete and inconsistent" and that the Life Act "leave prosecutors, like healthcare

[7] *See* https://www.pewresearch.org/short-reads/2016/06/21/where-major-religious-groups-stand-on-abortion/

providers and pregnant women, guessing at the scope and effect of the law." (Blonigen report at 9). These opinions reflect Mr. Blonigen's interpretation of the Life Act. Statutory interpretation is an issue of law. *In re Gallagher*, ¶ 8, 256 P.3d at 524. Accordingly, Mr. Blonigen's opinions are not admissible under Rule 702 because they are opinions on an ultimate issue of law. His status as a licensed attorney does not change this outcome. *See Heitz v. Campbell Cnty. Mem'l Hosp.*, Case No. 02-CV-1058-B, 2005 WL 8155357, at *5 (D. Wyo. April 15, 2005) (explaining that "no witness or expert, regardless of whether or not that witness or expert is an attorney, may define the law of the case").

Second, Mr. Blonigen's opinion that the exception in the Life Act for pregnancies resulting from sexual assault or incest "will result in the failure to provide abortion care to significant numbers of victims of childhood sexual abuse" falls far outside of his stated area of expertise. "An expert must stay within the reasonable confines of his or her subject area." *Millward*, 2018 WL 9371674, at *6. Nothing in his expert report suggests that Mr. Blonigen is qualified to offer an opinion on how the Life Act will affect the providing of abortions to victims of childhood sexual abuse.

For the foregoing reasons, this Court should strike Mr. Blonigen as an expert witness and should exclude his testimony from this case.

C. The Non-Retained Experts

1. Dr. Anthony and Dr. Hinkle

In their disclosure, Plaintiffs state that Dr. Anthony and Dr. Hinkle each "may provide opinions on the medical meaning (or lack thereof) of key terms in the abortion statutes and the impact of Wyoming's abortion statutes on her, as well as opinions on

abortion, abortion medication, obstetrics and gynecology." (Disclosure at 4-5). This Court should strike Dr. Anthony and Dr. Hinkle as non-retained expert witnesses and exclude their testimony from this case for three reasons.

First, to the extent that Dr. Anthony and Dr. Hinkle may provide opinions on the medical meaning of key terms in the Life Act or the chemical abortion statute, those opinions reflect their interpretation of the Life Act and the chemical abortion statute. Statutory interpretation is an issue of law. *In re Gallagher*, ¶ 8, 256 P.3d at 524. Under Rule 702, "an expert witness may not give an opinion on ultimate issues of law." *Specht*, 853 F.2d at 808 (collecting cases). Accordingly, opinions on the medical meaning of statutory terms is not admissible under Rule 702 because they are opinions on an ultimate issue of law.

Second, to the extent that Dr. Anthony and Dr. Hinkle each may provide opinions on the impact of the Life Act and the chemical abortion statute on her, those opinions are not relevant to the questions of whether the Life Act and the chemical abortion statute are constitutional. For Plaintiffs' facial claims, the only relevant information this Court should consider is found in the defined universe of legislative facts identified in cases such as *Saunders* and *Solvay Chemicals*. That defined universe of facts does not include sworn opinion testimony from non-retained expert witnesses. If Plaintiffs actually had as applied claims, the proffered opinions of Dr. Anthony and Dr. Hinkle would not be relevant because they do not appear to include an explanation of how the Life Act and the chemical abortion statute affect either of them differently than any other physician subject to the statutes.

Finally, to the extent that Dr. Anthony and Dr. Hinkle each may provide opinions "on abortion, abortion medication, obstetrics and gynecology," those opinions are not admissible under Rule 702(a) because they will not help this Court to determine a fact in issue or to understand evidence in this case. If this Court determines that information about abortion, abortion medication, obstetrics or gynecology is material and relevant to deciding any issue in this case, this Court can take judicial notice of that information as a legislative facts. *See* Mueller & Kirkpatrick, Federal Evidence § 2:12; *see also Mountain Fuel Supply Co.*, 578 P.2d at 1355 n.4.

2. Ms. Burkhart and Ms. Lichtenfels

In their disclosure, Plaintiffs state that Ms. Burkhart and Ms. Lichtenfels each "may provide opinions on abortion services and the impact of Wyoming's abortion statutes on her organization, physicians, patients, and Wyoming women." (Designation at 5, 6). This Court should strike Ms. Burkhart and Ms. Lichtenfels as non-retained expert witnesses and exclude their testimony in this case for two reasons.

First, to the extent that Ms. Burkhart and Ms. Lichtenfels may provide opinions on abortion services, those opinions are not admissible under Rule 702(a) because they will not help this Court to determine a fact in issue or to understand evidence in this case. If this Court determines that information about abortion services is material and relevant to deciding any issue in this case, this Court can take judicial notice of that information as legislative facts. *See* Mueller & Kirkpatrick, *Federal Evidence* § 2:12; *see also Mountain Fuel Supply Co.*, 578 P.2d at 1355 n.4.

Second, to the extent that Ms. Burkhart and Ms. Lichtenfels may provide opinions on the impacts of the Life Act and the chemical abortion statute, those opinions are not relevant to the questions of whether the Life Act and the chemical abortion statute are constitutional. For Plaintiffs' facial claims, the only relevant information this Court should consider is found in the defined universe of legislative facts identified in cases such as *Saunders* and *Solvay Chemicals*. That defined universe of facts does not include sworn opinion testimony from non-retained expert witnesses. If Plaintiffs actually had as applied claims, the proffered opinions of Ms. Burkhart and Ms. Lichtenfels would not be relevant because they do not appear to include an explanation of how the Life Act and the chemical abortion statute affect any specific Plaintiff differently than any other person or entity subject to the statutes.

[Intentionally Left Blank]

V. Conclusion

For the foregoing reasons, this Court should strike all of the experts listed in Plaintiffs' expert designation and should exclude the testimony of those individuals in this case.

Dated this 5th day of September 2023.

/s/Jay Jerde
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2023, a true copy of the foregoing was served via email, and mailed, postage prepaid, to the following:

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