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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,	)	
v.	)	Civil Action No. 18853
STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming; MATTHEW CARR, Sheriff Teton County, Wyoming; and MICHELLE WEBER, Chief of Police, Town of Jackson, Wyoming,	)	
Defendants.	)	

STATE DEFENDANTS' COMBINED MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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On September 18, 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 a motion for summary judgment in this case. On October 5, 2023, Defendants State of Wyoming, Wyoming Governor Mark Gordon, and Wyoming Attorney General Bridget Hill (the State Defendants) filed a cross-motion for summary judgment in this case. The State Defendants hereby submit this legal memorandum in response to Plaintiffs' motion for summary judgment and in support of State Defendants' cross-motion for summary judgment.

In the amended complaint, Plaintiffs allege the Life is a Human Right Act (the Life Act) and the chemical abortion statute violate a so-called "right to be left alone" that supposedly emanates from an unspecified amalgam of twelve different provisions in the Wyoming Constitution – article 1, sections 2, 3, 6, 7, 18, 19, 33, 34, 36, and 38; article 7, section 12; and article 21, section 25. (Am. Compl. ¶ xxxvii). Plaintiffs ask this Court to grant summary judgment in their favor with respect to claims based on ten of the listed constitutional provisions: article 1, sections 2, 3, 6, 7, 18, 19, 36, and 38; article 7, section 12; and article 21, section 25. (Pls.' Mot. for Summ. J. at 6).

This Court should deny Plaintiffs' motion for summary judgment with respect to article 1, sections 2, 3, 6, 7, 18, 19, 36, and 38; article 7, section 12; and article 21, section 25 and grant summary judgment in favor of the State Defendants on those claims. In addition, this Court should grant summary judgment in favor of the State Defendants on Plaintiff's claims based on article 1, sections 33 and 34. And, finally, this Court should dismiss the amended complaint in its entirety with prejudice.

INTRODUCTION

Abortion is not a legal right conferred by Wyoming law, and never has been. The Wyoming Constitution does not confer a right to abortion, either explicitly or implicitly. The Wyoming Legislature also has never conferred a statutory right to abortion. From 1869 until the early 1970s, a Wyoming statute made abortion a crime subject to one exception. After this statute was preempted by *Roe v. Wade*, the Legislature still did not confer an affirmative statutory right to abortion – it simply did not prohibit abortion before viability and continued to make abortion a crime to the extent allowable under federal law.

Now that abortion is no longer a federally recognized right, the Legislature has enacted statutes to prohibit abortion generally, subject to specified exceptions. In doing so, it has reestablished the public policy on abortion that the State of Wyoming followed for a century before *Roe* preempted state law.

Abortion has been the most divisive social issue in this country over the past fifty years. People on either side of the policy debate have strongly held beliefs or views on the topic. Plaintiffs clearly disagree with the policies embodied in the new abortion statutes, but the fact that they strenuously oppose those policies does not mean that the statutes are unconstitutional. To prevail in this case, Plaintiffs must show that the new abortion statutes are unconstitutional beyond any reasonable doubt. They have not done so. Plaintiffs have advanced numerous policy arguments against the abortion statutes, but have not given this Court any legitimate legal reason to declare that the statutes are unconstitutional. This Court, therefore, should grant summary judgment in favor of the State Defendants on all of the claims in this case and dismiss the amended complaint in its entirety with prejudice.

FACTUAL AND LEGAL BACKGROUND

I. The Facts Relevant to the Issues in this Case

A. The History of Abortion Regulation in Wyoming

In Wyoming, abortion has been regulated since the first year that Wyoming was designated as a Territory of the United States.[1] *See* Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869). As the following overview shows, the public policy of the State of Wyoming is, and always has been, to prohibit and criminalize abortion (subject to limited exceptions). Before *Roe v. Wade* was decided in 1973,[2] abortion was a crime in Wyoming for more than 100 years (subject to one exception). After *Roe* was decided, abortion after viability was prohibited (subject to one exception) and was a crime. Now that *Roe* has been overruled, the Wyoming Legislature has enacted the Life Act and the chemical abortion statute to prohibit and criminalize abortion (subject to limited exceptions), thereby re-affirming the long-standing public policy on abortion that the State followed for a century before *Roe*.

1. From 1869 until *Roe* was decided, abortion was a crime in Wyoming (subject to one exception after 1884).

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

> [A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted,

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

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

> shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars[.]

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

The original criminal abortion statute remained unchanged for fourteen years until the Territorial Legislature amended it in 1884. Among the notable changes, the Legislature added the word abortion and added an exception that permitted an abortion if necessary to preserve the life of the pregnant woman. 1884 Terr. Wyo. Sess. Laws ch. 1, § 2. The amended statute provided as follows:

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

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

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

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

> to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years.

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

The State of Wyoming was admitted to the union as a state in 1890. T.A. Larson, *History of Wyoming* 259 (Univ. of Neb. Press 1965). The first Legislature of the State of Wyoming adopted the Revised Statutes and Session Laws of the Territory of Wyoming for the years 1888 and 1890 as "the laws of the State of Wyoming" to the extent that the territorial laws did not conflict with the Wyoming Constitution and had not been repealed or amended and reenacted by the first Legislature. 1890 Wyo. Sess. Laws ch. 35, § 1. As a result, the 1890 territorial criminal abortion statute became state law.

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

After 1890, the criminal abortion statute remained in effect and substantively unchanged until the 1970's.[3] In January 1973, the United States Supreme Court held that the United States Constitution protects a woman's right to have an abortion before viability. *See generally Roe v. Wade*, 410 U.S. 113 (1973). Seven months after *Roe* was decided, the Wyoming Supreme Court declared the Wyoming criminal abortion statute to be unconstitutional. *Doe v. Burk*, 513 P.2d 643, 644-45 (Wyo. 1973).

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

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

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

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

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

During the 2022 Budget Session, the Wyoming Legislature enacted House Enrolled Act Number 57 (original House Bill 0092).[4] Governor Gordon signed HEA57 into law and it became effective on March 15, 2022. *Journal of the House of Representatives of the Sixty-Sixth Legislature of Wyo.* 243 (Budget Sess. Feb. 14, 2022 through March 11, 2022); 2022 Wyo. Sess. Laws 306. Relevant to this case, House Enrolled Act 57 created a new statutory section that provides, in part:

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

[4] https://wyoleg.gov/2022//HB0092

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

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

On June 24, 2022, the U.S. Supreme Court issued an opinion in *Dobbs v. Jackson Women's Health Organization*, — U.S. —, 142 S. Ct. 2228 (2022). In *Dobbs*, a five-Justice majority held that the United States Constitution "does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[5] *Dobbs*, 142 S. Ct. at 2284. The *Dobbs* majority also stated that the U.S. Constitution "does not confer a right to abortion." *Dobbs*, 142 S. Ct. at 2279.

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

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

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

4. In 2023, the Wyoming Legislature repealed the 2022 abortion statute and enacted new statutes to prohibit and to criminalize abortion.

During the 2023 General Session, the Wyoming Legislature repealed §§ 35-6-102(b) and 35-6-110 and replaced them with the Life Act and the chemical abortion statute. The Life Act was introduced as House Bill 152 and was presented to Governor Gordon as House Enrolled Act Number 88. (Ex. A). The chemical abortion statute was introduced as Senate File Number 109 and was presented to Governor Gordon as Senate Enrolled Act Number 93. (Ex. B).

a. The Life Act

Governor Gordon allowed House Enrolled Act Number 88 to become law without his signature. (*See* Ex. A at 13). The Life Act took effect in March 2023. (*See id.*).

In House Enrolled Act Number 88, the Legislature significantly revised the statutes governing the regulation of abortion by creating several new statutes, by renumbering several existing statutes, and by repealing several existing statutes. (Ex. A, §§ 1, 4, 5). The Legislature designated the new regulatory scheme as the "Life is a Human Right Act." Wyo. Stat. Ann. § 35-6-120.

Relevant to this case, House Enrolled Act Number 88 repealed the existing abortion prohibition and criminal penalty statutes (§§ 35-6-102(b) (2022) and 35-6-110 (1977)). (Ex. A, § 5). To replace these statutes, the Legislature enacted three new statutory sections

in the Life Act – Wyo. Stat. Ann. § 35-6-123, § 35-6-124, and § 35-6-125. (Ex. A, § 1 at 4-6). Section 35-6-123 prohibits abortion and provides as follows:

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

Wyo. Stat. Ann. § 35-6-123.

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

> **35-6-124. Exceptions to abortion prohibition; applicability.**
>
> (a) It shall not be a violation of W.S. 35-6-123 for a licensed physician to:
>
> (i) Perform a pre-viability separation procedure necessary in the physician's reasonable medical judgment to prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman, provided that no separation procedure shall be deemed necessary under this paragraph unless the physician makes all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of the unborn baby in a manner consistent with reasonable medical judgment;
>
> (ii) Provide medical treatment to a pregnant woman that results in the accidental or unintentional injury to, or the death of, an unborn baby;
>
> (iii) Perform an abortion on a woman when the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301. Prior to the performance of any abortion under this paragraph the woman, or the woman's parent or guardian if the woman is a minor or subject to a guardianship, shall report the act of incest or sexual assault to a law

> enforcement agency and a copy of the report shall be provided to the physician; or
>
> (iv) Perform an abortion on a woman when in the physician's reasonable medical judgment, there is a substantial likelihood that the unborn baby has a lethal fetal anomaly or the pregnancy is determined to be a molar pregnancy.

Wyo. Stat. Ann. § 35-6-124.

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

In the Life Act, the Wyoming Legislature made six findings that reflect the purposes of the Act. Wyo. Stat. Ann. § 35-6-121. The Legislature found, *inter alia*, that from conception an "unborn baby is a member of the human race," that all members of the human race are endowed with a right to life, and that abortion is not "health care" for purposes of article 1, section 38 of the Wyoming Constitution. Wyo. Stat. Ann. § 35-6-121(a)(i), (ii), (iv). The Legislature also listed six "legitimate interests" furthered by the Life Act. Wyo. Stat. Ann. § 35-6-121(a)(vi).

b. The Legislative History of the Life Act

The Life Act was amended multiple times, both in the House of Representatives and in the Senate. *See Journal of the House of Representatives of the Sixty-Seventh Legislature of Wyo.* 280-85 (Gen. Sess. Jan. 10, 2023, through March 3, 2023). The full House debated and voted on the Life Act on February 6 (Committee of the Whole), February 7 (second

reading), and February 8 (third reading), 2023.[6] The full Senate debated and voted on the Life Act on February 27 (Committee of the Whole), February 28 (second reading), and March 1 (third reading), 2023.[7]

The Senate amendments to the findings and purposes section (§ 35-6-121) and to the exceptions section (§ 35-6-124(a)) provide some possible insight into the legislative intent of the Life Act. As introduced, the findings and purposes section in the Life Act had ten different subsections and the exceptions section had only two exceptions.[8] The House of Representatives did not amend either section in the bill. (*See 2023 House Journal* 281-83).[9] When the bill reached the Senate, it was referred to the Agriculture, State and Public Lands & Water Resources Committee. (*2023 House Journal* 283).

The Senate Agriculture Committee recommended the following amendments to the findings and purposes section (shown as ~~strikethroughs~~):

35-6-121. Findings and purposes.

(a) The legislature finds that:

~~(i) The legislature, as a coequal branch of government, may make declarations interpreting the Wyoming constitution;~~

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[6] https://www.youtube.com/watch?v=ynn-N0JNa48 (at 1:53:02 to 3:26:26)
https://www.youtube.com/watch?v=nPaQvNKOV1w (at 51:46 to 1:51:56)
https://www.youtube.com/watch?v=I2QnmZ_h_vk (at 1:18:19) to 2:34:10)

[7] https://www.youtube.com/watch?v=8O2bRdO_F5U (at 57:41 to 2:30:52)
https://www.youtube.com/watch?v=TC-N3-V7opU (at 23:21 to 1:29:00)
https://www.youtube.com/watch?v=fQ2UG-woR0M (at (1:19:20 to 1:52:15)

[8] *See* https://wyoleg.gov/2023/Introduced/HB0152.pdf

[9] *See also* https://wyoleg.gov/2023/Engross/HB0152.pdf

(i)~~(ii)~~ As a consequence of an unborn baby being a member of the species homo sapiens from conception, the unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution;

(ii)~~(iii)~~ The legislature acknowledges that all members of the human race are created equal and are endowed by their creator with certain unalienable rights, the foremost of which is the right to life;

~~(iv) This act promotes and furthers article 1, section 3 of the Wyoming constitution, which guarantees that citizens shall be without distinction of race, color, sex or any circumstance or condition whatsoever;~~

(iii)~~(v)~~ This act promotes and furthers article 1, section 6 of the Wyoming constitution, which guarantees that no person may be deprived of life or liberty without due process of law;

~~(vi) The 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 18 race;~~

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

(v)~~(viii)~~ The legislature, in the exercise of its constitutional duties and powers, has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception;

~~(ix) The life of every human being begins at conception;~~

(vi)~~(x)~~ 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).

See House Journal 283 (HB0152SS001).

The Senate Agriculture Committee also recommended an amendment to add a third exception to § 35-6-124(a). (*2023 House Journal* 283 (HB0152SS001)). Under this amendment, an abortion may be performed when the pregnancy resulted from incest or sexual assault, provided reporting requirements to law enforcement are followed. *Id.*

The Senate debated the proposed standing committee amendments in Committee of the Whole on February 27, 2023.[10] The Senate adopted the proposed amendments. (*2023 House Journal* 283-84). The House of Representatives concurred with the amendments made by the Senate. (*2023 House Journal* 284-5).

The Senate added a fourth exception to § 35-6-124(a) during second reading. (*2023 House Journal* 284 (HB0152S2001)). Under this exception, an abortion may be performed when, in the reasonable medical judgment of the physician, it is substantially likely that the unborn baby has a lethal fetal anomaly or the physician determines the pregnancy is a molar pregnancy. *Id.* The Senate also amended the definitions section in the Life Act to define the terms "lethal fetal anomaly" and "molar pregnancy." *Id.* The Senate debated and adopted these amendments during second reading on February 28, 2023.[11] (*See also 2023 House Journal* 284).

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[10] *See* https://www.youtube.com/watch?v=8O2bRdO_F5U (at 57:41 to 2:30:52)

[11] *See* https://www.youtube.com/watch?v=TC-N3-V7opU (at 23:21 to 1:29:00)

The House of Representatives concurred with the amendments made by the Senate. (*2023 House Journal* 284-85). The Wyoming Legislature assigned House Enrolled Act Number 88 to the bill and forwarded it to Governor Gordon on March 3, 2023. (*2023 House Journal* 285). The Life Act became law without Governor Gordon's signature on March 17, 2023. *See* 2023 Wyo. Sess. Laws 438.

c. The Chemical Abortion Statute

Also during the 2023 legislative session, the Wyoming Legislature enacted Senate Enrolled Act Number 93 (original Senate File Number 109) to prohibit chemical abortions. (Ex. B). Senate Enrolled Act Number 93 created a new statute (originally numbered Wyo. Stat. Ann. § 35-6-120, now codified as Wyo. Stat. Ann. § 35-6-139). Subsection (a) in the newly created statute provides as follows:

> (a) Notwithstanding any other provision of law, 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.

Wyo. Stat. Ann. § 35-6-139(a).[12]

[12] The chemical abortion statute applies "notwithstanding any other provision of law," which means that the statute controls over the Life Act with respect to the regulation of chemical abortion. *See Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33-34 (Mo. 2015) (en banc) (explaining that the phrase "notwithstanding any other provision of law" in a statute means that no other statute or provision of law can conflict with it); *City of Phoenix v. Glenayre Elecs., Inc.*, 393 P.3d 919, 924 (Ariz. 2017) (explaining that the phrase "notwithstanding any other provision of law" in a statute means the statute "applies … inclusively to all other statutes").

The prohibition on chemical abortions is subject to three exceptions – one for use of contraceptives before conception or "before pregnancy can be confirmed through conventional medical testing;" one for the "treatment of a natural miscarriage according to currently accepted medical guidelines;" and one for treatment as necessary to preserve the life or health of the pregnant woman or if the pregnancy is the result of incest or sexual assault. Wyo. Stat. Ann. § 35-6-139(b). Under the third exception, the prohibition in subsection (a) shall not apply to:

> (iii) Treatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment, or the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301. As used in this paragraph, "imminent peril" means only a physical condition and shall not include any psychological or emotional conditions. No medical treatment shall form the basis for an exception under this paragraph if it is based on a claim or diagnosis that the pregnant woman will engage in conduct which she intends to result in her death or other self-harm.

(*Id.*).

Any physician or other person who violates § 35-6-120(a) is guilty of a misdemeanor. Wyo. Stat. Ann. § 35-6-139(c). Anyone convicted of violating § 35-6-120(a) may be imprisoned for not more than six months, fined not more than $9000, or both. (*Id.*). The chemical abortion statute provides that "[a] woman upon whom a chemical abortion is performed or attempted shall not be criminally prosecuted[.]" (*Id.*) (alterations added).

In Senate Enrolled Act Number 93, the Wyoming Legislature also amended two definitions in the existing § 35-6-101. (*Id.*). These definitions were repealed by House Enrolled Act Number 88 in March 2023. (Ex. A at 12). Senate Enrolled Act Number 93 did not take effect until July 1, 2023, so the amendments to the definitions in § 35-6-101

had no force and effect because § 35-6-101 was repealed when Senate Enrolled Act Number 93 took effect.

d. The Legislative History of the Chemical Abortion Statute

The chemical abortion statute was introduced as Senate File 109. *See Journal of the Senate of the Sixty-Seventh Legislature of Wyo.* 195-96 (Gen. Sess. Jan. 10, 2023, through March 3, 2023). As introduced, § 35-6-120(a) in Senate File 109 provided as follows:

> (a) Notwithstanding any other provision of law, no person shall manufacture, distribute, prescribe, dispense, sell, transfer or use **any chemical abortion drug in the state** for the purpose of procuring or performing an abortion.

(Emphasis added).[13]

The introduced version of Senate File 109 had three exceptions to the general prohibition on the use of chemical abortion drugs for abortion, including the life and health of the woman exception now codified as § 35-6-139(b)(iii) and provided that any physician or other person who violates the statute is guilty of a misdemeanor punishable by imprisonment for not more than six months, a fine not to exceed $9,000, or both.[14] It further provided that a woman upon whom a chemical abortion is performed or attempted shall not be criminally prosecuted and amended the existing § 35-6-101 to add a definition for the term "chemical abortion drug."[15]

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[13] https://wyoleg.gov/2023/Introduced/SF0109.pdf

[14] *Id.*

[15] *Id.*

The Senate did not amend Senate File 109. *2023 Senate Journal* 195-96. The full Senate debated and voted on Senate File 109 on January 25 (Committee of the Whole), January 26 (second reading), and January 27 (third reading).[16]

When Senate File 109 reached the House of Representatives, it was referred to the Revenue Committee. (*2023 Senate Journal* 196). The Revenue Committee proposed several amendments to Senate File 109. (*2023 Senate Journal* 196-97). The House Revenue Committee considered and took action on Senate File 109 on February 23, 2023.[17]

In Committee of the Whole, the House adopted some of the amendments recommended by the Revenue Committee, but rejected others. *Id.* (SF0109HS000.1, SF0109HS000.2). The full House debated and took action on those amendments in Committee of the Whole on February 27, 2023.[18]

On second reading, the House further amended Senate File 109. *Id.* (SF109H2001). The full House debated and adopted the second reading amendments in February 28, 2023.[19] The full House debated Senate File 109 on third reading and voted on the bill on March 1, 2023.[20]

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[16] https://www.youtube.com/watch?v=J2s8Wp8HLCI (at 2:55:15 to 3:18:19)
https://www.youtube.com/watch?v=jYQC6OGYxlg (at 19:06 to 19:25)
https://www.youtube.com/watch?v=q9H4fY7ryXk (at 2:26:54 to 2:59:50)

[17]https://www.youtube.com/watch?v=3LuQ25TU8Fg&list=PLOhkcX5d91No8QiqW5_bV4cv-NmKO3DQs&index=43 9 (at 1:27:39 to 2:44:28)

[18] https://www.youtube.com/watch?v=Izg4BoY095M (at 1:46:55 to 2:52:34)

[19] https://www.youtube.com/watch?v=NFkcF078IM0 (at 31:48 to 36:48)

The flurry of amendments to Senate File 109 resulted in substantive amendments only to subsections (a) and (d). After the amendments, those subsections provided as follows:

> (a) Notwithstanding any other provision of law, 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.
>
> * * *
>
> (d) A woman upon whom a chemical abortion is performed or attempted shall not be criminally prosecuted pursuant to subsection (c) of this section.

(Ex. B at 1-2). In essence, the amendments changed the focus of the bill from prohibiting the use of specifically identified drugs to procure or perform an abortion to prohibiting the use of any drug to procure or perform an abortion.

The Senate concurred with the House amendments to Senate File 109. (*2023 Senate Journal* 197-98). The Wyoming Legislature assigned Senate Enrolled Act Number 93 to the bill and forwarded it to Governor Gordon on March 3, 2023. (*2023 Senate Journal* 198). Governor Gordon signed the chemical abortion statute into law on March 17, 2023. *Id.* The chemical abortion statute took effect on July 1, 2023. (Ex. B at 3).

B. The Legislative History of Article 1, Section 38

Article 1, section 38 was adopted through the amendment process established by article 20 of the Wyoming Constitution. During the 2011 legislative session, Senate Joint Resolution No. SJ0002 was introduced to create a new section 24 in article 7 of the

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[20] https://www.youtube.com/watch?v=XO66gzYSJaU (at 1:44:00 to 1:47:12)

Wyoming Constitution.[21] The introduced version of SJ0002 created seven subsections in the proposed article 7, section 24. Subsection (a) provided that "[a]ll persons shall have the right to choose and provide for their own health care."[22] Subsections (b), (c), and (e) essentially prohibited any person from being compelled under federal or state law to participate in any health care system. (*Id.* at 2-3). Subsection (d) authorized persons and employers to pay directly for health services and authorized health care providers to "accept direct payment for lawful health care services[.]"(*Id.* at 2-3). Subsection (f) listed four things the proposed section 24 did not do, including that it did not "[a]ffect which health care services are permitted by law[.]" (*Id.* at 3-4) (alterations added). Subsection (g) provided definitions for certain words or phrases used in SJ0002, including the phrase "lawful health care services." (*Id.* at 4-5).

As SJ0002 made its way through the legislative process, it was amended six times. (Ex. C - *Journal of the Senate of the Sixty-First Legislature of Wyo.* 294-300 (Gen. Sess. Jan. 11, 2011, through March 3, 2011)). The Senate debated and voted on SJ0002 on January 27 and 28 (Committee of the Whole), January 31 (second reading), and February 1 (third reading), 2011.[23] The House of Representatives debated and voted on SJ0002 on

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[21] https://wyoleg.gov/2011/Introduced/SJ0002.PDF

[22] https://wyoleg.gov/2011/Introduced/SJ0002.PDF at 2

[23] https://wyoleg.gov/2011/Audio/senate/s0127am1.mp3 (at 59:11 to 2:00:53)
https://wyoleg.gov/2011/Audio/senate/s0128am1.mp3 (at 25:00 to 1:19:31)
https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 (at 33:31 to 1:03:33)
https://wyoleg.gov/2011/Audio/senate/s0201am1.mp3 (at 37:05 to 1:16:15)

February 11 (Committee of the Whole), February 14 (second reading), and February 15 (third reading), 2011.[24]

Of the six amendments to SJ0002, two amendments adopted by the Senate provide possible insight into the legislative intent of article 1, section 38. In Committee of the Whole, the Senate adopted an amendment (SJ0002SW001) offered by Senator Schiffer (Ex. C - *2011 Senate Journal* 295-96). The Schiffer amendment significantly altered the language and structure of the introduced version of SJ0002. (*Id.*). The amendment renumbered the proposed constitutional provision as article 1, section 38 with the catchline "Right of health care access." (Ex. C - *2011 Senate Journal* 296). The seven subsections in the introduced version were replaced with the following sentence:

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

(*Id.*). The Senate debated and took action on SJ0002 in Committee of the Whole on January 27 and 28, 2011.[25]

On second reading, the Senate adopted a new amendment (SJ0002S2001) offered by Senator Perkins. (Ex. C - *2011 Senate Journal* 297). The Perkins amendment deleted much of the Schiffer amendment language in favor of new language and a new structure for the proposed constitutional provision. (*Id.*). Under the Perkins amendment, the

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[24] https://wyoleg.gov/2011/Audio/house/h0211pm1.mp3 (at 1:14:35 to 1:40:20)
https://wyoleg.gov/2011/Audio/house/h0214am1.mp3 (at 21:56 to 26:30)
https://wyoleg.gov/2011/Audio/house/h0215am1.mp3 (at 38:20 to 1:11:19)

[25] https://wyoleg.gov/2011/Audio/senate/s0127am1.mp3 (at 59:11 to 2:00:53)
https://wyoleg.gov/2011/Audio/senate/s0128am1.mp3 (at 25:00 to 1:19:31)

placement of the provision remained as article 1, section 38 and continued to be entitled "Right of health care access." (*Id.*). The Perkins amendment created four subsections in section 38. Subsection (a) provided as follows:

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

(*Id.*). Subsection (b) authorized any person to pay directly for health services and health care providers to accept direct payment for health services. (*Id.*). Subsection (c) provided that the Wyoming Legislature "may determine reasonable and necessary restrictions on the rights granted" under section 38 "to protect the health and general welfare of the people and accomplish the purposes set forth in the Wyoming Constitution." (*Id.*). Subsection (d) directed the State of Wyoming to act to preserve the rights conferred by section 38 "from undue governmental infringement." (*Id.*). The Senate debated and took action on the second reading amendment on January 31, 2011.[26]

On third reading, the Senate adopted an amendment to clarify language in subsection (c) and to clarify the endorsement language. (Ex. C. - *2011 Senate Journal* 298). The Senate debated and took action on the third reading amendment on February 1, 2011.[27]

In the House of Representatives, the engrossed version of SJ0002 (the version with the final Senate amendments incorporated into it) was amended on second reading (SJ0002H2001) to delete the second sentence in section 38(a) regarding parents, guardians,

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[26] https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 (at 33:31 to 1:03:33)

[27] https://wyoleg.gov/2011/Audio/senate/s0201am1.mp3 (at 37:05 to 1:16:15)

or legal representatives making health care decisions for other persons. (Ex. C - *2011 Senate Journal* 300). On third reading, the House voted to delete the second reading amendment. (*Id.*). As a result, the engrossed version of SJ0002 remained unchanged and the joint resolution did not have to go back to the Senate for concurrence.

The Wyoming Legislature assigned Senate Enrolled Joint Resolution Number 2 to SJ0002 and forwarded it to then-Wyoming Governor Matt Mead on February 16, 2011. (*Id.*). Governor Mead signed Senate Enrolled Joint Resolution Number 2 on February 19, 2011. (*Id.*).

C. The Election History of Article 1, Section 38

The proposed article 1, section 38 appeared on the ballot as Constitutional Amendment A at the general election held on November 6, 2012.[28] In 2012, the Wyoming Secretary of State distributed a "voter's guide" that described the proposed section 38 by repeating verbatim the endorsement language from the general election ballot.[29] It said nothing about abortion and did not say that voting for the proposed section 38 would confer a right to abortion under the Wyoming Constitution. (*Id.*).

On the Sunday before the election, a voter guide published in the only statewide newspaper in Wyoming reported that proposed section 38 "would ensure that there will be no requirements concerning health care insurance for Wyoming residents." (Ex. D). This

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

[29] https://sos.wyo.gov/Elections/Docs/2012/2012VoterGuide.pdf

voter guide also described proposed section 38 as "an attempt to remove Wyoming from the effects of the Patient Protection Affordable Care Act passed by Congress." (*Id.*).

The ballot for the 2012 general election also had information about Constitutional Amendment A. Each ballot included the following endorsement language regarding the proposed amendment:

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

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

The voters approved Constitutional Amendment A.[30] The version of article 1, section 38 approved by the voters provides as follows:

> (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
>
> (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.
>
> (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.

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[30] *See generally* https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf at 1.

(d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

Wyo. Const. art. 1, § 38.

D. The Contemporary Circumstances Surrounding the Enactment of SJ0002 and the Adoption of Article 1, Section 38

During the 2011 legislative session, at least two bills were introduced with the intent of preventing the enforcement of the Affordable Care Act in Wyoming. *See, e.g.*, House Bill No. 00035 (2011) (to create a state health care choice and protection act as an alternative to the Affordable Care Act);[31] House Bill No. 00039 (2011) (to create a fund to pay for litigation against federal health care enactments, primarily the Affordable Care Act).[32] In addition to SJ0002, two other joint resolutions to amend the Wyoming Constitution to address health care freedom were introduced.[33]

During the 2012 legislative session, the Wyoming Legislature enacted a law to prohibit state agencies and any person representing the State of Wyoming from taking any steps to implement the Affordable Care Act at the state level until the U.S. Supreme Court decided a challenge to the constitutionality of the Affordable Care Act in *Florida v. U.S.*

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[31] https://www.wyoleg.gov/Legislation/2011/HB0035

[32] https://www.wyoleg.gov/Legislation/2011/HB0039

[33] https://www.wyoleg.gov/Legislation/2011/SJ0003
https://www.wyoleg.gov/Legislation/2011/HJ0009

Department of Health and Human Services (Docket Number 11-400).[34] 2012 Wyo. Sess. Laws 241-42.

At the time that section 38 was ratified, the public sentiment in Wyoming was largely opposed the Affordable Care Act. A November 2012 poll conducted by the University of Wyoming showed that 66% of the individuals surveyed disapproved of the Affordable Care Act.[35] The pollster attributed the high rate of disapproval to "general attitudes concerning the federal government[.]"[36]

News articles published before the 2012 election reported that Section 38 was intended to give Wyoming citizens an alternative to the federal Affordable Care Act. In the weeks before the 2012 general election, one national news magazine characterized the proposed section 38 as an attempt "to let individuals sidestep" the Affordable Care Act.[37] Under a headline reading "Wyoming voters will get a say on Obamacare mandate," the newspaper in Cheyenne reported that proposed section 38 was "designed to block" the insurance mandate in the Affordable Care Act. (Ex. E).

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[34] The State of Wyoming was a petitioner along with a number of other states in the *Florida* case. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

[35]https://www.uwyo.edu/uw/news/2012/11/wyoming-residents-have-mixed-views-on-health-care-changes.html

[36] *Id.*

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

II. The Law Governing this Court's Review of the Issues on Summary Judgment

A. Summary Judgment Standard

Rule 56 of the Wyoming Rules of Civil Procedure governs this Court's review on summary judgment. *Rivers v. Moore, Myers, & Garland, LLC*, 2010 WY 102, ¶ 8, 236 P.3d 284, 290 (Wyo. 2010). Rule 56(a) dictates that the trial court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant in entitled to judgment as a matter of law." Wyo. R. Civ. P. 56(a).

"A material fact is one that would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties." *Colton v. Town of Dubois*, 2022 WY 138, ¶ 10, 519 P.3d 976, 979 (Wyo. 2022). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

"Summary judgment is an appropriate resolution of a declaratory judgment action when there are no genuine issues of material fact." *Holding v. Luckinbill*, 2022 WY 10, ¶ 11, 503 P.3d 12, 16 (Wyo. 2022). "Summary judgment is particularly appropriate when facts in dispute are legislative, or tied to legal reasoning and the law making process, rather than adjudicative, concerning the conduct of the parties." *Friedman v. City of Highland Park*, 68 F.Supp.3d 895, 900 (N.D. Ill. 2014) (cleaned up). Legislative facts "do not preclude summary judgment … because they 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) (ellipsis added); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Legislative facts "usually

are not proved through trial evidence but rather by material set forth in the briefs" submitted by the parties. *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999).

B. Principles Governing Challenges to the Constitutionality of a Statute

Plaintiffs' challenge the constitutionality of the Life Act and the chemical abortion statute. To determine whether these statutes are constitutional, this Court should apply long-established legal principles that define Plaintiffs' burden of proof and impose limits on this Court's review. *See, e.g., Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 303 (Wyo. 2014) (summarizing the applicable principles).

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

Plaintiffs challenge the constitutionality of the Life Act and the chemical abortion statute on their face. (Pls.' Summ. J. Mem. at 7). Asserting that a statute is unconstitutional on its face presents "the most difficult challenge to mount successfully" because Plaintiffs "must establish that no set of circumstances exists under which the [statute] would be valid." *Powers*, ¶ 7, 318 P.3d at 303 (citation omitted) (alteration added). Plaintiffs "must demonstrate that the statute **always** operates unconstitutionally." *Wilson v. Andrews*, 10

S.W.3d 663, 670 (Tex. 1999) (emphasis added). If the challenged "statute is constitutional in at least one scenario, the facial challenge fails." *Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury*, 45 F.4th 324, 340 (D.C. Cir. 2022) (cleaned up); *see also In re Gwenevere T.*, 797 N.W.2d 854, 868 n.16 (Wisc. 2011) (explaining that "when there is at least one interpretation and application of a statute that is constitutional, the statute is constitutional on its face").

This Court should declare a statute to be unconstitutional only if such a result "is clear, palpable, unavoidable, and beyond reasonable doubt." *Dir. of Office of State Lands & Invs. v. Merbanco*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003) (citations omitted). It is "duty bound to uphold statutes where possible and resolve all doubts in favor of constitutionality." *Id*. To this end, this Court should "not conjure up theories to overturn and overthrow the solemn declarations of the legislative body." *State v. Johnson Cnty. High Sch.*, 5 P.2d 255, 258 (Wyo. 1931). That being said,

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

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

C. The Rules Governing the Interpretation and Construction of the Wyoming Constitution, the Life Act, and the Chemical Abortion Statute

Plaintiffs challenge the constitutionality of the Life Act and the chemical abortion statute on their face, so this Court must engaged in both constitutional and statutory interpretation and construction to decide the issues in this case.

When interpreting or construing the Wyoming Constitution, this Court seeks to determine the intent of the framers and the people. *Rasmussen v. Baker*, 50 P. 819, 821 (Wyo. 1897); *Powers*, ¶ 8, 318 P.3d at 303-04. To determine the intent of the framers and the people, this Court looks "first to the plain and unambiguous language used in the text of the constitution." *Gordon v. State by & Through Capitol Bldg. Rehab.*, 2018 WY 32, ¶ 30, 413 P.3d 1093, 1103 (Wyo. 2018). It considers the "the ordinary and obvious meaning of the words employed according to their arrangement and connection." *Rasmussen*, 50 P. at 823. "[E]very statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and … the constitution should not be interpreted to render any portion of it meaningless, with all portions of it read *in pari materia* and every word, clause and sentence considered so that no part will be inoperative or superfluous." *Geringer v. Bebout*, 10 P.3d 514, 520-21 (Wyo. 2000) (collecting cases that recognize these rules) (alteration and ellipsis added).

This Court gives the text of a constitutional provision the common and ordinary meaning of the words as it was understood by the majority of voters at the time the language in question was ratified. *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1257 (Wyo. 1995). To do so, this Court should refer to a dictionary published around the time the language was adopted. *See, e.g., Gordon*, ¶¶ 31-33, 413 P.3d at 1103-04 (relying on the 1889 *The Century Dictionary* to construe constitutional language adopted in 1890).

If the constitutional language at issue "is plain and unambiguous, there is no need for construction" and this Court presumes "the framers intended what was plainly expressed." *Cathcart v. Meyer*, ¶ 39, 88 P.3d at 1065. This Court thus should apply the

plain meaning of the language in an unambiguous constitutional provision. *Mgmt. Council of Wyo. Legislature v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998). However, this Court may look to extrinsic information to confirm the plain meaning of the unambiguous constitutional language. *See, e.g., Powers*, ¶¶ 39-55, 318 P.3d at 314-319 (the Wyoming Supreme Court used extrinsic information to confirm the plain meaning of an unambiguous constitutional provision).

A constitutional provision is ambiguous if it "is susceptible to more than one reasonable interpretation." *Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006). In construing an ambiguous constitutional provision, this Court may "consider 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." *Cantrell*, ¶ 6, 133 P.3d at 985. This Court may also resort to the debates on the Wyoming Constitution and other constitutional history to construe the provision. *Powers*, ¶ 39, 318 P.3d at 314 (citing *Rasmussen*, 50 P. at 824). If another state has a constitutional provision that is textually the same or similar to a provision in the Wyoming Constitution and the highest court in that state has interpreted the constitutional language in question, this Court may afford "persuasive effect" to that court's interpretation.[38] *Geringer*, 10 P.3d at 522.

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[38] In drafting the Wyoming Constitution, the framers had copies of the soon-to be ratified constitutions from five different states – Idaho, Montana, North Dakota, South Dakota, and Washington. *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 911-12 (Wyo. 1992). (citing Richard K. Prien, *The Background of the Wyoming Constitution,* § III (Aug. 1956) (unpublished M.A. Thesis, Univ. of Wyo.); T.A. Larson, *History of Wyoming*, 246-47 (1965)). During

When a plaintiff argues that a provision in Article 1 of the Wyoming Constitution affords different or greater protections or rights than an analogous federal constitutional provision, the plaintiff must perform a comparative analysis of the state and federal provisions using a "precise, analytically sound approach." *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 909 (Wyo. 1992). The analytical technique employed most often by the Wyoming Supreme Court considers the following "*non-exclusive* neutral criteria …: 1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern." *O'Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408 (Wyo. 2005) (italics in original) (footnote omitted and ellipsis added). Although the Wyoming Supreme Court typically refers to these criteria as the "*Saldana*" criteria or factors, or the "*Gunwall*" criteria or factors," the State Defendants will refer to them as the *Saldana*/*Gunwall* criteria in this legal memorandum.

The same methodology and principles for interpreting and construing the Wyoming Constitution apply to the interpretation and construction of the Life Act and the chemical abortion statute. To interpret these statutes, this Court should seek to discern "the legislature's intent as reflected in the language of the statute[s]." *Big Al's Towing & Recovery v. Dep't of Revenue*, 2022 WY 145, ¶ 15, 520 P.3d 97, 101 (Wyo. 2022) (citation

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the debates at the constitutional convention, the framers also mentioned the Colorado Constitution more than twenty times, the Pennsylvania Constitution seven times, the Illinois Constitution five times, and the Nebraska and Nevada Constitutions four times each. Prien, *The Background of the Wyoming Constitution*, § III at 18.

omitted) (alteration added). This Court should "give effect to each word, clause and sentence chosen by the legislature, and construe them *in pari materia*." *Big Al's Towing & Recovery*, ¶ 16, 520 P.3d at 102 (citation omitted). "If the statutory language is sufficiently clear and unambiguous," then this Court should apply "the words according to their ordinary and obvious meaning." *Id.* (citation omitted). "A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability." *Id.* ¶ 15, 520 P.3d at 101 (citation omitted). But "even if a statute is unambiguous," this Court may "resort to extrinsic aids of interpretation to confirm [that its] interpretation is consistent with the legislature's intent." *Solvay Chems., Inc. v. Wyo. Dep't of Revenue*, 2022 WY 122, ¶ 25, 517 P.3d 1123, 1131 (Wyo. 2022) (alteration added) (underline in original).

If the statute is ambiguous, this Court should "look beyond the language of the statute and apply rules of statutory construction to determine the legislature's intent[.]" *Wyodak Res. Dev. Corp. v. Wyo. Dep't of Revenue*, 2017 WY 6, ¶ 27, 387 P.3d 725, 732 (Wyo. 2017) (alteration added). "A statute is ambiguous if it is vague or uncertain and susceptible to more than one reasonable interpretation." *Id.*

D. The Constitutional Limits on the Lawmaking Authority of the Wyoming Legislature

The Wyoming Constitution "is not a grant but a limitation upon legislative power." *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1124 (Wyo. 1978). In framing the Wyoming Constitution, the people of Wyoming committed to the Wyoming Legislature "the whole lawmaking power of the state which they did not expressly or

impliedly withhold. Plenary power in the legislature is the rule for all purposes of civil government, and a prohibition to exercise a particular power is an exception." *State ex rel. Bennett v. Barber*, 32 P. 14, 16 (Wyo. 1893).

As a result, "every subject within the scope of civil government is liable to be dealt with by the legislature." *Id*. The Wyoming Legislature "may do anything within the domain of legislation which is not repugnant to the state or federal Constitutions[.]" *State ex rel. Wyo. Agric. Coll. v. Irvine*, 84 P. 90, 106 (Wyo. 1906) (alteration added). As the Wyoming Supreme Court has explained:

> **Except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case.** The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. **The judiciary can only arrest the execution of a statute when it conflicts with the Constitution.** It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.

Johnson Cnty. High Sch., 5 P.2d at 260 (quoting *Constitutional Limitations* (8th ed.) vol. 1, pp. 345, 346) (emphasis added).

Police power is an inherent part of the Wyoming legislature's plenary lawmaking authority. *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 417 (Wyo. 1962). "The police power can be generally described as a government's ability to regulate private activities and property usage without compensation as a means of promoting and

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

The proper exercise of police power is "essential for every civilized government[.]" *State v. Langley*, 84 P.2d 767, 770 (Wyo. 1938) (alteration added). So much so that the Wyoming Constitution expressly provides that "[t]he police power of the state is supreme over all corporations as well as individuals." Wyo. Const. art 2, § 10 (alteration added). The scope of the police power is "great" and "very comprehensive." *Bulova Watch Co.*, 371 P.2d at 417; *State v. Sherman*, 105 P. 299, 300 (Wyo. 1909). "The legitimate objectives of the police power are loosely characterized as being public in nature and the potential range is very broad." *Cheyenne Airport Bd.*, 707 P.2d at 727. As the Wyoming Supreme Court has explained:

> The authority of the states to enact such laws **as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation** and administration.

Zancanelli v. Cent. Coal & Coke Co., 173 P. 981, 985 (Wyo. 1918) (emphasis added); *see also Newport Int'l Univ. v. State, Dep't of Educ.*, 2008 WY 72, ¶ 39, 186 P.3d 382, 391 (Wyo. 2008).

That being said, the police power authority is not unlimited. *Bulova Watch Co.*, 371 P.2d at 417; *Langley*, 84 P.2d at 771. The substantive due process and equal protection provisions in the Wyoming Constitution impose important sideboards on the Wyoming Legislature's exercise of the police power. *See, e.g., Schakel v. State*, 513 P.2d 412, 414-15 (Wyo. 1973) (declaring a police power statute to be unconstitutional because it violated

due process and equal protection guarantees in the Wyoming Constitution). To pass muster under substantive due process or equal protection, a police power statute must satisfy the rational basis test if the statute affects an ordinary interest or the strict scrutiny test if the statute affects a fundamental right. *See, e.g., Vaughn v. State,* 2017 WY 29, ¶ 26, 391 P.3d 1086, 1095 (Wyo. 2017) (substantive due process); *Martin v. Bd. of Cnty. Comm'rs of Laramie Cnty.,* 2022 WY 21, ¶ 14, 503 P.3d 68, 73 (Wyo. 2022) (equal protection).

Under the rational basis test, a statute that affects only an ordinary interest must be "rationally related to a legitimate state interest." *Martin,* ¶ 14, 503 P.3d at 73 (citation omitted). Under the strict scrutiny test, a statute that affects a fundamental interest or right must be "necessary to achieve a compelling state interest" and the State must show "that it could not use a less onerous alternative to achieve its objective." *Id.*

ARGUMENT

I. Plaintiffs have not asserted as applied claims in this case.

Since the motion to intervene hearing in this case, Plaintiffs have insisted that they are asserting as applied claims against the Life Act and the chemical abortion statute. They reiterate this point throughout their summary judgment memorandum. (*See* Pls.' Summ. J. Mem. at 7, 24, 51, 52, 59, 60 n.9, 72, 79). To actually have an as applied challenge, however, Plaintiffs must do more than just say that they have as applied claims.

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." *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011) (italics in original). "If an as-applied challenge is successful, the statute

may not be applied to the challenger, but is otherwise enforceable." *Minn. Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013) (citation omitted).

Plaintiffs' request for remedy in their amended complaint and statements in their summary judgment memorandum prove conclusively that Plaintiffs do not have as applied claims here. In their amended complaint, Plaintiffs ask this Court to declare that the Life Act and the chemical abortion statute are unconstitutional and "are therefore invalid and unenforceable[.]" (Am. Compl. at ¶ xliii) (alteration added). They further ask this Court to issue a permanent injunction preventing the State Defendants from enforcing the Life Act and the chemical abortion statute "with respect to any abortion[.]" (Am. Compl. at ¶ xliv) (alteration added). Plaintiffs seek to have the Life Act and the chemical abortion statute declared to be wholly invalid and to prevent enforcement of the statutes against everyone who falls within the reach of the statutes. The breadth of their requested remedies confirms that they are asserting only facial challenges.

Statements in Plaintiffs' summary judgment memorandum corroborate this point. Plaintiffs repeatedly ask this Court to enjoin enforcement of the Life Act and the chemical abortion statute as against everyone who may be subject to it. (*See* Pls' Summ. J. Mem. at 2-3, 85, 86). This Court cannot grant this relief for an as applied claim. The remedy for an as applied claim enjoins enforcement of an unconstitutional statute only as against the complaining party but the statute otherwise remains in effect. *Minn. Majority*, 708 F.3d at 1059.

Plaintiffs also have not demonstrated how the Life Act and the chemical abortion statute are unconstitutional only as the statutes apply to any specific Plaintiff (as opposed

to all of the individuals in Wyoming who are subject to the statutes), so they have not shown how the statutes are unconstitutional under the particular circumstances of this case. As a result, Plaintiffs have not demonstrated that the Life Act and the chemical abortion statute are unconstitutional as applied to any of them. *Carel*, 668 F.3d at 1217. Or, in other words, they do not have any as applied claims in this case.

II. The declaration testimony submitted by Plaintiffs is neither material nor relevant to the facial constitutional claims in this case.

Despite their arguments to the contrary, Plaintiffs have asserted only facial challenges to the constitutionality of the Life Act and the chemical abortion statute. To support their arguments on summary judgment, they rely heavily on written testimony from various individuals. Plaintiffs assert that the evidence in the declarations is relevant to the question of whether the challenged statutes impose reasonable and necessary restrictions on the right to make health care decisions. (Pls.' Summ. J. Mem. at 47-48). They are wrong. This Court should not consider the written testimony in addressing the constitutionality of the Life Act and the chemical abortion statute because the testimony is neither material nor relevant to the constitutional claims in this case.

In the summary judgment context, "the substantive law will identify which facts are material." *Anderson*, 477 U.S. at 248. A challenge to the facial constitutionality of a statute presents only a question of law. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1201 (Idaho 2023). In addition, every discrete aspect of this Court's review of a facial claim involves only questions of law. To address a facial challenge, this Court first must interpret or construe the text of the pertinent constitutional and statutory provisions. The

interpretation or construction of constitutional provisions or statutes are questions of law. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (constitutional interpretation); *Solvay Chems., Inc.*, ¶ 7, 517 P.3d at 1149 (statutory interpretation).

This Court also must assess the constitutionality of the challenged statutes in light of the applicable constitutional test. Only the rational basis test and the test set forth in article 1, section 38(c) apply to constitutional issues asserted in this case.[39] The rational basis test and the section 38(c) test are questions of law. *See Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990) (stating that both parts of the rational basis test are questions of law); *see also Sammon v. N. J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3rd Cir. 1995) (same); *Simi Inv. Co. v. Harris Cnty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000) (same).

Under the rational basis test, the Wyoming Legislature is not constitutionally required "to articulate its reasons for enacting a statute[.]" *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003) (alteration added). Thus, the legislative choice embodied in a statute "is not subject to courtroom fact-finding and need not be based on evidence or empirical data." *Greenwalt*, ¶ 39, 71 P.3d at 730. In addition, "if any conceivable basis exists which will reasonably, although arguably, support the enactment," then this Court should "assume that the legislature has acted in a non-arbitrary

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[39] Abortion is not a fundamental right, *see Dobbs v. Jackson Women's Health Org.*, — U.S. —, 142 S. Ct. 2228, 2242-43, 2253-54 (2022), so the strict scrutiny test does not apply to any of the claims in this case.

and rational manner, and … hold the statute to be constitutional." *White v. State*, 784 P.2d 1313, 1316 (Wyo. 1989) (ellipsis added); *see also Dobbs*, 142 S. Ct. at 2284 (explaining that, under the rational basis test, a statute must be upheld "if there is a rational basis on which the legislature **could have thought** that it would serve legitimate state interests") (emphasis added).

The foregoing case law makes it clear that the rational basis test does not depend upon evidentiary proof, so third party testimony has no place in a rational basis analysis. Thus, the facts put forth in the various declarations offered by Plaintiffs are not material or relevant to either part of the rational basis test. And if such facts are not material or relevant to the rational basis test, they also are not material or relevant to the section 38(c) test.

The facts in the declarations also are not material or relevant to the question of whether the Life Act and the chemical abortion statute are facially unconstitutional because "[c]ertainty of facts is not required to answer a pure question of law." *Sinclair Wyo. Ref. Co. v. Infrassure, Ltd.*, 2021 WY 65, ¶ 10, 486 P.3d 990, 994 (Wyo. 2021) (cleaned up). To the extent that facts are needed to resolve facial constitutional claims, the material facts (if any) are legislative facts because they inform this Court's analysis of the questions of law at issue.

Legislative facts "are the general facts which help the tribunal decide questions of law and policy and discretion." *Foster's Inc. v. City of Laramie*, 718 P.2d 868, 878 (Wyo. 1986) (Rose, J., specially concurring) (citation omitted); *see also McGrath v. Univ. of Alaska*, 813 P.2d 1370, 1374 (Alaska 1991) (same); *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 767 (Iowa 1998) (same); *Lee v. Martinez*, 96 P.3d 291, 296 (N.M. 2004)

(same). Legislative facts "are facts only in the sense that they provide premises in the process of legal reasoning." *See Atlantic Richfield Co. v. State*, 705 P.2d at 428.

Sources of legislative facts include "legislative history," "medical literature," and "existing social, economic, and political conditions," among "many other things." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 2:12 (4th ed., July 2022 update). Legislative facts usually are established by material cited in or submitted with the briefs. *Daggett*, 172 F.3d at 112. A reviewing court typically takes judicial notice of legislative facts. Mueller & Kirkpatrick, *Federal Evidence* § 2:12.

Only legislative facts are material or relevant to this Court's interpretation of the constitutional and statutory provisions and its ultimate assessment of whether the Life Act and the chemical abortion statute are constitutional. Mueller & Kirkpatrick, *Federal Evidence* § 2:12. The facts in the sworn testimony in the declarations are not legislative facts because they reflect personal opinions (including some opinions about the meaning of legislative facts) and legal interpretations. The sworn testimony lacks the objectivity required for addressing the purely legal questions at issue in this case. As a result, this Court should strike the declarations from the expert witnesses for the reasons explained in the State Defendants' motion to strike expert witnesses and should disregard the other declaration testimony on summary judgment.

III. Plaintiffs have not shown that the Wyoming Constitution confers or protects a fundamental right to abortion.

Plaintiffs contend that they have raised "a host of claims involving fundamental rights" in this case. (Pls.' Summ. J. Mem. at 6). To carry their burden of proof, however,

Plaintiffs must do more than merely say that their constitutional claims raise fundamental rights – they must demonstrate that they have a fundamental right and that the Life Act and the chemical abortion statute impermissibly infringe upon that right. *Baessler*, ¶ 13, 258 P.3d at 725. Both of the challenged statutes regulate abortion, so Plaintiffs must demonstrate that the Wyoming Constitution confers or protects fundamental right to abortion. They have not made this showing and literally cannot because abortion is not a fundamental right under the Wyoming Constitution.

An analysis of whether abortion is a fundamental right under the Wyoming Constitution begins with the concept of natural rights. The Wyoming Constitution recognizes the existence of inherent or natural rights and protects such rights from undue governmental interference. *Langley*, 84 P.2d at 770-71; *see also* Wyo. Const. art. 1, § 2 (referring to the "inherent right to life, liberty and the pursuit of happiness"); art. 1, § 3 (referring to the "enjoyment of natural … rights"); art. 1, § 36 (referring to "other rights retained by the people"). The natural rights recognized and protected by the Wyoming Constitution "are not absolute or unlimited, but are relative" and subject to the police power of the State. *Langley*, 84 P.2d at 770.

What once were referred to as inherent or natural rights are now referred to as fundamental rights. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (explaining that fundamental rights used to be called natural rights). "Fundamental rights are those liberties that are objectively deeply rooted in this country's history and tradition." *Vaughn*, ¶ 27, 391 P.3d at 1095 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). To be fundamental, a right must be "implicit in the concept of ordered liberty,

such that neither liberty nor justice would exist if they were sacrificed." *Washington*, 521 U.S. at 721 (cleaned up).

The Wyoming Constitution does not explicitly confer a right to abortion. *See generally* Wyo. Const. The question thus becomes whether abortion is an unenumerated fundamental right protected by the Wyoming Constitution.

As explained in section IV(D)(1) below, article 1, section 36 makes it clear that the framers intended for the Wyoming Constitution to protect unenumerated fundamental rights that existed in the United States when the Wyoming Constitution was adopted. States with a reserved rights provision similar to section 36 have interpreted that provision as reserving to the people unenumerated fundamental rights that existed in the United States when the state constitution was adopted. *See, e.g., McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974) (holding that a fundamental right was retained by the people under the reserved rights provision because the right existed when the Alaska Constitution was "enacted and became effective"); *Hall v. Nw. Outward Bound Sch., Inc.*, 572 P.2d 1007, 1110 n. 11 (Or. 1977) (suggesting that a right "retained" under the reserved rights provision must be shown to have existed when the reserved rights provision was adopted). Thus, the Wyoming Constitution will protect a right to abortion only if abortion was a fundamental right in this country in 1890.

In *Dobbs*, the U.S. Supreme Court held that abortion is not a fundamental right because "such a right has no basis … in our Nation's history." *Dobbs*, 142 S. Ct. at 2283. The *Dobbs* Court specifically determined that that abortion is not deeply rooted in the history and tradition of this country and is not implicit in ordered liberty. *Dobbs*, 142 S. Ct.

at 2242. *Dobbs* holds that abortion has never been a fundamental right in the United States and thereby confirms that abortion was not a fundamental right in this country in 1890. As a result, abortion is not an unenumerated right protected by the Wyoming Constitution.

The fact that abortion is not deeply rooted in the history and tradition of this country should end this Court's inquiry into whether abortion is a fundamental right because, to date, the Wyoming Supreme Court has looked only to the history and tradition of the United States to determine whether a claimed right is a fundamental right under either the U.S. Constitution or the Wyoming Constitution. *See Vaughn*, ¶ 27, 391 P.3d at 1095. Not every state does the same, however. In two recent cases involving challenges to state abortion statutes, the Supreme Court of Idaho and the Supreme Court of North Dakota each assessed whether a right to abortion is deeply rooted in the history and traditions of the state, not the country. *Planned Parenthood Great Nw.*, 522 P.3d at 1148; *Wrigley v. Romanick*, 988 N.W.2d 231, 241-42 (N.D. 2023).

This Court should not follow the lead of the Idaho and North Dakota Supreme Courts in this regard because *Vaughn* binds this Court's analysis of whether abortion is a fundamental right. *See Gillis v. F&A Enters.*, 934 P.2d 1253, 1256 (Wyo. 1997) (stating that, once the Wyoming Supreme Court "renders a decision, the lower courts are bound by that decision in deciding all future cases"). Under the history and tradition test adopted in *Vaughn*, abortion is not a fundamental right. *See Dobbs*, 142 S. Ct. at 2242.

Even if this Court breaks from the precedent in *Vaughn* and performs a state history and tradition analysis instead of a national one, it will find that abortion is not deeply rooted in the history and tradition of Wyoming. From 1869 to 1884, abortion was a crime in

Wyoming with no exceptions. From 1884 until 1973, abortion was a crime in Wyoming unless an abortion was necessary to preserve the life of the pregnant woman. After *Roe* recognized a federal constitutional right to abortion before viability, abortion after viability was prohibited and a crime in Wyoming unless an abortion was necessary to preserve life or health of the pregnant woman according to appropriate medical judgment. After *Dobbs* overruled *Roe* and *Casey*, the Wyoming Legislature enacted the Life Act and the chemical abortion statute to prohibit and criminalize abortion in Wyoming subject to specified exceptions.

Nothing in this history of abortion regulation in Wyoming even remotely suggests that abortion is deeply rooted in the history and tradition of this state. Before *Roe*, abortion was permitted in Wyoming only when necessary to preserve the life of the pregnant woman – abortion for any other reason was a crime. Thus, for the first 104 years that Wyoming existed as either a territory or a state, abortion was a crime subject to one exception.

After *Roe*, abortion before viability was not prohibited under Wyoming law for forty-nine years, but only because federal law preempted state law on the issue. During this time period, the Legislature did not grant an affirmative legal right to have an abortion – instead it continued to prohibit and criminalize abortion to the extent permitted under *Roe* and *Casey*. And after *Roe* and *Casey* were overruled, the Wyoming Legislature has once again prohibited and criminalized abortion.

When viewed through the lens of Wyoming history and tradition, abortion has always been prohibited and a crime in Wyoming when the policy choice has been left solely to the discretion of state policymakers. Accordingly, abortion is not deeply rooted in the

history and tradition of Wyoming and therefore is not a fundamental right protected by the Wyoming Constitution. Abortion is an ordinary social welfare interest that the Wyoming Legislature may regulate as long as any statute regulating abortion is rationally related to a legitimate governmental interest or objective. *See Martin,* ¶ 14, 503 P.3d at 73; *Vaughn,* ¶ 26, 391 P.3d at 1095.

IV. This Court should deny Plaintiffs' motion for summary judgment with respect to article 1, sections 2, 3, 6, 7, 18, 19, 36, and 38; article 7, section 12; and article 21, section 25 and should grant summary judgment in favor of the State Defendants on those claims.

Plaintiffs have challenged the constitutionality of the Life Act and the chemical abortion statute on six distinct grounds. They contend that the statutes violate: (1) the right to make "health care decisions" conferred by article 1, section 38, (Pls.' Summ. J. Mem. at 23-51); (2) the right to due process of law under article 1, section 6 because the Life Act and the chemical abortion statute are impermissibly vague, (Pls.' Summ. J. Mem. at 51-59); (3) the prohibition on the establishment of religion in article 1, section 19 and article 7, section 12, (Pls.' Summ. J. Mem. at 59-79); (4) the free exercise of religion in article 1, section 18 and article 21, section 25, (*Id.*); (5) the right to equal protection of the law under article 1, section 3, (Pls.' Summ. J. Mem. at 79-81); and (6) the unenumerated right to be let alone by government, the unenumerated right to control the composition of one's family, and the unenumerated right to bodily autonomy as protected by article 1, sections 2, 7, and 36 (Pls.' Summ. J. Mem. at 82-85).

As explained below, Plaintiffs' have not shown that the Life Act and the chemical abortion statute violate any provision in the Wyoming Constitution. Accordingly, this

Court should deny Plaintiffs' motion for summary judgment in its entirety, grant the State Defendants' motion for summary judgment, and dismiss the amended complaint with prejudice.

A. The Life Act and the chemical abortion statute do not violate article 1, section 38.

In 2012, the voters adopted section 38 to confer a new, qualified constitutional right for competent adults in Wyoming to make their "own health care decisions." Wyo. Const. art. 1, § 38. Section 38 provides in pertinent part:

> (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
>
> * * *
>
> (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.
>
> (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

Wyo. Const. art. 1, § 38.

Plaintiffs contend that the Life Act and the chemical abortion statute violate section 38 in a variety of ways. (Pls.' Summ. J. Mem. at 23-51). Ultimately, their section 38 arguments fail because abortion is not a "health care" for purposes of section 38 and the decision to get an abortion is not the pregnant woman's "own" health care decision, so the Life Act and the chemical abortion statute do not fall within the scope of article 38. If this

Court concludes that abortion is "health care" for purposes of section 38, then Plaintiffs' section 38 arguments still fail because:

- Abortion cannot be a "health care decision" if the Wyoming Legislature has prohibited abortion;
- The constitutional history of section 38 shows that the Wyoming Legislature and the voters in Wyoming did not intend for the right to make "health care decisions" to implicitly confer a constitutional right to abortion; and
- Plaintiffs have not shown beyond a reasonable doubt that the Life Act and the chemical abortion statute impermissibly restrict any right conferred by section 38(a) in all circumstances.

1. The plain meaning of "health care" in section 38(a) does not include a constitutional right to abortion because abortion is not "health care" and the decision to get an abortion is not the pregnant woman's "own" health care decision.

Plaintiffs contend that section 38(a) confers an implicit right to abortion because the term "health care" includes abortion. The question for this Court is whether the Wyoming Legislature (as the drafters of the provision) and the voters (as the adopters of the provision) intended for the term "health care" in section 38(a) to implicitly confer a constitutional right to abortion. *Mgt. Council of Wyo.*, 953 P.2d at 843. The answer to this question is "No."

The Court's inquiry into the meaning of "health care" in section 38(a) should begin with the common and ordinary meaning of the term as it was understood at the time section 38 was ratified. *Gordon*, ¶ 31, 413 P.3d at 1103. To discern this meaning, this Court should

consult the common dictionary definition in a dictionary published around 2011/2012. *See, e.g., Gordon*, ¶ 31, 413 P.3d at 1103 (relying on a dictionary published in 1889 to define terms used in the 1890 version of the Wyoming Constitution). At the time section 38 was adopted, the term "health care" meant:

- "[E]fforts made to maintain or restore health, esp. by trained and licensed professionals[.]" *Merriam-Webster's Coll. Dictionary* 574 (11th ed. 2012) (alterations added).
- "Collectively, the services provided, [usually] by medical professionals, to maintain and restore health." *Black's Law Dictionary* 835 (10th ed. 2014) (alterations added).

The foregoing definitions share a common theme of maintaining or restoring health. At the time section 38 was adopted, the word "health" meant:

- "[T]he condition of being sound in body, mind, or spirit; *esp.*: freedom from physical disease or pain[.]"*Merriam-Webster's Coll. Dictionary* 574 (11th ed. 2012) (alterations added).
- "The quality, state, or condition of being sound or whole in body, mind, or soul; esp. freedom from pain or sickness." *Black's Law Dictionary* 835 (10th ed. 2014) (alterations added).

To fit within the definition of "health," this Court would have to find that pregnancy is a physical disease or sickness. And, to fit within the definition of "health care," this Court would have to find that abortion frees a pregnant woman from the physical disease or sickness of pregnancy. Although pregnancy impacts the physical condition of the pregnant

woman, it is a bridge too far to say that pregnancy is a physical disease or sickness or that abortion restores the health of the pregnant woman who is otherwise in good health.

Abortion is not a "health care" for purposes of section 38(a) when the decision to get an abortion is based upon considerations other than the physical health of the pregnant woman. Without question, when a medical professional performs or causes an abortion, the abortion involves medical services to the extent that it requires surgery or the prescribing and administering of medication. To be "health care" for purposes of section 38(a), however, the decision to get an abortion must be intended to restore the body, mind, or spirit of the pregnant woman from pain, physical disease, or sickness. Some decisions to get an abortion qualify under this legal standard, but not all of them do.

This Court acknowledged as much in the April 2023 TRO Order when it said that the Life Act burdens pregnant woman with respect to, among other things, their families, their careers, and their finances. (4/17/23 TRO order, ¶ 50). If a pregnant woman in good health decides to get an abortion based solely upon family, career, or financial considerations, then that decision cannot be "health care" for purposes of section 38(a) because the abortion would not be necessary to maintain or restore the body, mind, or spirit of the pregnant woman from pain, physical disease, or sickness.

The legislative findings and the statutory definitions in the Life Act provide an additional basis for finding that abortion is not "health care." In the Life Act, the Wyoming Legislature explicitly found that "[i]nstead of being health care, abortion is the intentional termination of the life of an unborn baby." Wyo. Stat. Ann. § 35-6-121(a)(iv). This finding

derives from the statutory definition of abortion in the Life Act, which provides as follows in pertinent part:

> (i) "Abortion" means **the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman**, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, **with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby**. …

Wyo. Stat. Ann. § 35-6-122(a)(i) (emphasis added). In turn, the Legislature defined "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. Ann. § 35-6-122(a)(iv) (emphasis added). Given the language emphasized in these statutory definitions, abortion at any time during the entire embryonic and fetal stages is "the intentional termination of the life of an unborn baby."

The legislative findings and the statutory definition of "abortion" in the Life Act is consistent with the common and ordinary meaning of the word "abortion" when the statutory scheme was enacted in 2023. Currently, abortion means "an artificially induced termination of pregnancy for the purpose of destroying and embryo or fetus." *Black's Law Dictionary* 6 (11th ed. 2019).

In Wyoming, "legislative findings are controlling in the absence of a controversy questioning their validity." *Witzenburger*, 575 P.2d at 1131. The validity of the legislative finding that "abortion is the intentional termination of the life of an unborn baby" cannot reasonably be questioned because this finding is consistent with the common and ordinary meaning of the word "abortion." And it cannot be reasonably disputed that when an

otherwise healthy pregnant woman gets an abortion for reasons unrelated to her own health, abortion is not "health care." This Court, therefore has no reason to question the validity of the legislative findings that abortion is not "health care" for purposes of section 38.

To the extent the legislative finding in § 35-6-121(a)(iv) can be deemed to be a legislative interpretation of section 38(a), this Court should defer to the legislative finding. In Wyoming, a legislative interpretation of the Wyoming Constitution does not bind this Court, but it should give "much weight" to the legislative interpretation. *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 411 (Wyo. 1979); *State ex rel. Irvine v. Brooks*, 84 P. 488, 493 (Wyo. 1906). In fact, this Court should "be loath to interpret the constitution otherwise." *Geringer*, 10 P.3d at 522. Here, the finding that abortion is not "health care" is consistent with the common and ordinary meaning of the terms "abortion" and "health care," so this Court has no legitimate reason to disregard the finding.

Even if this Court concludes that abortion is "health care," the Life Act and the chemical abortion statute do not fall within the scope of section 38(a) because a pregnant woman's decision to get an abortion is not her "own" decision for purposes of section 38(a). At the time section 38(a) was ratified, the common meaning of the word "own" was "for or by oneself: independently of assistance or control[.]" *Merriam-Webster's Coll. Dictionary* 867 (11th ed. 2012) (alteration added). To the extent that the word "own" means "for … oneself," section 38(a) confers a right for a pregnant woman to make decisions that affect her health care provided those decisions do not also affect others. If a pregnant woman makes a health care decision that affects both her health and the health of someone

else, then the decision is not just for herself, and therefore is not her "own" health care decision.

Under this interpretation, the Life Act and the chemical abortion statute do not fall within the scope of section 38(a) because the decision to have an abortion affects more than just the pregnant woman. *See Raidoo v. Moylan*, 75 F.4th 1115, 1125 (9th Cir. 2023) (explaining that "abortion implicates fetal life in addition to the patient's health"). An abortion ends the life of the unborn baby. Thus, the decision to have an abortion affects the health of the unborn baby because the abortion causes the death of the unborn baby. As a result, the decision to get an abortion is not the pregnant woman's "own" health care decision.

Plaintiffs offer several arguments in an attempt to explain why the Life Act and the chemical abortion statute violate section 38(a). They first argue that the plain meaning of "health care" in section 38(a) includes abortion. (Pls.' Summ. J. Mem. at 24). As support for this argument, they rely primarily on the analysis in paragraphs 39 through 41 in this Court's order granting a temporary retaining order against the Life Act (the April TRO order). (*Id.*).

In paragraph 39, this Court first noted that "words and phrases used throughout" the Life Act "invalidate the [State] Defendants' argument that abortion is not a form of health care." (4/17/23 TRO order, ¶ 39) (alteration added). It then concluded that abortion is "health care" under the plain language of the Life Act because the plain meaning of a number of words and phrases used throughout the Act "strongly suggests that [abortion] is a procedure that involves health care." (*Id.*) (alteration added). This Court employed similar

reasoning in paragraph 41 in concluding that abortion is "a health care procedure" because it "requires medical expertise, the prescription of medications and drugs, [and] the use of reasonable medical judgment[.]" (4/17/23 TRO order, ¶ 41). But when an otherwise healthy pregnant woman gets an abortion for reasons unrelated to her health, abortion is a procedure that involves medical services, not "health care" under the plain meaning of that term.

In paragraph 40, this Court concluded that "abortion is a form of health care" because the Life Act "itself acknowledges the medical necessity of abortions in the lives of Wyoming women." (4/17/23 TRO order, ¶ 40). In explaining this point, this Court focused on the life and health of the pregnant woman exceptions in the Life Act. (*Id.*). When abortion is a medical necessity for the pregnant woman, both the Life Act and the chemical abortion statute permit the woman to end the pregnancy. Wyo. Stat. Ann. § 35-6-124(a)(i); Wyo. Stat. Ann. § 35-6-139(b)(iii). But when an otherwise healthy pregnant woman gets an abortion for reasons unrelated to her health, the abortion cannot be considered to be "health care."

Plaintiffs next cite to various legislative facts as proof that the term "health care" in section 38(a) unambiguously includes abortion. (Pls.' Summ. J. Mem. at 24-25). In making this argument, they rely on information from federal government agencies, non-governmental organizations and agencies, a Wyoming statute, and a Wyoming state agency. (*Id.*) (citations omitted). Although this Court may consider legislative facts to confirm the plain meaning of an unambiguous term, it cannot rely on such facts as proof that the term is unambiguous. *See, e.g., Cranston v. Cranston*, 879 P.2d 345, 349 (Wyo.

1994) (a court should not resort to extrinsic information if a statute communicates a plain meaning); *see also Solvay Chems.,* ¶¶ 24-25, 517 P.3d at 1131-32.

Plaintiffs also assert that pregnancy affects the "health" of the pregnant woman because pregnancy may cause many different health conditions, ranging from relatively minor conditions to serious ones that may include permanent disability or death. (Pls.' Summ. J. Mem. at 26). But again, for abortion to fit within the definition of "health care," this Court would have to find that pregnancy is a physical disease or sickness and abortion frees a pregnant woman from the physical disease or sickness of pregnancy. That interpretation goes too far in trying to make abortion fit within the common meaning of "health care."

Finally, Plaintiffs argue that, by finding that abortion is not "health care," the Wyoming Legislature has impermissibly amended section 38(a). (Pls.' Summ. J. Mem. at 26-27). This argument ignores the plain language in section 38(c). In adopting and ratifying section 38(c), the Legislature and the voters intended to preserve the Legislature's authority to regulate medical services in Wyoming. The enactment of the Life Act and the chemical abortion statute represents a constitutionally permissible exercise of lawmaking authority under section 38(c).

2. Even if this Court concludes that abortion is "health care," abortion cannot be a "health care decision" under section 38(a) if abortion is prohibited by statute.

Even if this Court concludes that abortion is "health care," abortion cannot be a "health care decision" under section 38 if abortion is prohibited by statute. To understand

why, it helps to distinguish between the two sides of the health care process – the health care provider side and the patient side.

On the health care provider side, the Wyoming Legislature, through its police powers, regulates health care in Wyoming. *See Taylor v. Wyo. Bd. of Med.*, 930 P.2d 973, 975 (Wyo. 1997) (acknowledging that the Wyoming Legislature has provided for the regulation of the practice of medicine in Wyoming through the Wyoming Medical Practices Act); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (explaining that a state "has a significant role to play in regulating the medical profession"). Through its police powers, the Wyoming Legislature may place restrictions on the specific types of medical services that are offered by Wyoming health care providers. Health care providers offer medical services to patients, but as the regulated participant in a highly regulated profession, they may only offer medical services that comply with applicable law.

Patients, on the other hand, purchase medical services from health care providers. Health care providers may only offer legally permissible medical services, so patients may only purchase medical services that are legally available. As consumers of medical services, patients have no direct role in determining what services are offered.

The constitutional right to make "health care decisions" under Section 38(a) does not change the role of the patient in the health care process. Section 38(a) confers a right for individuals as patients to make "health care decisions." The word "decision" means "a determination arrived at after consideration[.]" *Merriam-Webster's Coll. Dictionary* 322 (11th ed. 2012) (alteration added). Thus, the word "decisions" contemplates a patient choosing which medical services to purchase, if any, but any medical services the patient

purchases necessarily must be legally available. A medical service that is not legal cannot be offered by health care providers, so the service cannot be one that the consumer may consider in making a health care decision.

The constitutional right to make "health care decisions" under Section 38(a) also does not change the role of the Wyoming Legislature in the health care process. The Legislature still determines what medical services may be offered by health care providers and, by extension, what medical services are available to patients. Section 38(c) recognizes as much, providing that "[t]he legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38(c) (alteration added).

The phrase "health care decisions" in section 38(a) gives competent adults in Wyoming the constitutional right to decide what legally available health services they will purchase from health care providers, nothing more and nothing less. To say otherwise would be to say that the Wyoming Legislature and the voters intended for section 38 to allow patients to determine what medical services are available, regardless of whether those services are prohibited by law. Or, stated differently, to say otherwise would be to say that the Legislature and the voters intended to delegate a significant aspect of the Legislature's police power to competent adults in Wyoming. This result cannot be because section 38(c) unambiguously acknowledges the authority of the Wyoming Legislature to regulate health care in Wyoming.

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

It is absurd to think that the Legislature and the voters intended to give patients such unfettered, unilateral authority to disregard the law. Section 38(a) cannot be interpreted in a manner that leads to such an absurd result. *See Cantrell*, ¶ 11, 133 P.3d at 986-87 (stating that constitutional provisions "should not be read so as to produce absurd results").

In the April 2023 TRO order, this Court took a dim view of the foregoing medical marijuana analogy. (4/17/23 TRO order, ¶ 49). In rejecting the analogy, this Court noted that when "a pregnancy must be terminated there are no alternative procedures for terminating a pregnancy other than an abortion" but a medical condition that may be treated with medical marijuana could be treated with alternative medications. (*Id.*).

This view misses the point of the analogy. Plaintiffs' interpretation of "health care" would give competent adults in Wyoming an unfettered constitutional right to demand and receive a specific type of treatment even if the Wyoming statutes prohibit that treatment. The existence of alternative treatment options would not matter – the patient would have

the constitutional right to demand the treatment regardless of its legality. In essence, their interpretation of "health care" deprives section 38(c) of any meaning.

The State Defendants acknowledge that, at the time section 38 was adopted by Wyoming voters, state law did not prohibit abortion before viability. This fact in no way supports an argument that the right to make "health care decisions" implicitly confers a constitutional right to abortion. To the contrary, this fact aligns with the interpretation that section 38(a) only gives patients the right to decide what legally medical services to pursue. To say that section 38(a) forever implicitly confers a constitutional right to abortion because abortion before viability was legal under state law at the time section 38(a) was adopted would be to say that, as of November 14, 2012, section 38 removed the Wyoming Legislature's authority to regulate the provision of medical services in Wyoming. Such an interpretation cannot be squared with section 38(c), which unambiguously recognizes the Legislature's authority to regulate health care under its historic police powers.

In the final analysis, section 38(a) cannot reasonably be interpreted as implicitly conferring a constitutional right to abortion under the guise of making a "health care decision." Abortion is an ordinary social welfare interest, so the regulation of abortion through the Life Act and the chemical abortion statute falls squarely within the Legislature's historic police powers, which means that abortion is not a legally available medical service and therefore not within the scope of the right to make "health care decisions" conferred by section 38(a).

That being said, the Life Act and the chemical abortion statute are constitutional under section 38 only if they represent a constitutionally permissible exercise of legislative

authority under section 38(c). Section 38 has its own constitutionally imposed standard that this Court must apply to determine whether a statute impermissibly infringes upon the right to make "health care decisions." See Wyo. Const. art. 1, § 38(c). As a result, neither the rational basis test nor the strict scrutiny test apply in this Court's assessment of whether the Life Act and the chemical abortion statute violate section 38(a).

Section 38(c) provides that the Wyoming Legislature "may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38(c). The phrase "reasonable and necessary restrictions" mirrors the description of the permissible exercise of police powers of the State in past cases where the Wyoming Supreme Court explained that the State "has the authority to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of [its] people." *Zancanelli*, 173 P. at 985 (alteration added); *Newport Int'l Univ.*, ¶ 39, 186 P.3d at 391.

The phrase also mirrors the explanation of the relationship between the rational basis test and the Legislature's exercise of its police powers in *Langley*, where the Court stated that the rational basis test requires that a statute "must be reasonable and not arbitrary" and that the Legislature primarily determines "what measures are necessary and proper to further the legitimate purposes or objects" of the police power. *Langley*, 84 P.2d at 771 (internal citations omitted) (emphasis added). Thus, section 38(c) effectively makes the long established test for the State's permissible exercise of its police powers the test for

assessing the constitutionality of a statute alleged to impermissibly infringe upon the right to make "health care decisions" in section 38(a).

A comparison of the language in section 38(c) with the language in the rational basis and strict scrutiny tests shows that the section 38(c) test is equivalent to the rational basis test. The term "reasonable" in section 38(c) and the phrase "rationally related" in the rational basis test each require a substantially similar nexus between the restrictions imposed by the police power statute and the objective(s) of the statute. And the objectives requirement in section 38(c) – protection of the health and general welfare of the people of Wyoming or the accomplishment of some other purpose of the Wyoming Constitution – is functionally the same as the "legitimate state interest or objective" requirement in the rational basis test. The section 38(c) test is not equivalent to the strict scrutiny test because section 38(c) does not require that restrictions on the right to make "health care decisions" be narrowly tailored or be the least onerous alternative to achieve the State's objective.

In terms of assessing the reasonableness and necessity of legislation under section 38(c), the Court should afford great deference to the Wyoming Legislature as the "sole judge of the policy, wisdom, and expediency of statutes." *State v. W.S. Buck Mercantile Co.*, 264 P. 1023, 1025 (Wyo. 1928). The authority to enact laws the Legislature deems to be necessary to promote the health, safety, and general welfare of the people of Wyoming "carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration." *Zancanelli*, 173 P. at 985. As the branch of state government most directly answerable to the people, the Legislature should be given wide latitude to make the type of policy decision

embodied in the Life Act and the chemical abortion statute. This Court, therefore, should afford great deference to the policy choice reflected in the Life Act and the chemical abortion statute, both in terms of reasonableness and necessity.

Here, the Life Act and the chemical abortion statute reasonably balance the legally protected rights of the pregnant woman with the legally protected rights of the unborn baby. The statutes allow for a pregnancy to be terminated when it jeopardizes the life or health of the pregnant woman or when the pregnancy results from a non-consensual act while, at the same time, assuring that abortion will not cause the death of unborn babies in circumstances where those exceptions do not apply. The Life Act and the chemical abortion therefore impose reasonable and necessary restrictions on abortion and do not unconstitutionally infringe upon the right to make "health care decisions" conferred by section 38(a).

On summary judgment, Plaintiffs persist in their argument that section 38(c) and (d) together create a strict scrutiny test for assessing whether a statute violates the right to make "health care decisions" in section 38(a). (Pls.' Summ. J. Mem. at 27-28). They insist that, under section 38, "a statute must be reasonable and necessary to protect public welfare and not unduly infringe on the right of Wyoming citizens to control their own health care." (Pls.' Summ. J. Mem. at 27) (emphasis removed). In making this argument, they improperly conflate section 38(c) and section 38(d).

Section 38(c) and section 38(d) serve different purposes. Section 38(c) establishes the test for assessing whether a statute that regulates medical services impermissibly infringes upon the right to make "health care decisions" conferred by section 38(a). Section

38(d), on the other hand, imposes an affirmative duty on the State of Wyoming to take action to protect the right to make "health care decisions" from undue government infringement. Section 38(c) limits the lawmaking authority of the Wyoming Legislature, while section 38(d) imposes an affirmative duty to act on all of state government. Section 38(d) simply does not apply when this Court addresses whether the Life Act and the chemical abortion statute violate section 38(a). To interpret section 38(d) as also imposing a limit on the Legislature's lawmaking authority would make section 38(c) meaningless, which would be improper as a matter of constitutional interpretation. *See Geringer*, 10 P.3d at 520 (explaining that the Wyoming Constitution "should not be interpreted to render any portion of it meaningless").

Plaintiffs look to section 38(d) and the phrase "undue infringement" as a justification for their strict scrutiny argument because section 38(c) cannot reasonably be interpreted as being a strict scrutiny test. (Pls.' Summ. J. Mem. at 28). As explained above, section 38(c) simply does not create a strict scrutiny test.

Plaintiffs also try to leverage the "undue infringement" language as support for an argument that this Court may consider factual evidence in addressing the facial constitutionality of the Life Act and the chemical abortion statute. (Pls.' Summ. J. Mem. at 48-49) (citing *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996)). They note that the court in *Jane L.* considered factual evidence in performing a *Casey* undue burden analysis. (Pls.' Summ. J. Mem. at 48). Plaintiffs then contend that *Jane L.* stands for the proposition

that "courts routinely rely upon factual evidence in adjudicating facial challenges to legislation."[40] (*Id.*).

Plaintiffs assert (without citing any legal authority) that the undue burden analysis in *Jane L.* "remains good law" even though the undue burden test has been overruled. (Pls.' Summ. J. Mem. at 49). This assertion makes no sense. The undue burden test is no longer good law, so an analysis based on that test also is no longer good law and has no persuasive value going forward. Regardless, the undue burden test was unique to the analysis of abortion laws under *Casey* and in no way aligned with the established federal law precedent for assessing the facial constitutionality of a statute that did not regulate abortion.

Plaintiffs also rely on a Montana case further support for the proposition that a court may consider evidence in assessing the facial constitutionality of a statute. (Pls.' Summ. J. Mem. at 50-51). In *Armstrong v. State*, the Montana Supreme Court considered evidence is assessing whether the state had a compelling interest for enacting a statute regulating how pre-viability abortions are performed. *Armstrong v. State*, 989 P.2d 364, 385-86 (Mont. 1999). *Armstrong* is distinguishable because the court there required the state to prove the compelling interest "by clear and convincing evidence." *Armstrong*, 989 P.2d at 384. The Wyoming Supreme Court has not adopted this evidentiary standard for challenges under the Wyoming Constitution. *Armstrong* is also distinguishable because the district court granted the requested remedy only as to two individual plaintiffs. *Armstrong*, 989

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[40] Plaintiffs cite to four other cases as support for the argument that a court may consider evidence in assessing the facial constitutionality of a statute. (Pls.' Summ. J. Mem. at 50) (citations omitted). Each case is distinguishable, either factually or legally.

P.2d at 371. The district court thus granted a true as applied remedy. Plaintiffs do not have not requested a similar type of applied remedy in this case.

Apart from their level of scrutiny argument, Plaintiffs make two substantive arguments in an attempt to show that the Life Act violates section 38. (Pls.' Summ. J. Mem. at 28-43). Neither argument has merit.

First, Plaintiffs contend that the Life Act "is not reasonably necessary to protect public health and welfare." (Pls.' Summ. J. Mem. at 28-38). In this argument, they attack the reasonableness of the various State interests identified in Wyo. Stat. Ann. § 35-6-121(a)(vi) and in the State Defendants' responses to interrogatories. (*Id.*). This argument ultimately fails because Plaintiffs have not shown that the Life Act is unreasonable and unnecessary in all circumstances. *See Powers*, ¶ 7, 318 P.3d at 303.

At least four of the identified State interests establish that the Life Act and the chemical abortion statute are reasonable and necessary to protect the health and general welfare of Wyoming citizens. The Act furthers the State's interest in respect for and preservation of prenatal life at all stages of development by prohibiting abortions generally subject to specific exceptions, thereby preventing the death of many unborn babies and protecting the legal rights of those unborn babies.

Plaintiffs essentially argue that this State interest is unreasonable because the Life Act does not preserve fetal life in all circumstances. (Pls.' Summ. J. Mem. at 30-31). This argument ignores the reality that the Life Act properly balances the legal rights of pregnant women with the legal rights of unborn babies to accomplish the long-standing public policy interest in prohibiting abortion generally to protect life from conception. In striking a

reasonable balance between these competing rights, the Wyoming Legislature determined that, in certain circumstances, the legal rights of the pregnant woman will take precedence over the legal rights of the unborn baby and then the woman will be allowed to end the pregnancy. The general ban on abortion is necessary to prevent the deaths of the many unborn babies that would be killed if abortion were generally allowed. Given that there is no constitutional right to abortion, the balance created by a general ban on abortion subject to specific exceptions is more than reasonable and necessary to promote the health and general welfare of Wyoming citizens and to protect the constitutional rights of Wyoming citizens.

The Life Act also furthers the State's interest in the prevention of discrimination on the basis of race, sex, or disability by prohibiting abortion generally, thereby preventing the killing of an unborn baby because of the baby's race or sex, or because the baby might be born with a disability. Plaintiffs castigate this State interest as being "absurd," but they offer no argument to show that it makes the Life Act unreasonable. (Pls.' Summ. J. Mem. at 36). Instead, Plaintiffs argue that the Life Act is unnecessary because "[t]here is absolutely no evidence that Wyoming women have used abortion as a tool of discrimination." (*Id.*). This argument fails because the legislative choice embodied in a statute "is not subject to courtroom fact-finding and need not be based on evidence or empirical data." *Greenwalt*, ¶ 39, 71 P.3d at 730. Regardless, the Wyoming Legislature alone determines "the policy, wisdom, and expediency of statutes" it enacts. *W.S. Buck Mercantile Co.*, 264 P. at 1025.

Plaintiffs also argue that, to further this interest, the Wyoming Legislature should have enacted a statute specifically banning discriminatory abortions instead of the broader prohibition on abortion in the Life Act. (Pls.' Summ. J. Mem. at 36). The fact that the Legislature could have enacted a more specific law to further the interest in preventing discriminatory abortions does not mean that a more comprehensive statute that furthers the same interest is unreasonable.

In addition, the Life Act furthers the State's interests in respect for human life and in protecting the rights conferred to all Wyoming citizens under the Wyoming Constitution by balancing the legal rights of the pregnant woman with the legal rights of the unborn baby. The Act recognizes that an unborn baby becomes a member of the human race at conception and, from that point forward, has a constitutionally protected right to life. The pregnant woman also has a constitutionally protected right to life. The Act assures that the life and legal rights of the pregnant woman and the life and legal rights of the unborn baby are protected during pregnancy but, as a policy matter, allows the legally protected rights of the pregnant woman to take precedence over the life of the unborn baby in some circumstances.

Plaintiffs do not offer much resistance to these State interests. They simply say that the interest in respect for human life "appears to be duplicative of" the State interests in protecting prenatal life and in protecting women's health. (Pls.' Summ. J. Mem. at 37). The reasonableness of this State interest is obvious. The Life Act respects the life of an unborn baby by protecting the child from being killed by abortion unless one of the exceptions

apply and respects the life of the pregnant woman by permitting a pregnancy to be ended if the pregnancy poses a substantial risk to the life or health of the pregnant woman.

Second, Plaintiffs contend that the Life Act "unduly infringes on the constitutional right of women to make their own health care decisions." (Pls.' Summ. J. Mem. at 38-43). This argument is a policy argument, plain and simple. It is completely devoid of cogent legal argument. Plaintiffs devote six pages to explaining the reasons why they disagree with the policies embodied in the Life Act. (*Id.*). To support this argument, they primarily cite to written testimony from various declarations. (*Id.*).

"Declaration of public policy is a matter for the legislature not the courts." *Union Pac. Res. Co. v. State*, 839 P.2d 356, 380 (Wyo. 1992). Plaintiffs should direct their policy arguments to the Wyoming Legislature and not to this Court. In addition, as explained above, the declaration testimony cited in support of this argument cannot be considered in addressing the facial constitutionality of the Life Act. And, to the extent that they rely on written testimony from their expert witnesses, this Court should not consider that testimony for the reasons stated in the State's motion to strike expert witnesses.

For the chemical abortion statute, Plaintiffs argue that the State has "no conceivable basis" to assert that the statute "is reasonable and necessary to protect public health and safety." (Pls.' Summ. J. Mem. at 43-47). They support this argument with written testimony from various declarations. (*Id.*). This argument also amounts to nothing more than a policy argument explaining why Plaintiffs disagree with the chemical abortion statute. This Court should not consider it because public policy is a legislative matter. *Union Pac. Res. Co.*, 839 P.2d at 380. In addition, to the extent that Plaintiffs rely on written testimony from

their expert witnesses to support this argument, this Court should not consider that testimony for the reasons stated in the State's motion to strike expert witnesses. In sum, Plaintiffs' argument regarding the chemical abortion statute in no way demonstrates that the statute is not reasonable and necessary.

3. Even if this Court concludes that abortion is "health care," the constitutional history shows that section 38 was not intended to implicitly confer a constitutional right to abortion.

Even if this Court concludes that abortion is "health care" for purposes of section 38, the constitutional history of the provision confirms that the Wyoming Legislature and the voters in Wyoming did not intend for section 38 to implicitly confer a constitutional right to abortion under the guise of making a "health care decision." This Court may resort to the constitutional history regardless of whether it concludes that the term "health care" is unambiguous or ambiguous. *See Powers*, ¶¶ 39-55, 318 P.3d at 314-19 (looking to constitutional history to confirm the plain meaning of a constitutional provision); ¶45 n.12, 318 P.3d at 316 n.12 (stating that a court may consider constitutional history when a constitutional provision is ambiguous). This Court also may consider extrinsic 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**[.]" *Cantrell*, ¶ 6, 133 P.3d at 985 (alteration and emphasis added).

The Senate debated SJ0002 (the bill that eventually because section 38) during Committee of the Whole on two different days – January 27 and 28, 2011. (Ex. C - *2011 Senate Journal* 295-97). The debate on January 28 shows that several senators had concerns that the introduced version of SJ0002, with the amendments suggested by the

Senate Judiciary Committee, was too long, had too many words, or was too complicated.[41] In response to those concerns, the Senate adopted an amendment proposed by Senator Schiffer (SJ0002SW001) that replaced the seven subsections in the introduced version of SJ0002 with one sentence. (Ex. C - *2011 Senate Journal* 295-96).

The proposed language that became section 38 (with minor changes) was introduced by Senator Perkins as an amendment during second reading. (Ex. C - *2011 Senate Journal* 297-98). The debate during second reading suggests that the Perkins amendment was intended to give each competent adult in Wyoming the freedom to choose whether to receive (or to not receive) health care services and the freedom to choose how to pay for such services.[42]

The debate also clearly shows that the Perkins amendment was not intended to give adults in Wyoming an unrestricted right to make health care decisions. (*Id.*). To this end, the proposed section 38(c) was intended to maintain the Legislature's authority to regulate the practice of medicine in Wyoming to protect Wyoming citizens. (*Id.*).

The Perkins amendment replaced the Schiffer amendment that would have allowed the Wyoming Legislature to define the extent of the right conferred by section 38. (Ex. C - *2011 Senate Journal* 296). Some legislators believed that the Schiffer amendment thereby deprived the right of any real meaning.[43] The debate on second reading

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[41] https://wyoleg.gov/2011/Audio/senate/s0128am1.mp3 (at 25:00 to 1:19:31)

[42] https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 (at 33:31 to 1:03:33)

[43] https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 (at 33:31 to 1:03:33)

shows that the Perkins amendment was intended to balance the individual adult's right to make health care decisions with the Legislature's traditional role in regulating the practice of medicine in this state.[44] At no point in the debate did any senator suggest that section 38 would, or was intended to, confer a constitutional right to abortion such that the Legislature could not prohibit abortion in the future if *Roe* were overturned.

The election history of section 38 also shows that the Legislature and the voters did not intend for that section to implicitly confer a constitutional right to abortion. To start, the statement endorsed on the general election ballot for the proposed amendment said nothing about abortion. The endorsement essentially provided a concise summary of section 38 gleaned from the text of the provision. No voter could read the endorsement and reasonably believe that, in voting to ratify section 38, she was amending the Wyoming Constitution to implicitly confer a constitutional right to abortion.

The information voters most likely would have consulted before voting also shows that the voters did not intend for section 38 to implicitly confer a constitutional right to abortion. The Wyoming Secretary of State voter guide for the 2012 general election described the proposed section 38 by repeating verbatim the endorsement language from the general election ballot.[45] The guide said nothing about abortion and did not say that voting for the proposed amendment would confer a constitutional right to abortion.

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[44] *Id.*

[45] https://sos.wyo.gov/Elections/Docs/2012/2012VoterGuide.pdf

On the Sunday before the election, a voter guide published in the only statewide newspaper in Wyoming reported that proposed section 38 "would ensure that there will be no requirements concerning health care insurance for Wyoming residents" and described proposed section 38 as "an attempt to remove Wyoming from the effects of the Patient Protection Affordable Care Act passed by Congress." (Ex. D). The guide did not say that section 38 would confer a right to abortion or protect the existing Wyoming abortion statute from being changed by the Wyoming Legislature in the future. It also did not say that section 38 would allow patients to receive medical procedures or treatments that were otherwise prohibited by law in Wyoming.

The historical setting surrounding the approval of section 38 confirms that both the Legislature and the voters intended for the provision to protect Wyoming citizens from requirements of the federal Affordable Care Act. During the 2011 legislative session, at least two bills were introduced with the intent of preventing the enforcement of the Affordable Care Act in Wyoming and two other joint resolutions to amend the Wyoming Constitution to address health care freedom were introduced.[46] Although SJ0002 was the only anti-Affordable Care Act legislation to pass during the 2011 legislative session, the fact that other bills and joint resolutions were introduced and debated shows the extent to

[46] https://www.wyoleg.gov/Legislation/2011/HB0035
https://www.wyoleg.gov/Legislation/2011/HB0039
https://www.wyoleg.gov/Legislation/2011/SJ0003
https://www.wyoleg.gov/Legislation/2011/HJ0009

which the Wyoming Legislature generally opposed the Affordable Care Act and sought to protect Wyoming citizens from its reach.

The Wyoming Legislature's opposition to the Affordable Care Act continued during the 2012 legislative session. During that session, the Legislature enacted a law to prohibit state agencies and any person representing the State of Wyoming from taking any steps to implement the Affordable Care Act at the state level until the U.S. Supreme Court decided a challenge to the constitutionality of the Affordable Care Act in *Florida v. U.S. Department of Health and Human Services* (Docket Number 11-400). 2012 Wyo. Sess. Laws 241-42. The enactment of this law further shows the Legislature's hostility towards the Affordable Care Act.

The Wyoming Legislature's hostility towards the Affordable Care Act reflected the prevailing attitude of Wyoming citizens at the time. When section 38 was ratified, a poll conducted by the University of Wyoming showed that 66% of the individuals surveyed disapproved of the Affordable Care Act.[47]

News reports before the 2012 general election conveyed that Section 38 that the proposed section 38 was intended to counteract or block the Affordable Care Act.[48] Consistent with this view, the leading scholar on the Wyoming Constitution has opined that section 38 "is perhaps best described as a 'message' amendment, expressing the state's

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[47] https://www.uwyo.edu/uw/news/2012/11/wyoming-residents-have-mixed-views-on-health-care-changes.html

[48] https://swampland.time.com/2012/10/31/ballot-initiative-of-the-day-will-wyoming-resist-obamacare/; *see also* (Ex. E).

displeasure with the controversial federal Affordable Care Act[.]" Robert B. Keiter, *The Wyoming State Constitution* 110 (2d ed. 2017). This scholar noted that section 38 "seems largely preempted by federal law and thus of limited relevance" because the U.S. Supreme Court upheld the Affordable Care Act in 2012. *Id.*

Other subsections in section 38 further corroborate the view that the Wyoming Legislature and the voters intended for section 38 to counteract the Affordable Care Act. Section 38(b) confers the constitutionally protected right for individuals to make "direct payment for health care without imposition of fines or penalties for doing so." Wyo. Const. art. 1, § 38(b). Health care providers generally accept direct payment for services rendered, so this subsection only makes sense when viewed in light of the individual mandate in the Affordable Care Act. "[T]he individual mandate requires most Americans to maintain 'minimum essential' health insurance coverage." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 539 (2012). By creating a state constitutional right to make direct payment for health care services, the Legislature and the voters intended to give Wyoming citizens an alternative to the individual mandate.

Section 38(d) dictates that the State of Wyoming "shall act to preserve" the rights conferred in section 38 "from undue government infringement." Wyo. Const. art 1, § 38(d) (alteration added). In this phrase, the word "government" necessarily includes the federal government and excludes the State of Wyoming. More specifically, it makes no sense to direct the State of Wyoming to take action to preserve the rights conferred in section 38 from undue infringement by the State of Wyoming, particularly because Section 38(c) already limits the State's authority to restrict the right to make health care decisions.

Section 38(d) thus directs the State to take action to preserve the rights conferred in section 38 from undue infringement by the federal government.

The foregoing history shows that the State of Wyoming and Wyoming citizens were concerned that the Affordable Care Act authorized the federal government to dictate health care decisions for individuals. Section 38 thus cannot be reasonably interpreted as implicitly conferring a constitutional right to abortion under the guise of making a "health care decision" because it was intended to push back on the federal government's implementation of the Affordable Care Act. The history and circumstances confirm that Wyoming Legislature and the voters did not intend for Section 38 to implicitly confer a constitutional right to abortion, to constitutionally protect the right to abortion as it existed in 2012, or to empower competent adult Wyoming citizens to dictate what types of health care are legally available in Wyoming.

4. If this Court concludes that the right to make "health care decisions" conferred by section 38(a) includes a right to abortion, Plaintiffs have not shown beyond a reasonable doubt that the Life Act and the chemical abortion statute impermissibly restrict that right in all circumstances.

Even if this Court concludes that the right to make "health care decisions" conferred by section 38(a) includes the right for a pregnant woman to get an abortion, the Life Act and the chemical abortion statute are not facially unconstitutional because they do not impermissibly restrict that right in all circumstances. Specifically, the Life Act and the chemical abortion statute do not infringe upon that right when the life or health of the pregnant woman exceptions in Wyo. Stat. Ann. § 35-6-124(a)(i) or Wyo. Stat. Ann. § 35-6-139(b)(iii) apply. Both exceptions permit a pregnancy to be ended if the pregnancy poses

a substantial risk to, or substantially endangers, the life or health of the pregnant woman.

The Life Act and the chemical abortion statute thus do not infringe upon a pregnant woman's right to make "health care decisions" in a scenario where her physician, using reasonable or appropriate medical judgment, determines that the pregnancy poses a substantial risk to, or will substantially endanger, the life or health of the pregnant woman if the pregnancy is not ended. In that scenario, the prohibition in § 35-6-123 or § 35-6-139(a) would not apply.

The fact that Plaintiffs cannot demonstrate that the Life Act and the chemical abortion statute will impermissibly infringe upon the right to make "health care decisions" in all circumstances dooms their section 38 argument. As a result, this Court should hold that the Life Act and the chemical abortion statute do not violate section 38.

B. The Life Act and the chemical abortion statute do not violate article 1, sections 18 and 19; article 7, section 12; or article 21, section 25.

Plaintiffs contend that the Life Act and the chemical abortion statute violate the provisions in the Wyoming Constitution that prohibit the appropriation of state monies to religious entities (article 1, section 19), prohibit sectarianism in public schools (article 7, section 12), and protect the free exercise of religion by Wyoming citizens (article 1, section 18 and article 12, section 25). (Pls.' Summ. J. Mem. at 59-72 (establishment); 72-79 (free exercise). Their arguments on these issues do not comport with the applicable law or with the facts surrounding the enactment of the Life Act and the chemical abortion statute.

1. The Life Act and the chemical abortion statute do not violate article 1, section 19 or article 21, section 25 and they do not establish a religious viewpoint.

Plaintiffs incorrectly identify article 1, section 18 and article 21, section 25 as provisions that prohibit the establishment of religion. (Pls.' Summ. J. Mem. at 59). To the extent that the Wyoming Constitution prohibits the establishment of religion, that prohibition exists only in article 1, section 19 and article 7, section 12. *See In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d 728, 744 (Wyo. 2017) (referring to article 1, section 19 and article 7, section 12 as a "variation of the federal establishment clause").

Plaintiffs' establishment of religion arguments lack merit because the Life Act and the chemical abortion statute: (1) do not violate the plain language in article 1, section 19 and article 7, section 12; (2) do not afford greater protections than the federal Establishment Clause, and, (3) if this Court concludes that state provisions provide protections similar to the federal Establishment Clause, the Life Act and the chemical abortion statute still do not violate article 1, section 19 and article 7, section 12.

a. The Life Act and the chemical abortion statute do not violate the plain language of article 1, section 19 and article 7, section 12.

Article 1, section 19 and article 7, section 12 have very different language than the federal Establishment Clause. Article 1, section 19 provides:

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

Wyo. Const. art. 1, § 19. This section "provides that state funds shall not be used to support any sectarian or religious institutions." Keiter, *The Wyoming State Constitution* 89. Article 7, section 12 provides:

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

Wyo. Const. art. 7, § 12. This section "explicitly prohibits the use or incorporation of religious doctrine or beliefs in the public schools." Keiter, *The Wyoming State Constitution* 219.

No provision in the Life Act or the chemical abortion statute gives or appropriates money to any sectarian or religious society or institution. *See generally* Wyo. Stat. Ann. § 35-6-120 through -138; § 35-6-139. The statutes also do not have anything to do with public education. *Id.* The Life Act and the chemical abortion statute therefore do not violate the plain language of either article 1, section 19 or article 7, section 12.

b. Article 1, section 19 and article 7, section 12 do not afford greater protections than the federal Establishment Clause.

Plaintiffs ask this Court to adopt "something akin" to the establishment of religion test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to interpret article 1, section 19 and article 7, section 12. (Pls.' Summ. J. Mem. at 61-62). They make this request under the guise that the Wyoming Constitution can be more protective of individual rights than the U.S. Constitution. (Pls.' Summ. J. Mem. at 61). This argument fails for two reasons.

First, Plaintiffs have not made a precise, analytically sound argument to explain why article 1, section 19 and article 7, section 12 provides broader protections than the federal Establishment Clause. As the party asserting that a provision in the Wyoming Constitution is more protective than an analogous federal constitutional provision, Plaintiffs "must provide proper argument and briefing using a precise and analytically sound approach" before this Court may consider the claim. *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 837 (Wyo. 2019) (cleaned up). Although a "precise and analytically sound approach to state constitutional interpretation will likely involve consideration of some of the [*Saldana*/*Gunwall* criteria]," those criteria are not compulsory or exclusive. *Id.* (alteration added).

Here, Plaintiffs have done nothing more than make conclusory statements in an attempt to align the various religion provisions in the Wyoming Constitution with the three elements of the establishment of religion test from *Lemon*. (Pls.' Summ. J. Mem. at 61-62). And, in doing, so, they improperly rely on the free exercise of religion provisions (article 1, section 18 and article 21, section 25). (*Id.*).

Moreover, although Plaintiffs acknowledge that the U.S. Supreme Court has abandoned the establishment of religion test from *Lemon*, they essentially ask this Court to adopt the test any way. (Pls.' Summ. J. Mem. at 61). The Supreme Court abandoned the *Lemon* test because it "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Kennedy v. Bremerton Sch. Dist.*, — U.S. —, —, 142 S.Ct. 2407, 2427 (2022) (cleaned up). Plaintiffs do not explain why this Court should willingly adopt a constitutional test that has proven to be unworkable.

For these reasons, Plaintiffs' establishment of religion argument is neither precise nor analytically sound. This Court, therefore, should not consider their argument. *Sheesley*, ¶ 15, 437 P.3d at 837.

Second, the textual differences between the federal Establishment Clause and the state constitutional provisions show that the federal provision provides broader protection than article 1, section 19 and article 7, section 12. The First Amendment provides that "Congress shall make no law respecting an establishment of religion[.]" U.S. Const. amend. I (alteration added). The state constitutional provisions provide a much more specific, much more limited, protection against the establishment of religion. They only prohibit the use of state funds to support sectarian or religious institutions and the teaching or incorporation of religious doctrine or beliefs in the public schools. Keiter, *The Wyoming State Constitution* 89, 219. The more specific language used in the Wyoming constitutional provisions confirms that they do not afford greater protections than the establishment of religion prohibition in the First Amendment.

c. If this Court concludes that article 1, section 19 and article 7, section 12 provide protections similar to the federal Establishment Clause, the Life Act and the chemical abortion statute do not violate the state constitutional provisions.

Even if this Court concludes that the state constitutional provisions provide equivalent protections to those found in the establishment of religion clause in the First Amendment, the Life Act and the chemical abortion statute still do not run afoul of article 1, section 19 and article 7, section 12. The U.S. Supreme Court opinion in *Harris v. McRae* is instructive on this point. *See Harris v. McRae*, 448 U.S. 297, 319 (1980).

Harris involved a legal challenge to the constitutionality of the Hyde Amendment for fiscal year 1980, which "prohibited … the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances." *Harris*, 448 U.S. at 302. The plaintiffs argued that the funding limitations in the Hyde Amendment violated the federal establishment clause "because it incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Harris*, 448 U.S. at 318-19 (alteration added). The *Harris* Court rejected this argument, opining that

> [a]lthough neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, **it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions.**

Harris, 448 U.S. at 319 (cleaned up) (emphasis added). By way of example, the Court explained that, although "the Judaeo-Christian religions oppose stealing," that fact "does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* And, to drive its point home, the Court concluded that "the Hyde Amendment … is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion." *Id.* (citation omitted) (ellipsis added).

The Life Act and the chemical abortion statute say nothing about religion or faith. In addition, no legislative history suggests the Wyoming Legislature intended for the Life Act and the chemical abortion statute to prefer one faith-based view over others or that either was based on any religious view.

Religion was discussed during the debates on the Life Act, primarily during Committee of the Whole in the House of Representatives and Committee of the Whole in the Senate.[49] During the debate, a few legislators expressed a concern that the Life Act violated the religion provisions in the Wyoming Constitution, while many others stated that the bill was not based on any religious view.[50] Religion also was discussed in Committee of the Whole when the Senate debated the chemical abortion statute.[51] And, similar to the debate on the Life Act, a couple of senators expressed a concern that the chemical abortion statute violated the religion provisions in the Wyoming Constitution, while others stated that the bill was not based on any religious view.[52] Thus, the legislative history confirms that any similarity between the Life Act or the chemical abortion statute and any particular faith-based view is coincidental and therefore does not run afoul of either article 1, section 19 or article 7, section 12.

Plaintiffs acknowledge that, under the current federal Establishment Clause test, "the government may not 'make a religious observance compulsory.'" (Pls.' Summ. J. Mem. at 61) (quoting *Kennedy*, 142 S.Ct. at 2429). They then argue that the Life Act makes religious observance compulsory because it prohibits abortion based upon the religious

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[49] https://www.youtube.com/watch?v=ynn-N0JNa48 (House of Representatives) (at 1:53:02 to 3:26:26)
https://www.youtube.com/watch?v=8O2bRdO_F5U (Senate) (at 57:41 to 2:30:52)

[50] *Id.*

[51] https://www.youtube.com/watch?v=mSrEf3j-f1A (at 2:55:15 to 3:18:19)

[52] *Id.*

view that life begins at conception. (Pls.' Summ. J. Mem. at 62). They also say that the chemical abortion statute implicitly does the same thing. (Pls.' Summ. J. Mem. at 65). Plaintiffs incorrectly assume the premise that life begins at conception is exclusively a religious viewpoint – it is not.

Two provisions in the Life Act allude to life beginning at conception. *See* Wyo. Stat. Ann. § 35-6-121(a)(i) (stating that an unborn baby is "a member of the species homo sapiens from conception"); § 35-6-121(a)(v) (stating that the Wyoming Legislature "has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception"). But the view that life begins at conception is not exclusively a religion-based viewpoint. *See Roe*, 410 U.S. at 159, *overruled on other grounds by Dobbs*, 142 S.Ct. at 2284 (acknowledging that "the respective disciplines of medicine, philosophy, and theology" each have views on the question of when life begins"). At least two courts have noted that life begins at conception can be a scientific view. *See Foster v. State Farm Mut. Auto. Ins. Co.*, 843 F.Supp. 89, 98 n.2 (W.D.N.C 1994) (noting that, in 1981, a Senate Judiciary Committee subcommittee "specifically found, as a matter of scientific fact, that human life begins at conception"); *Nealis v. Baird*, 996 P.2d 438, 453 & n.69 (Okla. 1999) (citing numerous medical treatises in stating that "[c]ontemporary scientific precepts accept as a given that human life begins at conception").

Plaintiffs rely on declaration testimony from two of their expert witnesses as proof that the belief that life begins at conception is a distinctly religious viewpoint. (Pls.' Summ. J. Mem. at 66-67). This testimony should be rejected for two reasons. First, this Court should strike the two expert witnesses in question for the reasons stated in the motion to

strike expert witnesses filed by the State Defendants on September 5, 2023. Second, the testimony should be rejected because it is incorrect to the extent that it states that life begins at conception is a distinctly religious viewpoint.

Plaintiffs also cite to an amicus curiae brief from the *Dobbs* case as proof that the belief that life begins at conception is a distinctly religious viewpoint. (Pls.' Summ. J. Mem. at 67) (citation omitted). This argument should be rejected because, a explained above, it is incorrect.

Plaintiffs support their establishment of religion argument with an extensive block quote from a Kentucky circuit court order. (Pls.' Summ. J. Mem. at 67-68)) (quoting *EMC Womens Surgical Ctr. v. Cameron*, No. 22-CI-3255, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022)). They offer this passage without explaining why it is factually or legally relevant to this Court's interpretation of the Wyoming constitutional and statutory provisions at issue. The order was issued by a trial level court in Kentucky based on facts unique to that case. In addition, it appears that the circuit court judge in the Kentucky case raised the religion question *sua sponte*. *See Cameron v. EMC Womens Surgical Ctr., PSC*, 664 S.W.3d 633, 707 (Ky. 2023) (Nickell, J. concurring in part and dissenting in part). In sum, Plaintiffs have given this Court no reason to believe that the Kentucky case provides persuasive authority for addressing the establishment of religion claim Plaintiffs have raised in this case.

Plaintiffs also resort to the history of criminal law in Wyoming to support their establishment of religion claim. They assert that "no secular legal tradition" in Wyoming supports the declaration in the Life Act that an unborn baby is a human being from

conception. (Pls.' Summ. J. Mem. at 68). To this end, they argue that, before 2021, the killing of a fetus was a crime distinct from the crimes of first and second degree murder. (*Id.*) (citing *Goodman v. State*, 601 P.2d 178, 184-85 & n.11) (Wyo. 1979)). Then, without explanation, they leap to the conclusion that a religious viewpoint is the "only plausible motivation" for the declaration in the Life Act. (Pls.' Summ. J. Mem. at 68).

Plaintiffs' legal history argument ignores an important aspect of the history of criminal law in Wyoming – the history of abortion regulation. From 1869 to 1884, abortion was a crime in Wyoming with no exceptions. From 1884 until 1973, abortion was a crime in Wyoming with one exception. So, from 1869 until 1973, Wyoming criminal law protected an unborn baby from conception unless the pregnancy threatened the life of the pregnant woman. The State changed the criminal abortion statute after *Roe* was decided, but still prohibited and criminalized abortion to the extent allowable under *Roe*. Thus, *Roe* forced the State to abandon its long-established legal tradition of protecting an unborn baby from conception in the abortion context. Nothing in the legal history of the pre-*Roe* criminal abortion statute suggests that it was motivated in any way by a religious viewpoint. The statute reflected a traditionalist view of abortion. *See Harris*, 448 U.S. at 319.

Plaintiffs' reference to recent amendments to the first and second degree murder statutes ignores a past criminal statute that protected the life of an unborn baby. In 1890, the Wyoming Legislature enacted a statute to make it a felony to kill "an unborn quick child" by willfully assaulting the pregnant woman and knowing that she is pregnant. *See* Wyo. Revised Stats. § 4955 (1899). The word "quick" was dropped from the statute in the 1910 compiled statutes, but the State Defendants have found no evidence that the Wyoming

Legislature amended the word out of the statute.[53] The statute remained unchanged until 1971, when it was amended to read as follows:

> Whoever unlawfully kills an unborn child, **or causes a miscarriage, abortion or premature expulsion of a fetus,** by any assault or assault and battery wilfully [*sic*] committed upon a pregnant woman, knowing her condition, is guilty of a felony and shall be imprisoned in the pententiary [*sic*] not more than fourteen years.

1971 Wyo. Sess. Laws ch. 108 (emphasis added). In 1982, the crime of killing an unborn child was omitted from the criminal code without explanation during a comprehensive revision of the code. Theodore E. Lauer, *Goodbye 3-Card Monte: The Wyoming Criminal Code of 1982*, 19 Land & Water L. Rev. 107, 124 (1984).

The enactment of a crime for the killing an unborn quick child in addition to the criminal abortion statute confirms that the Wyoming Legislature intended to protect fetal life from conception through birth. The criminal abortion statute protected the life of the unborn child from conception by criminalizing the use of poisons, substances or instruments to procure a miscarriage. The unborn child statute protected the life of an unborn child from quickening by criminalizing the act of killing an unborn child by a different means – by assaulting a woman known to be pregnant.

When the Legislature enacted the killing an unborn child in 1890, it also amended the criminal abortion statute to increase to term of incarceration to match the term in the unborn quick child statute (up to fourteen years). (1890 Terr. Wyo. Sess. Laws ch. 73, §

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[53] The history line of the statute shows that it was not amended between the publication of the 1899 Revised Statutes of Wyoming and the 1910 Compiled Statutes of Wyoming. *See* Wyo. Stat. Ann. § 6-4-507 (1977) (attached as Ex. G).

31). The harmonizing of the criminal penalty provisions in the two statutes shows that Legislature intended for the statutes to work in harmony to provide comprehensive protection to the life of an unborn child from conception through birth. Thus, contrary to Plaintiffs' argument, the State policy on abortion has traditionally protected unborn children from conception.

Plaintiffs also are factually incorrect when they say that "no secular legal tradition" in Wyoming supports the declaration in the Life Act that an unborn baby is a human being from conception. The Life Act is not unique in acknowledging the legal rights of the unborn. For example, since 1979 the Wyoming statutes governing intestate succession have provided as follows: "Persons conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent." Wyo. Stat. Ann. § 2-4-104. And, in the context of the Wyoming Worker's Compensation Act, the Wyoming Supreme Court has held that, "[a]s a matter of law, the prospective child is a dependent of the putative father if in fact the child, when born, is actually his child." *State ex rel. Wyo. Worker's Comp. Div. v. Halstead*, 795 P.2d 760, 767 (Wyo. 1990).

Given that different disciplines have different views on when life begins, Plaintiffs must identify specific evidence in the legislative history of the Life Act and the chemical abortion statute that shows the Legislature intended for either statute to establish a religious view of when life begins. They have not done so. Accordingly, their argument based on the life begins at conception language in the Life Act fails.

Plaintiffs attempt to leverage public statements made by two of the sponsors of the Life Act as evidence that the Life Act and the chemical abortion statute were religiously motivated. (Pls.' Summ. J. Mem. at 68-71). This argument has two fatal flaws.

First, the statements Plaintiffs cite in their argument were made during a roundtable discussion on the abortion statute that was enacted in 2022 and repealed in 2023. Statements made about a different statute cannot be legally relevant to the legislative intent underlying the statute being challenged.

Second, even if this Court concludes that statements about the 2022 abortion statute may be relevant here, this Court cannot consider "the subjective intent of a particular legislator" as evidence of the legislative intent of a statute. *Mountain Cement Co. v. S. of Laramie Water & Sewer Dist.*, 2011 WY 81, ¶ 55 n.12, 255 P.3d 881, 902 n.12 (Wyo. 2011) (citing *Indep. Producers Mktg. Corp. v. Cobb*, 721 P.2d 1106, 1108 (Wyo. 1986)). This rule applies to statements made by the sponsor of the legislation. *Greenwalt*, ¶ 52, 71 P.3d at 735.

Plaintiffs cite or quote several federal cases for the proposition that this Court may consider the legislative history of a statute (including public statements made by individual legislators) to discern whether a statute violates the federal Establishment Clause. (Pls.' Summ. J. Mem. at 63-64. They rely on most of the cases for the unremarkable proposition that a reviewing court may look to legislative history to discern the intent of a statute.[54]

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[54] *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *McCreary Cnty., Ky. v. Am. Civil Liberties Union*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

However, they rely on two cases to argue that this Court may consider statements by individual legislators to discern the intent of the Life Act and the chemical abortion statute – *Edwards v. Aguillard* and *Kitzmiller v. Dover Area School District*. (Pls.' Summ. J. Mem. at 63-64) (citations omitted). Their reliance on these cases is misplaced, albeit for different reasons.

Edwards is easily distinguishable. Plaintiffs rely on *Edwards* for the proposition that the U.S. Supreme Court found an establishment clause violation based in part on correspondence from the legislative sponsor of the challenged statute. (Pls.' Summ. J. Mem. at 64) (citing *Edwards v. Aguillard*, 482 U.S. 578, 595-97 (1987)). In *Edwards*, the Court referred to correspondence between the sponsor of the statute and key witnesses who testified on the statute in describing the argument in the appellees' motion for summary judgment. *Edwards*, 482 U.S. at 595. The Court did not rely on that correspondence in its analysis on the merits. *Edwards*, 482 U.S. at 595-96.

Plaintiffs quote *Kitzmiller* for the proposition that federal courts "routinely and properly look to individual legislators' public statements to determine legislative purpose." (Pls.' Summ. J. Mem. at 64) (quoting *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 746 n.20 (M.D. Pa. 2005)). *Kitzmiller* does not apply here because federal case law governing the interpretation of a statute in light of the federal Establishment Clause cannot trump the binding Wyoming Supreme Court precedent cited above. And, as a result, the statements of individual legislators are not relevant in determining the legislative intent of the Life Act or the chemical abortion statute.

Plaintiffs also point to a legislative finding in the introduced version of House Bill Number 152 as proof of the religious motivation behind the bill. (Pls.' Summ. J, Mem. at 70-71) (citation omitted). This particular finding was removed by an amendment in the Senate.[55] Plaintiffs maintain that this particular finding reflects the intent of the sponsors regarding the Life Act and that removing the finding from the bill did not remove the intent conveyed by the finding. (Pls.' Summ. J, Mem. at 70-71).

This Court must interpret the Life Act to discern the legislative intent of the Act, and the subjective intent of individual legislators (including the sponsors of the bill) does not reflect the intent of the Wyoming Legislature as a whole. *Barlow Ranch, Ltd. P'ship v. Greencore Pipeline Co. LLC*, 2013 WY 34, ¶ 45, 301 P.3d 75, 89-90 (Wyo. 2013). It also defies logic to argue that language the Legislature amended out of a bill in any way continues to be legally relevant in discerning the legislative intent of the bill after it becomes law.

2. The Life Act and the chemical abortion statute do not violate the free exercise of religion guarantees in article 1, section 18 and article 21, section 25.

Plaintiffs contend that the Life Act and the chemical abortion statute violate the guarantee of free exercise of religion found in article 1, section 18 and article 21, section

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

of the Wyoming Constitution. (Pls.' Summ. J. Mem. at 72-79). Article 1, section 18 provides that

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

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

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

Wyo. Const. art. 21, § 25.

These related but distinct provisions protect the free exercise of religion in Wyoming. Keiter, *The Wyoming State Constitution* 88, 337. The Wyoming Supreme Court has characterized article 1, section 18 and article 21, section 25 as "religious liberty" provisions. *In re ASM*, 2021 WY 109, ¶ 20 n.2, 496 P.3d 764, 769 n.2 (Wyo. 2021). The Court has also described article 1, section 18 as being "similar" to the free exercise clause in the First Amendment. *Trujillo v. State*, 2 P.3d 567, 575 n.4 (Wyo. 2000).

In dicta, the Wyoming Supreme Court has suggested that article 1, section 18 and article 21, section 25 "may offer broader protections than does the United States Constitution." *In re Neely*, ¶ 42, 390 P.3d at 742. Plaintiffs leverage this statement in *Neely* to argue that this Court should interpret article 1, section 18 and article 21, section 25 as expansively as the Minnesota and Washington Supreme Courts have interpreted free exercise language in the constitutions of those states. (Pls.' Summ. J. Mem. at 74-76)

(citing *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) & *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 224 (Wash. 1992)).

Plaintiffs' argument based on the *Neely* case suffers from at least two infirmities. First, Plaintiffs incorrectly state that the *Neely* Court "noted that the free exercise provisions of the Wyoming Constitution are 'significantly broader that similar provision[s] of the United States Constitution." (Pls.' Summ. J. Mem. at 73) (citing *In re Neely*, ¶¶ 40, 42, 390 P.3d at 742) (alteration added by Plaintiffs). This statement mispresents what the *Neely* Court said. In paragraph 40, the *Neely* Court noted that the appellant had made that point. *In re Neely*, ¶ 40, 390 P.3d at 742.

Second, the statements by the *Neely* Court regarding article 1, section 18 and article 21, section 25 are dicta. The *Neely* Court stated equivocally that the state constitutional provisions "may offer broader protections than does the United States Constitution," then concluded that neither provision applied in the case. *In re Neely*, ¶ 42, 390 P.3d at 742. "[E]quivocal statements in the context of dicta have no precedential value." *BP Am. Prod. Co. v. Dep't of Revenue, State of Wyo.*, 2005 WY 60, ¶ 18, 112 P.3d 596, 606 (Wyo. 2005).

Nothing in the history of section 18 suggests that the framers intended for it to provide greater protections than the free exercise of religion language in the First Amendment to the United States Constitution. The constitutional history of section 18 provides no helpful guidance on the issue of whether the framers intended for the provision to provide greater protections than the federal provision. *See, e.g.,* Keiter, *The Wyoming State Constitution* 88-89 (summarizing the constitutional history of article 1, section 18). In *Trujillo*, the Wyoming Supreme Court suggested that the federal free exercise of religion

provision and section 18 are similar, but it has not directly addressed the issue. *See Trujillo*, 2 P.3d at 575 n.4.

Absent definitive guidance from the Wyoming Supreme Court, "decisions in other states bearing on the same or similar constitutional language" should be given "persuasive effect" in interpreting section 18. *Saunders*, ¶ 23, 344 P.3d at 778. The language in section 18 "is very similar" to a provision in the North Dakota Constitution.[56] Prien, *The Background of the Wyoming Constitution* 48 (emphasis in original). The free exercise clause in the North Dakota Constitution "affords protections similar to those provided by the Establishment Clause."[57] *North Dakota v. Burckhard*, 579 N.W.2d 194, 196 (N.D. 1998); *see also Bendewald v. Ley*, 168 N.W. 693, 696 (N.D. 1917) (explaining that the free exercise clause in the North Dakota Constitution has "[t]he same effect" as the free exercise protection in the First Amendment). This Court thus should interpret the free exercise clause in section 18 as affording protections similar to the federal Free Exercise Clause.

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[56] The *Neely* Court's suggestion that court interpretations of the free exercise provisions from Minnesota and Washington might show how section 18 should be interpreted appears to be inconsistent with Wyoming Supreme Court precedent. Although the three state constitutional provisions have the same language addressing limits on the free exercise right ("shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state"), the provisions are otherwise not textually similar. *Compare* Wyo. Const. art. 1, § 18 *with* Wash. Const. art. 1, § 11 & Minn. Const. art. 1, § 16. Under Wyoming Supreme Court precedent, the free exercise provision in the North Dakota Constitution provides the best authority for construing section 18 because it is textually similar and the framers had a copy of the North Dakota Constitution at the Wyoming constitutional convention. *See Dworkin*, 839 P.2d at 911-12.

[57] Although the *Burckhard* court used the term "Establishment Clause," the court actually was referring to the Free Exercise Clause. *North Dakota*, 579 N.W.2d at 196.

The U.S. Constitution "does not confer a right to abortion" and "does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs*, 142 S. Ct. at 2279, 2284. Thus, prohibiting abortion does not impermissibly infringe upon the protections provided by the Free Exercise Clause. And, if section 18 confers similar protections as the federal Free Exercise Clause, then the Life Act and the chemical abortion statute do not impermissibly infringe upon section 18.

The Life Act and the chemical abortion statute do not impermissibly infringe upon article 21, section 25 because that provision does not provide broader or different protections than article 1, section 18. In the original version of the Wyoming Constitution, the language that now appears in section 25 was located in section 2 of the last subpart of the document. *Journal and Debates of the Constitutional Convention of Wyoming*, App. at 58 (1893). This subpart was not identified as an "Article," but instead was entitled "Ordinances." *Id.* The original Constitution included five "ordinances," one of which was the freedom of religion provision now found in section 25. *Id*. The five ordinances are "irrevocable without the consent of the United States and the people of the state[.]" *Id.*

The title "Ordinances" and the irrevocability clause in that subpart suggest that framers included the five ordinances in the Wyoming Constitution because Congress required them to do so to be admitted as a state. For most states in the Union, an existing U.S. territory adopted a state constitution after Congress passed an enabling act to establish conditions that Congress expected the territory to meet before and after it was admitted as a new state. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed Upon States Entering the Union*, 46 Am. J. Leg. Hist., 128 (2004)

(alteration added and footnote with citations omitted). Congress often required these conditions "to be drafted into the new state constitution itself and/or to be part of an 'irrevocable' ordinance passed by the state constitutional convention." *Id.*

The Territory of Wyoming followed a slightly different path to statehood, but it appears that framers included the five ordinances in the Wyoming Constitution because they believed that doing so was required for admission as a new state. In 1888, the Tenth Territorial Legislature adopted a joint resolution asking Congress to pass an enabling act to authorize the Territory to take the steps necessary to be admitted as a state into the Union. 1888 Wyo. Sess. Laws. 226-28. During the 50th Congress, proposed enabling acts for Wyoming were introduced in both the House of Representatives and in the Senate. (S. Rep. No. 51-115, App. B at 31 (1890) (summarizing the "steps antecedent" to the passage of the act of admission for Wyoming)).

When Congress did not act quickly enough to pass an enabling act, the Territory convened a constitutional convention in September 1889 and adopted a constitution. Larson, *History of Wyoming* 238, 256. The debates show that the framers followed the Senate proposed enabling act (S. 2445) as they drafted and debated the ordinances to be included in the Wyoming Constitution. *See, e.g., Debates of the Constitutional Convention* 154, 156, 198, 212, 249, 587, 751. Among other things, S. 2445 dictated that the Wyoming Constitution must include five ordinances that are "irrevocable without the consent of the United States and the people of the State [of Wyoming.]" (Ex. F at 15) (alteration added). The first ordinance provided "[t]hat perfect toleration of religious sentiment shall be

secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship." *Id.* (alteration added).

The debates show that the framers believed the five ordinances in S. 2445 had to be included in the Wyoming Constitution before Congress would admit Wyoming as a state. During the debate on the ordinances subpart, former Territorial Governor Hoyt argued that the religious tolerance ordinance and two other ordinances, "while proper in themselves, … necessarily belong to other articles to be incorporated in the constitution, and should be omitted" from the ordinances subpart. *Debates of the Constitutional Convention* 587. He suggested that the religious tolerance language belonged in the bill of rights. *Id.* In response, future Wyoming Supreme Court Justice Potter stated as follows:

> I think I can call Governor Hoyt's attention to the senate bill, to the end of the bill where it refers to Wyoming, and I find the same provision in the bill referring to other states, that said convention will provide by ordinances irrevocable, without the consent of the United States and the people of said state, certain things, and this section is in exactly the words of the senate bill. **No matter if they are in other places of the constitution, they must go into the constitution under the head of ordinances.**

Id. (emphasis added).

The debates at the constitutional convention make it clear beyond any reasonable doubt that the framers included the religious tolerance ordinance in the Wyoming Constitution because they believed S. 2445 required it to be in the Constitution. Nothing in the constitutional history of article 21, section 25 even remotely suggests that the framers intended for section 25 to offer broader protections for religious liberty than those found in the U.S. Constitution or those found in article 1, section 18. The Wyoming Supreme Court has not addressed this question, but the leading scholar on the Wyoming Constitution

has opined that section 25 is redundant of article 1, section 18. *See* Keiter, *The Wyoming State Constitution* 331 (stating that article 21, sections 24 through 28 "are redundant of earlier provisions" in the Wyoming Constitution).

Precedent from Idaho supports the view that article 21, section 25 does not confer broader or different protections than article 1, section 18. The Idaho Constitution has a religious tolerance ordinance with the exact same language as section 25. *Compare* Idaho Const. art. 21, § 19, cl. 1 *with* Wyo. Const. art. 21, § 25. The Idaho Constitution also has a provision in its bill of rights that guarantees religious liberty, although the wording of the Idaho provision is somewhat different that the wording of article 1, section 18. *Compare* Idaho Const. art. 1, § 4 *with* Wyo. Const. art. 1, § 18.

The Idaho Supreme Court has held that religious tolerance ordinance in the Idaho Constitution does not afford greater protections than the religious liberty provision in the bill of rights article. *State v. Heath*, 485 P.3d 1121, 1127 (Idaho 2021). In *Heath*, a plaintiff argued that religious tolerance ordinance afforded greater protections because the ordinance has broader, more emphatic language and is placed after the free exercise provision in the constitution. *Heath*, 485 P.3d at 1126-27.

The *Heath* court rejected these arguments, explaining that the inclusion of the religious tolerance ordinance in the Idaho Constitution and its specific language "is a result of a historical quirk." *Heath*, 485 P.3d at 1127. The Territory of Idaho convened a constitutional convention before Congress had passed and enabling act for Idaho. *Id.* (citation omitted). Without an enabling act to guide them, the delegates at the Idaho convention adopted nearly verbatim the ordinances that were set forth in an omnibus

enabling act that Congress has recently passed for North and South Dakota, Montana, and Washington. *Id.* (citation omitted). They did so without much debate even though the ordinances addressed subject matter that also was addressed in other provisions in the Idaho Constitution. *Id.* (citation omitted). Based on this history, the *Heath* court concluded that "the language and existence" of the religious tolerance ordinance "merely reflects the belt-and-suspenders approach the delegates of the Idaho convention took to anticipating and assuaging congressional concerns about admitting Idaho to the Union." *Id.*

The same conclusion holds true for the language and existence of article 21, section 25 in the Wyoming Constitution. The debates on section 25 confirm that the framers included it in the Constitution because they believed S. 2445 required it to be there with the exact wording that was used in S. 2445. *Debates of the Constitutional Convention* 587. Nothing in the constitutional history of section 25 suggests the framers intended for it to confer broader or different protections than article 1, section 18.

As the foregoing analyses demonstrate, article 1, section 18 and article 21, section 25 do not afford broader of different protections than the federal Free Exercise Clause. However, even if this Court: (1) concludes that article 1, section 18 and article 21, section 25 confer broader or different protections than the federal Free Exercise Clause; and (2) adopts federal case law interpreting the federal Free Exercise Clause, the Life Act and the chemical abortion statute do not impermissibly infringe upon the free exercise of religion.

Plaintiffs assert that the Life Act violates Ms. Dow's free exercise rights because it prohibits "abortion under circumstances where it would be acceptable or required under Jewish doctrine[.]". (Pls.' Summ. J. Mem. at 78) (alteration added). They then argue that

the Life Act triggers strict scrutiny review because the Life Act "provides a mechanism for individualized exceptions for sexual assault, incest and certain medical conditions," but does not allow an exception for religious beliefs. (Pls.' Summ. J. Mem. at 79).

Under the federal Free Exercise Clause, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia, Penn.*, — U.S. —, —, 141 S.Ct 1868, 1876 (2021). The U.S. Supreme Court has explained this two-part test as follows:

> A government policy will not qualify as neutral if it is specifically directed at religious practice. A policy can fail this test if it discriminates on its face, or if a religious exercise is otherwise its object. A government policy will fail the general applicability requirement 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.

Kennedy, 142 S.Ct. at 2422 (2022) (cleaned up) (emphasis added).

A law provides "a mechanism of individualized exceptions" when "it invites the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S.Ct at 1877 (cleaned up). If the law in question provides for a system of individualized exceptions, the State "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (cleaned up).

Even if this Court concludes that the Life Act and the chemical abortion statute each have individualized exceptions as described in the *Fulton* test, Plaintiffs' free exercise of religion argument fails for two reasons. First, the Life Act and the chemical abortion statute do not infringe upon Ms. Dow's asserted right in all circumstances. Plaintiffs assert that

her 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." (Pls.' Summ. J. Mem. at 78). Both the Life Act and the chemical abortion statute permit a pregnancy to be ended if necessary to preserve the life or health of the pregnant woman. Wyo. Stat. Ann. § 35-6-124(a)(i); Wyo. Stat. Ann. § 35-6-139(b)(iii). To prevail on a facial constitutional challenge, Plaintiffs must demonstrate that the Life Act and the chemical abortion statute are unconstitutional in all circumstances. *See Powers*, ¶ 7, 318 P.3d at 303. They cannot do so with respect to Ms. Dow and her religious beliefs.

But even if *Fulton* applied, the State has a "compelling reason" for not including a religious hardship exception in the statutes – protecting the legal rights of unborn babies. In the context of the free exercise provisions, abortion implicates competing constitutionally protected rights – the right to free exercise of religion by the pregnant woman and the right to life of the unborn baby. Neither right is absolute. Without the Life Act and the chemical abortion statute, the free exercise right of the pregnant woman would extinguish the unborn baby's constitutionally protected right to life and the unborn baby could do nothing to protect its rights. The Wyoming Legislature thus enacted the Life Act and the chemical abortion statute to balance these competing rights and assure that the rights of the unborn baby have some protection.

C. The Life Act and the chemical abortion statute do not violate article 1, section 3.

Plaintiffs contend that the Life Act and the chemical abortion statute violate their right to equal protection as guaranteed by article 1, section 3. (Pls.' Summ. J. Mem. at 79-81). Section 3 provides:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, **the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever** other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Wyo. Const. art. 1, § 3 (emphasis added).

The plain language of this section makes clear that the framers intended for section 3 to protect political rights and privileges. *Maxfield v. State*, 2013 WY 14, ¶ 29, 294 P.3d 895, 902 (Wyo. 2013). The provision unambiguously provides that "the laws of this state **affecting the political rights and privileges of its citizens** shall be without distinction of race, color, sex, or any circumstance or condition whatsoever[.]" Wyo. Const. art. 1, § 3 (alteration and emphasis added). Nothing in the Life Act or the chemical abortion statute in any way affects the political rights and privileges of the citizens of the State of Wyoming.

Plaintiffs quote section 3, but do not explain how or why the Life Act and the chemical abortion statute violate the plain language of this provision. (Pls.' Summ. J. Mem. at 79-81). Instead, they offer three arguments seemingly based on a broader concept of equal protection, none of which have merit.

First, Plaintiffs quote a 1992 Wyoming Supreme Court decision to suggest that the equal protection provisions in the Wyoming Constitution provide more robust protection

that their federal counterparts. (Pls.' Summ. J. Mem. at 80) (*quoting Johnson v. State Hearing Exam'rs Office*, 838 P.2d 158, 164-66 (Wyo. 1992)). This argument cannot be squared with existing Wyoming Supreme Court precedent regarding the intent of the Declaration of Rights article in the Wyoming Constitution.

In 1890, the individual rights recognized and protected by the United States Constitution did not apply to the states, so "[i]f Wyoming's citizenry were to enjoy individual constitutional rights at the time of statehood," those rights had to be identified in the Wyoming Constitution. Keiter, *The Wyoming State Constitution* 45. The Wyoming Supreme Court shares this view, explaining that

> [t]he most that can be definitely ascertained from the differences in the constitutional histories of the two documents may well be explained by the simple fact that it was the prevailing view that protection of individual rights was considered to be the province of the state and the federal rights acted only upon the federal government, and the Wyoming drafters acted accordingly.

Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999).

To address individual rights, the framers of the Wyoming Constitution enumerated specific individual rights in article 1 under the header of "Declaration of Rights." *See generally* Wyo. Const. art. 1. Article 1 in the original version of the Wyoming Constitution had thirty-seven sections. (1890 Wyo. Sess. Laws at 35-38). In these sections, the framers both recognized rights and protected those rights from undue government interference. Keiter, *The Wyoming State Constitution* 45.

Some scholars have opined that the framers intended for article 1 "to provide greater protection of citizens' rights." *Vasquez*, 990 P.2d at 484-85 (referencing Robert B. Keiter

& Tim Newcomb, *The Wyoming Constitution: A Reference Guide* 11-12 (1993)). But, outside of the *Johnson v. State Hearing Examiner's Office* case, the Wyoming Supreme Court has not endorsed this view. *See Vasquez*, 990 P.2d at 485 (declining to adopt this view even though the court acknowledged that Mr. Keiter and Mr. Newcomb competently theorized about the framers' intent). To the contrary, the Court has explained that "[n]o state constitutional history exists which would lead us to believe that Wyoming initially included individual rights as a strong statement of societal values or because it intended to provide greater protection of individual rights." *Vasquez*, 990 P.2d at 484.

Consistent with this statement in *Vasquez*, the Wyoming Supreme Court precedent decided after the *Johnson v. State Hearing Examiner's Office* case holds that the equal protection provisions in the Wyoming Constitution do not afford greater protection than the federal Equal Protection Clause. *See, e.g., Greenwalt*, ¶ 39, 71 P.3d at 73 (stating that the federal and state equal protection provisions "have the same aim in view") (citation omitted); *Martin*, ¶ 9 n.3, 503 P.3d at 72 n.3 (same). Although the Wyoming Supreme Court has quoted the "more robustly" language from *Johnson* once since *Greenwalt* was decided,[58] the Court's prevailing view appears to be that the equal protection provisions in the Wyoming Constitution and the Equal Protection Clause provide similar protections.

Next, Plaintiffs quote language from the preliminary injunction order for the 2022 abortion statute to argue that the Life Act and the chemical abortion statute impermissibly

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[67] *See In re Neely*, ¶ 48, 390 P.3d at 744.

discriminate against women on the basis of sex. (Pls.' Summ. J. Mem. at 81). In *Dobbs*, the U.S. Supreme Court specifically found that "the goal of preventing abortion does not constitute invidiously discriminatory animus against women." *Dobbs*, 142 S.Ct. at 2245. The same is true here.

Finally, Plaintiffs argue that strict scrutiny applies because equal protection is a fundamental right. (Pls.' Summ. J. Mem. at 80-81). The equal protection provisions in the Wyoming Constitution protect existing rights or interests. To invoke strict scrutiny, Plaintiffs must show that they have a fundamental right and that the Life Act and the chemical abortion statute infringe upon that right. Here, Plaintiffs have to show that the Wyoming Constitution implicitly confers a constitutional right to abortion. They have not done so, so any equal protection analysis of the Life Act and the chemical abortion statute must apply the rational basis test.

The Life Act and the chemical abortion statute do not violate equal protection because they are rationally related to a legitimate state interest or objective. Under the equal protection provisions in the Wyoming Constitution, a statute that affects ordinary interests in the social welfare area will pass constitutional muster if it is rationally related to a legitimate state interest or objective. *White*, 784 P.2d at 1315. Abortion qualifies as an ordinary interest in the social welfare area because it is not a fundamental interest under the Wyoming Constitution. A statute is "rationally related" to a legitimate state objective if the statute "constitutes a reasonable and effective means" of accomplishing that objective. *Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988).

The rational basis test "is highly deferential to the constitutionality of the statute." *White*, 784 P.2d at 1316. "Whether legislation is wise or unwise, politic or impolitic, is not a judicial question." *White v. Hinton*, 30 P. 953, 955 (Wyo. 1892). The Wyoming Legislature "is ordinarily the sole judge of the policy, wisdom, and expediency of statutes enacted pursuant to the police power, and …must be presumed to have known the needs of the state and to have enacted the law in question for the greater welfare of the people as a whole[.]"*W.S. Buck Mercantile Co.*, 264 P. at 1025 (alterations and ellipsis added).

In assessing the reasonableness of a statute enacted under the police power, this Court does not substitute its judgment for that of the Wyoming Legislature "on questions about which reasonable men might differ. If the purpose of the law is to promote the public welfare, the means adopted need not be the best." *City of Laramie*, 275 P. at 107. A police power statute affecting ordinary economic or social interests need only be "of debatable reasonableness." *Cheyenne Airport Bd.*, 707 P.2d at 727. For such a statute, "if any conceivable basis exists which will reasonably, although arguably, support the enactment," then this Court should "assume that the legislature has acted in a non-arbitrary and rational manner, and … hold the statute to be constitutional." *White*, 784 P.2d at 1316 (ellipsis added).

That being said, the rational basis test is not toothless. *Greenwalt*, ¶ 39, 71 P.3d at 731. In numerous cases, this Court has held a statute to be unconstitutional because it the statute was not rationally related to a legitimate state interest. *See Greenwalt*, ¶ 83, 71 P.3d at 745 (Kite, J. dissenting) (collecting cases).

The State interests served by the Life Act and the chemical abortion statute depend in part on the Wyoming Legislature's finding that life begins at conception. See Wyo. Stat. Ann. § 35-6-121(a)(i) (finding that an unborn baby is "a member of the human race from conception"). As a threshold matter, therefore, this Court should address whether the Wyoming Legislature may lawfully exercise its lawmaking authority to define when life begins as a public policy matter.

In the exercise of its plenary lawmaking authority, the Wyoming Legislature may enact a statute on any subject unless some provision in the U.S. Constitution or in the Wyoming Constitution prohibits it from doing so. *State ex rel. Wyo. Agric. Coll.*, 84 P. at 106. No provision in the U.S. Constitution precludes the Wyoming Legislature from deciding when life begins for purposes of Wyoming abortion law. *See Dobbs*, 142 S.Ct. at 2284 (stating that the United States "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion").

Also, no provision in the Wyoming Constitution precludes the Wyoming Legislature from enacting a statute to define when life begins for purposes of Wyoming abortion law. As explained above, the Wyoming Constitution does not confer either an explicit or an implicit right to abortion and the view that life begins at conception is not strictly a religious viewpoint, so defining when life begins in the Life Act does not run afoul of any constitutional provision in those regards.

Wyoming Supreme Court precedent supports the conclusion that no provision in the Wyoming Constitution precludes the Wyoming Legislature from enacting a statute to define when life begins. In interpreting the Wyoming Worker's Compensation Act, the

Court has held that, "[a]s a matter of law, the prospective child is a dependent of the putative father if in fact the child, when born, is actually his child." *Halstead*, 795 P.2d at 767. In reaching this holding, the *Halstead* Court noted that it would be "constitutionally impermissible" discrimination to hold otherwise. *Id.*

The Life Act also is not the only Wyoming statute to protect the legal rights of the unborn. For example, the Wyoming statutes governing intestate succession provide that a baby conceived before the decedent's death but born thereafter has the same right of inheritance as if the baby had been born in the lifetime of the decedent. Wyo. Stat. Ann. § 2-4-104. Likewise, since 2021 the Wyoming criminal statutes have made it a crime to murder an unborn child. Wyo. Stat. Ann. §§ 6-2-101(d), 6-2-104(b). For purposes of these criminal statutes, the Wyoming Legislature has defined "unborn child" as "a member of the species homo sapiens, at any state of development, who is carried in the womb[.]" Wyo. Stat. Ann. § 6-1-104(a)(xviii).

The findings in the Life Act represent a lawful exercise of the Legislature's plenary lawmaking authority because no constitutional provision prohibits the Wyoming Legislature from enacting a statute to define when life begins. Thus, the question becomes whether state interests furthered by the Life Act and the chemical abortion statute are rationally related to a legitimate government interest or purpose.

In the Life Act, the Wyoming Legislature identified numerous legitimate interests or objectives served by the regulation of abortion under the Life Act. Wyo. Stat. Ann. § 35-6-121(a)(vi). For instance, the Act serves the objectives of "respect for and preservation of prenatal life at all stages of development" and "the protection of maternal health and

safety[.]" *Id.* (alteration added). It respects and preserves prenatal life at all stages of development by generally prohibiting abortion from fertilization to childbirth subject to specific exceptions. The Act reasonably balances this objective with the interests of the pregnant woman by allowing for a pregnancy to be ended if it poses a substantial risk to the life or health of the pregnant woman and by allowing a pregnant woman to have an abortion if the pregnancy resulted from a non-consensual act (incest or sexual assault).

Plaintiffs argue that the Life Act is not rationally related to the interest in protecting prenatal life because the Act allows for an abortion when the pregnancy results from incest or sexual assault. (Pls.' Summ. J. Mem. at 31-32). This argument assumes ignores the fact that this exception balances the respective legal rights involved by allowing the rights of the pregnant woman to take precedence if the pregnancy resulted from a non-consensual act. This argument also ignores the fact that, even with this exception, the Life Act still preserves the life of many unborn babies by prohibiting abortion generally.

The Life Act also protects maternal health and safety. The prohibition on abortion does not apply when, "in the physician's reasonable medical judgment," the pregnancy must be ended to prevent: (1) "the death of the pregnant woman"; (2) "a substantial risk of death for the pregnant woman because of a physical condition"; or (3) "the serious and permanent impairment of a life-sustaining organ of a pregnant woman[.]" Wyo. Stat. Ann. § 35-6-124(a)(i). Under this exception, a physician may perform a pre-viability separation procedure to end the pregnancy as long as "the physician makes all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of the unborn baby in a manner consistent with reasonable medical judgment[.]" *Id.* This

exception reflects the Wyoming Legislature's policy decision to protect the life and health of the pregnant woman over the life of the unborn baby when the pregnancy poses a substantial risk to the woman's life or health, as long as reasonable medical efforts are made to also protect the life of the unborn baby.

Additionally, the Life Act furthers the State's interests in respect for human life and in protecting the rights conferred to all Wyoming citizens under the Wyoming Constitution by balancing the legal rights of the pregnant woman with the legal rights of the unborn baby. The Act recognizes that an unborn baby becomes a member of the human race at conception and, from that point forward, has a constitutionally protected right to life. The pregnant woman also has a constitutionally protected right to life. The Act assures that the life and legal rights of the pregnant woman and the life and legal rights of the unborn baby are protected during pregnancy but, as a policy matter, allows the legally protected rights of the pregnant woman to take precedence over the life of the unborn baby when one of the specific exceptions applies.

The chemical abortion statute is constitutional for the same reasons as the Life Act. The statute respects and preserves prenatal life at all stages of development by generally prohibiting abortion from fertilization subject to specific exceptions. It also protects maternal health and safety by allowing a pregnant woman to get an abortion "to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment[.]" Wyo. Stat. Ann. § 35-6-139(b)(iii) (alteration added). The statute assures that the life and legal rights of the pregnant woman and the life and legal rights of the unborn baby are protected during pregnancy but, as a policy matter,

allows the legally protected rights of the pregnant woman to take precedence over the life of the unborn baby when one of the specific exceptions applies.

The list of State interests in § 35-6-121(a)(vi) and the additional State interests offered by the State Defendants are not exclusive for purposes of rational basis review. The Wyoming Legislature is not constitutionally required "to articulate its reasons for enacting a statute," so the legislative choice embodied in a statute "is not subject to courtroom fact-finding and need not be based on evidence or empirical data." *Greenwalt*, ¶ 39, 71 P.3d at 730. The identification of the state interest or purpose for the statute may be based on rational speculation. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Therefore, even if this Court rejects the interests or objectives cited by the Wyoming Legislature or by the State Defendants, this Court still must consider whether any other State interest may be served by the Life Act and the chemical abortion statute.

Abortion is not a fundamental right under the Wyoming Constitution, so this Court should review the Life Act and the chemical abortion statute under the rational basis test. However, if this Court concludes that the strict scrutiny test applies, then the Life Act and the chemical abortion statute are constitutional because both are narrowly tailored to achieve a compelling state interest.

The most obvious compelling interest here is the State's interest in preserving prenatal life at all stages of development. When abortion was a right conferred under the U.S. Constitution, the U.S. Supreme Court recognized that states have a "substantial … interest in potential life throughout pregnancy." *Planned Parenthood of Se. Penn.*, 505 U.S. at 876, *overruled on other grounds by Dobbs*, 142 U.S. at 2284 (ellipsis added). Plaintiffs

acknowledge as much in their summary judgment memorandum. (Pls.' Summ. J. Mem. at 29-30) (stating that "protection of prenatal life is undoubtedly a legitimate and compelling basis to regulate health care"). Now that there is no constitutional right to abortion, the State's interest in preserving prenatal life elevates to a compelling interest because only the State through its lawmaking authority can take action to prevent the indiscriminate killing of many unborn babies by means of abortion.

To satisfy the "narrowly tailored" component of the strict scrutiny test, the State must show "that it could not use a less onerous alternative to achieve its objective." *Martin,* ¶ 14, 503 P.3d at 73 (citation omitted). The Life Act and the chemical abortion statute both are the least onerous means to achieve the objective of preserving prenatal life at all stages of development because both statutes have exceptions that permit a pregnancy to be terminated when the pregnancy threatens the life or health of the pregnant woman. The statutes assure that the life and legal rights of the pregnant woman and the life and legal rights of the unborn baby are protected during pregnancy but, as a policy matter, allow the legally protected rights of the pregnant woman to take precedence over the life of the unborn baby when one of the specific exceptions applies.

D. The Life Act and the chemical abortion statute do not violate article 1, sections 2, 7, or 36.

Plaintiffs contend that the Life Act and the chemical abortion statute impermissibly infringe upon three unenumerated rights – "the right to be let alone," "the right to associate with one's family," and the right to bodily autonomy – and thereby violate article 1,

sections 2, 7, and 36 of the Wyoming Constitution. (Pls.' Summ. J. Mem. at 82-85). For the reasons explained below, their arguments on these points lack merits.

1. The Life Act and the chemical abortion statute do not violate section 36.

Plaintiffs appear to contend that the Life Act and the chemical abortion statute violate section 36 because the statutes allegedly violate the three unenumerated rights noted above. That literally cannot be so because section 36 is not a source of individual rights.

Although the language in section 36 largely mirrors the language in the Ninth Amendment to the United States Constitution, a *Saldana/Gunwall* analysis is not necessary to determine if section 36 affords greater protections than its federal counterpart. Section 36 is not a source of any individual rights, so it cannot afford different or greater individual rights than the Ninth Amendment.

Section 36 provides that "[t]he enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people." Wyo. Const. art. 1, § 36. The framers included section 36 in the Wyoming Constitution "as an acknowledgment that fundamental personal rights, not specifically enumerated in the constitution, still are protected from governmental infringement. Those rights not granted to the state by the constitution remain with the people." *Watt v. Watt*, 971 P.2d 608, 615 (Wyo. 1999) (overruled on other grounds in *Arnott v. Arnott,* 2012 WY 167, 293 P.3d 440 (Wyo. 2012)).

As explained in *Watt*, by enumerating specific fundamental rights in the Wyoming Constitution the framers did not intend to deny other fundamental rights that are not

mentioned in the Wyoming Constitution. In essence, section 36 says that the interpretive doctrine of *expressio unius est exclusio alterius* cannot be used to argue the Wyoming Constitution does not protect fundamental rights that are not specifically mentioned in the Constitution.[59]

The phrase "others retained by the people" confirms that the framers did not intend for section 36 to grant or confer any fundamental natural rights. By saying that the people "retained" the other fundamental rights not enumerated in section 36, the framers acknowledged that those rights exist independent of section 36 and of the Wyoming Constitution. Section 36 thus merely acknowledges unenumerated fundamental rights exist but it does not create any such rights.

The leading scholar on the Wyoming Constitution has opined that the "language and purpose" of section 36 "appears similar to that of the Ninth Amendment." Keiter, *The Wyoming State Constitution* 108. Federal court interpretations of the Ninth Amendment show this opinion to be true.

The founding fathers of the U.S. Constitution added the Ninth Amendment to the Bill of Rights "to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution." *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991)

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[59] The *expressio unius est exclusio alterius* maxim dictates that "[w]here a statute enumerates the subjects or things on which it is to operate, or the persons affected, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned[.]" *City of Cheyenne v. Huitt*, 844 P.2d 1102, 1104 (1993) (alterations added).

(quoting *Charles v. Brown*, 495 F. Supp. 862, 863-64 (N.D. Ala. 1980)). As one federal district court has explained:

> [T]he Ninth Amendment does not specify any rights of the people, rather it serves as a savings clause to keep from lowering, degrading or rejecting any rights which are not specifically mentioned in the document itself. The Ninth Amendment does not raise those unmentioned rights to constitutional stature; it simply takes cognizance of their general existence.

Charles, 495 F. Supp. at 863. Or, in other words, "[t]he Ninth Amendment is a rule of interpretation rather than a source of rights." *Froelich v. State, Dep't of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999) (citation omitted).

The same holds true for section 36. Accordingly, if section 36 is not a source of rights, then the Life Act and the chemical abortion statute cannot violate section 36.

2. The Life Act and the chemical abortion statute do not violate section 2.

Although section 2 is a source of individual rights, the Life Act and the chemical abortion statute also do not violate that provision. Section 2 is entitled "Equality of all" and provides that "[i]n their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal." Wyo. Const. art. 1, § 2 (alteration added). Section 2 prohibits "arbitrary and invidious discrimination." *Hansen v. State*, 904 P.2d 811, 817 (Wyo. 1995). In *Dobbs*, the U.S. Supreme Court specifically found that "the goal of preventing abortion does not constitute invidiously discriminatory animus against women." *Dobbs*, 142 S.Ct. at 2246. Accordingly, the Life Act and the chemical abortion statute do not violate section 2.

3. The Life Act and the chemical abortion statute do not violate section 7.

Section 7 also is a source of individual rights, but the Life Act and the chemical abortion statute also do not violate that provision. Section 7 provides that "[a]bsolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Wyo. Const. art. 1, § 7 (alteration added). It appears that the language in section 7 was borrowed from the 1868 edition of *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* authored by Michigan Supreme Court Justice and University of Michigan Law Professor Thomas M. Cooley. The language in section 7 appears verbatim in the Cooley treatise. Cooley, *Constitutional Limitations* 35. In his treatise, Justice Cooley characterized the no absolute, arbitrary power principle as "a general principle[] of republican government" expected to be found in the declaration of rights section in a state constitution. *Id.* (alteration added).

The published debates from the constitutional convention provide circumstantial evidence that the delegates borrowed the language in section 7 from the Cooley treatise. The framers followed a United States Senate proposed enabling act for Wyoming (S. 2445) as they drafted the Wyoming Constitution. *See, e.g., Debates of the Constitutional Convention* 154, 156, 198, 212, 249, 587, 751. At least two delegates specifically stated that the framers intended to follow the requirements of S. 2445 in drafting the Wyoming Constitution. *See Debates of the Constitutional Convention* 154 (Mr. Jeffrey: "In following out the manner of providing a constitution for the future state of Wyoming, it has been seen

fit to follow the provisions as laid down in Senate Bill No. 2,445."); 156 (Mr. Jeffrey: "I think that it is the general desire of the members of this convention that in framing this constitution we should follow out as nearly as possible the provisions of this Senate Bill No. 2,445."); 198 (Mr. Teschemacher: "I think that the members of this convention all remember that we are supposed to be working under the senate bill …"); 249 (Mr. Teschemacher: "if we are acting under Senate Bill 2,445, which we have been trying to act under, …"); 751 (Mr. Jeffrey: "I presume it is the intention of this convention to proceed in all respects as far as possible in conformity with this senate bill …").

S. 2445 included a requirement that the Wyoming Constitution "be republican in form." (Ex. F, at 15). Given that the Cooley treatise described the no absolute, arbitrary power principle as a general principle of republican government expected to the found in the declaration of rights section in a state constitution, and given that section 7 has the exact same language as the Cooley treatise, it makes sense that the language in questions derived from the Cooley treatise.[60]

The Wyoming Supreme Court defined the scope of section 7 in *White v. State*. In a parenthetical to a citation in *White*, the Wyoming Supreme Court explained that the framers

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[60] Section 2 in the Kentucky Constitution has language similar to section 7. Section 2 provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. One author has stated that Wyoming borrowed the language in section 7 from the Kentucky Constitution, but she did not cite any authority to support that statement. Allison Connelly, *A Sleeping Giant: Section II of the Kentucky Bill of Rights*, 15 The Advocate Newsletter 115 (June 1992).

included section 6 and section 7 separately in article 1 of the Wyoming Constitution because they understood

> that the concept of due process consisted not only of the historically accepted procedural element evident on the face of § 6, but also entailed restraints on the passage of substantive laws such that the majority could exercise its will against an individual only to the extent that such an exercise was reasonable and not arbitrary.

White, 784 P.2d at 1318 (citing *Langley*, 84 P.2d at 770-71)). In *White*, the Court concluded that: (1) section 7 protects existing individual rights from the unreasonable and arbitrary exercise of the State's police powers; and (2) a statute that passes constitutional muster under the Fourteenth Amendment also complies with section 7. *White*, 784 P.2d at 1318.

A state statute that regulates abortion will be sustained under the Fourteenth Amendment if it could be rationally related to a legitimate state interest. *Dobbs*, 142 S.Ct. at 2284. As explained above, the Life Act and the chemical abortion statute are rationally related to a legitimate State interest, so those statutes pass constitutional muster under the Fourteenth Amendment and therefore do not violate section 7.

4. The "right to be let alone" is not a recognized unenumerated right under Wyoming law.

Plaintiffs contend that the Life Act and the chemical abortion statute violate the unenumerated "right to be let alone." (Pls.'s Summ. J. Mem. at 82-83). They equate the "right to be let alone" with the right to privacy. (*Id.*). No provision in the Wyoming Constitution explicitly confers a general right to privacy so, in essence, Plaintiffs contend

that the Wyoming Constitution confers an implicit right to privacy and this implicit right to privacy includes an implicit right to abortion.[61] They are wrong on both counts.

The phrase "right to be let alone by government" comes from a dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In his dissent in *Olmstead*, Justice Louis Brandeis explained that, in adopting the Fourth and Fifth Amendments to the U.S. Constitution, the framers

> 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 let alone-the most comprehensive of rights and the right most valued by civilized men**. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting) (emphasis added). Although first stated in a dissenting opinion of a now overruled case,[62] the U.S. Supreme Court has relied on the "right to be let alone" principle in cases after *Olmstead* was overruled. *See, e.g., Winston v. Lee*, 470 U.S. 753, 758-59 (1985); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

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[61] Article 6, section 11 addresses privacy in the context of voting. It provides in part that "[a]ll voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory." Wyo. Const. art. 6, § 11.

[62] The U.S. Supreme Court overruled *Olmstead* in *Katz v. United States*, 389 U.S. 347, 353 (1967).

Plaintiffs' attempt to divine an implicit right to abortion from the "right to be let alone" principle fails because the Wyoming Supreme Court has not adopted the principle, although the Court has quoted the phrase in two past opinions.[63] *See Emp. Sec. Comm'n of Wyo. v. W. Gas Processors*, 786 P.2d 866, 872 n.10 (Wyo. 1990); *Howard v. Aspen Way Enters., Inc.*, 406 P.3d 1271, 1277 (Wyo. 2017).

In *Employment Security Commission,* the Court quoted the phrase in a footnote summarizing the federally protected right to privacy. *Emp't Sec. Comm'n of Wyo.*, 786 P.2d at 872 n.10. The Court did not adopt the "right to be let alone" principle as a right conferred and protected by the Wyoming Constitution.

The *Employment Security Commission* Court also referred in *dicta* to "the right to privacy in Wyoming[.]" *Emp. Sec. Comm'n of Wyo.*, 786 P.2d at 872. In a footnote tied to this phrase, the Court cited three Wyoming Supreme Court cases and article 1, section 36 in the Wyoming Constitution as authority for this so-called right to privacy. *Emp. Sec. Comm'n*, 786 P.2d at 872 n.11 (citations omitted). None of the cited cases hold that the Wyoming Constitution confers or protects a general right to privacy. They address privacy in the federal law context or as a matter of Wyoming common and statutory law. *See Scadden v. State*, 732 P.2d 1036, 1040 (Wyo. 1987) (federal law); *Arnold v. Mountain West Farm Bureau Mut. Ins. Co.*, 707 P.2d 161, 165 (Wyo. 1985) (attorney-client privilege

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[63] Without citing to *Olmstead*, the Wyoming Supreme Court in 1936 equated the "right to privacy" in one's home to a "right to be let alone." *Town of Green River v. Bunger*, 58 P.2d 456, 460 (Wyo. 1936). The *Town of Green River* Court made this statement in the context of the right to privacy in one's home. *Id.*

under Wyoming law); *Beardsley v. Wierdsma*, 650 P.2d 288, 295 (Wyo. 1982) (federal law). The citation to article 1, section 36 suggests that the *Employment Security Commission* Court viewed the right to privacy as an unenumerated fundamental right, but the Wyoming Supreme Court has never recognized a general right of privacy as an unenumerated right.

No one can read footnotes 10 and 11 in *Employment Security Commission* and reasonably conclude that the Wyoming Supreme Court has recognized the "right to be let alone" as a right conferred and protected under the Wyoming Constitution. Accordingly, Plaintiffs' reliance on *Employment Security Commission* is misplaced.

Howard also does not support Plaintiffs' "right to be let alone" argument. In *Howard*, the Court stated that "Wyoming's commitment to individual privacy interests is well established." *Howard*, ¶ 22, 406 P.3d at 1277. The *Howard* Court then cited to *Town of Green River* and *Employment Security Commission* as support for this statement. *Id.* The Wyoming Supreme Court did not recognize the "right to be let alone" in *Employment Security Commission*, so *Howard* cannot reasonably be interpreted as adopting the "right to be let alone" principle.[64]

[64] To the extent that the U.S. Constitution confers a right to privacy as described by Justice Brandeis in *Olmstead*, that right cannot also include an implicit right to abortion because the U.S. Constitution "does not confer a right to abortion." *Dobbs*, 142 S.Ct. at 2279. Therefore, even if the Wyoming Constitution confers an implicit right to privacy to the same extent as the U.S. Constitution, that right does not encompass a right to abortion.

In the final analysis, neither *Employment Security Commission* nor *Howard* support an argument that the Wyoming Constitution confers a "right to be left alone" as a general right to privacy, let alone a right as expansive as Plaintiffs suggest. And, even if this Court concludes that the Wyoming Constitution confers and protects a "right to be let alone," that right does not include an implicit right to abortion. Accordingly, Plaintiffs' attempt to divine a right to abortion from the "right to be left alone" principle lacks merit.

The Wyoming Supreme Court has not recognized an implicit general right to privacy, but it has recognized an implicit right to privacy in the Wyoming Constitution in one specific circumstance. Article 1, section 4 provides in part that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated[.]" Wyo. Const. art. 1, § 4. The Wyoming Supreme Court has "expressed willingness to protect the privacy rights of citizens" under this section "if police conduct is unreasonable under all the circumstances." *Fertig*, ¶ 20, 146 P.3d at 498. But the unambiguous language in section 4 limits its reach to "unreasonable searches and seizures," neither of which includes an implicit right to abortion.

5. The right to familial association does not confer an implicit right to abortion.

Plaintiffs contend that the Life Act and the chemical abortion statute violate the unenumerated "right to control the composition of one's family." (Pls.' Summ. J. Mem. at 83). They equate this alleged right to "the right to associate with one's family," which is a fundamental right that has been recognized by the Wyoming Constitution. (Pls.' Summ. J. Mem. at 83) (citation omitted).

The recognized right to associate with one's family does not include an implicit right to abortion. Under the Wyoming Constitution, "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. 1, §§ 2, 6, 7, and 36 and *Matter of Voss' Adoption*, 550 P.2d 481 (Wyo. 1976)) (other citations omitted). This fundamental right is grounded in the history and tradition of humanity. *Matter of Voss' Adoption*, 550 P.2d at 485. The history and tradition of familial association thus cannot include a right to abortion because the right to abortion is not deeply rooted in the history and tradition of the United States, let alone the history and tradition of humanity. *See Dobbs*, 142 S. Ct. at 2242-43.

Plaintiffs do not make a legal argument to explain how or why the recognized right to associate with one's family includes an implicit right to abortion. (Pls.' Summ. J. Mem. at 83). They simply note that the right to familial association is "a fundamental liberty" and then move on to their bodily autonomy argument. (*Id.*) (citation omitted). As a result, they have not carried their burden of proof on this point.

6. The right to bodily autonomy is not a recognized unenumerated right under Wyoming law.

The Wyoming Supreme Court has not recognized a right to bodily autonomy under the Wyoming Constitution, so Plaintiffs rely on cases from Kansas and Montana as the source for such a constitutional right. (Pls.' Summ. J. Mem. at 83-84) (citations omitted). In essence, they argue that the Wyoming Constitution protects an implicit right to bodily autonomy, and that implicit right includes a right to abortion. Although not quite as perfunctory as their familial association argument, Plaintiffs have not provided a cogent

legal argument to explain how or why the Wyoming Constitution reasonably can be interpreted as protecting an implicit right to bodily autonomy or why such an implicit right includes an implicit right to abortion.

For the Kansas case, Plaintiffs merely summarize the case by providing two block quotations and basically explaining the holding of the court regarding the natural right to bodily autonomy. (Pls.' Summ. J. Mem. at 83-84) (citing *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 483, 497-98, 502 (Kan. 2019)). They do not provide a legal analysis to cogently explain why the analysis in *Hodes* provides persuasive authority for interpreting the Wyoming Constitution. Their argument based on *Hodes* thus fails because it lacks a "precise, analytically sound approach." *Dworkin*, 839 P.2d at 909.

Regardless, *Dobbs* destroys the persuasiveness of *Hodes* as authority for recognizing abortion as an implicit right under the Wyoming Constitution. In *Dobbs*, the U.S. Supreme Court concluded that abortion is not deeply rooted in the history and tradition of this country and is not implicit in ordered liberty and therefore is not a fundamental or natural right in this country. *Dobbs*, 142 S. Ct. at 2242. So, even if *Hodes* could be considered to be persuasive authority on the question of whether bodily autonomy is a fundamental or natural right, *Hodes* is not persuasive on the question of whether abortion is a fundamental or natural right. That question was answered in *Dobbs*.

For the Montana case, Plaintiffs again merely summarize the case by providing a block quotation and basically explaining the holding of the court regarding the right to personal autonomy. (Pls.' Summ. J. Mem. at 84) (citing *Armstrong*, 989 P.2d at 382-83). They do not provide a corresponding legal analysis to cogently explain why the analysis in

Armstrong provides persuasive authority for interpreting the Wyoming Constitution. Their argument based on *Armstrong* similarly fails because it lacks a "precise, analytically sound approach." *Dworkin*, 839 P.2d at 909.

Armstrong has no persuasive value as authority for interpreting the Wyoming Constitution because the holding in that case regarding the implicit right to abortion relied on an explicit right to privacy provision in the Montana Constitution. *Armstrong*, 989 P.2d at 384 (citing Mont. Const. art. 2, § 10). The Wyoming Constitution does not have a similar privacy provision and, as explained above, does not confer a right of privacy outside of the search and seizure context. Accordingly, the reasoning of *Armstrong* does not extend to the Wyoming Constitution, either legally or logically.

Plaintiffs conclude their unenumerated rights argument by yet again insisting that strict scrutiny applies to this Court's review of the constitutionality of the Life Act and the chemical abortion statute. (Pls.' Summ. J. Mem. at 85). For the reasons explained above, Plaintiffs have not shown that "the right to be let alone," "the right to associate with one's family," or the right to bodily autonomy provide a basis for concluding that abortion is a fundamental right under the Wyoming Constitution. Absent a fundamental right, the strict scrutiny test does not apply to this Court's review of the Life Act and the chemical abortion statute. *Martin,* ¶ 14, 503 P.3d at 73.

E. The Life Act and the chemical abortion statute are not impermissibly vague under article 1, section 6.

Plaintiffs contend that the Life Act and the chemical abortion statute are unconstitutionally vague. (Pls.' Summ. J. Mem at 51-52). Their vagueness arguments lack

merit because a person of ordinary intelligence can read the Life Act and the chemical abortion statute and comprehend the conduct prohibited.

With respect to Plaintiffs' vagueness claim, this Court should reach the claim only if it finds that the Life Act and the chemical abortion statute do not otherwise infringe upon a constitutionally protected right of Plaintiffs. If this Court concludes that these statutes are otherwise unconstitutional, the vagueness challenge becomes moot.

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

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

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

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

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

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

To prevail on a claim that a statute is unconstitutionally vague on its face, a plaintiff must show that the statute "reaches a substantial amount of constitutionally protected conduct, or that it specifies no standard of conduct at all." *Jones v. State*, 2016 WY 110, ¶ 24, 384 P.3d 260, 266 (Wyo. 2016). "[S]uccessful challenges to statutes for facial vagueness are rare." *Teniente v. State*, 2007 WY 165, ¶ 86, 169 P.3d 512, 536 (Wyo. 2007). For purposes of the protected conduct aspect of the vagueness doctrine, it is not enough to say that the Life Act "implicates protected conduct" – Plaintiffs must show that the Life Act "reaches a substantial amount of constitutionally protected conduct." *See Jones*, ¶ 24, 384 P.3d at 266. They have not done so here.

For the standard of conduct aspect of the vagueness doctrine, "the ultimate test" for impermissible vagueness "is whether a person of ordinary intelligence could read the statute and comprehend what conduct is prohibited because laws must provide explicit standards for those who apply them." *Browning v. State*, 2001 WY 93, ¶ 11, 32 P.3d 1061, 1066 (Wyo. 2001) (cleaned up). "A statute specifies a standard of conduct if, by its terms or as authoritatively construed in prior opinions, it applies without question to certain activities, even though its application to other activities is uncertain." *Fraternal Order of Eagles Sheridan Aerie No. 186, Inc. v. State, ex rel. Forwood*, 2006 WY 4, ¶ 46, 126 P.3d 847, 863 (Wyo. 2006). A party asserting that a statute is facially vague because it lacks a standard of conduct "must do more than identify some instances in which the application

of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications." *Alcalde v. State*, 2003 WY 99, ¶ 15, 74 P.3d 1253, 1260-61 (Wyo. 2003) (cleaned up).

A person of ordinary intelligence can read the Life Act and comprehend the conduct prohibited. The Life Act generally prohibits both chemical and surgical abortion, subject to four specified exceptions. Wyo. Stat. Ann. § 35-6-123. The general prohibition on abortion applies to any "person," while the exceptions apply only to licensed physicians. Wyo. Stat. Ann. §§ 35-6-123; 35-6-124(a) (intro).

Three of the exceptions in the Life Act are relevant here. A licensed physician may perform an abortion if the pregnancy resulted from sexual assault or incest or if, in the physician's reasonable medical judgment, the unborn baby has a lethal fetal anomaly or the pregnancy is a molar pregnancy. Wyo. Stat. Ann. § 35-6-124(a)(iii), (iv). A licensed physician also may perform a "pre-viability separation procedure" to end a pregnancy if the physician exercises "reasonable medical judgment" and determines that: (1) ending the pregnancy is necessary to prevent the death of the pregnant woman; (2) the pregnancy "poses a substantial risk of death for the pregnant woman;" or (3) the pregnancy "poses a substantial risk" of causing the "serious and permanent impairment of a life-sustaining organ" of the pregnant woman. Wyo. Stat. Ann. § 35-6-124(a)(i). This exception requires the physician to make all reasonable medical efforts to save life of the pregnant woman and the life of the unborn baby. *Id.*

In § 35-6-124(a)(i), the phrase "substantial risk of death" means the possibility of death is real or true and not imaginary or illusory. *Merriam-Webster's Collegiate*

Dictionary 1245 (substantial); 1076 (risk) (11th ed. 2020). The phrase "life-sustaining organ of a pregnant woman" means any organ in the human body that helps someone to stay alive. *See* https://www.merriam-webster.com/dictionary/life-sustaining (last visited Sept. 25, 2023). The Wyoming Legislature defined the phrase "reasonable medical judgment" as "a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved[.]" Wyo. Stat. Ann. § 35-6-122(a)(iii) (alteration added).

Given these definitions, a physician can read § 35-6-124(a)(i) and understand that a separation procedure may be performed if: (1) the physician uses his or her education, knowledge, experience, and training to examine the pregnant woman and evaluate whether she has a physical condition that creates a real or true possibility that she may die or that may result in the serious and permanent impairment of a life-sustaining organ of the pregnant woman; and (2) the physician determines that a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved would conclude that a separation procedure likely would prevent the real or true possibility that the pregnant woman may die or that a separation procedure likely would eliminate the possibility that the physical condition may result in the serious and permanent impairment of a life-sustaining organ of the pregnant woman.

In terms of facial constitutionality, the Life Act specifies a standard of conduct that applies without question to certain activities. It unambiguously prohibits any "person" from "knowingly" taking any action with the "specific intent of causing or abetting an abortion,"

except as provided in § 35-6-124. Wyo. Stat. Ann. § 35-6-123(a). This provision unquestionably prohibits abortion, subject to the exceptions set out in § 35-6-124.

The three relevant exceptions in § 35-6-124 also plainly specify standards of conduct that apply without question to certain activities. To survive a facial challenge, each exception need only apply with certainty in one or more instances. *Alcalde,* ¶ 15, 74 P.3d at 1260-61. Each of the exceptions would apply with certainty in at least one circumstance:

- The exception in § 35-6-124 (a)(i) would apply without question in a situation where the pregnancy has caused the pregnant woman to develop preeclampsia, the preeclampsia poses a real threat to the life of the pregnant woman, and the physician, using his or her education, knowledge, experience, and training, determines in his or her reasonable medical judgment that performing a separation procedure likely will prevent the preeclampsia from causing the death of the pregnant woman.[65] Plaintiffs concede that this exception may apply when preeclampsia threatens the life of the pregnant woman, and have identified numerous other medical conditions where the exception also may apply. (Pls.' Summ. J. Mem. at 55-56).

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[65] Preeclampsia is a blood pressure condition that causes high blood pressure and high levels of protein in the urine. For the pregnant woman, preeclampsia could cause hypertensive emergency or damage to the heart, kidneys, liver, or lungs. If preeclampsia is creating a substantial risk of death for the pregnant woman, the condition can only be treated by delivering the unborn baby.
See https://my.clevelandclinic.org/health/diseases/17952-preeclampsia

- The exception in § 35-6-124 (a)(iii) would apply without question in a situation where the pregnancy resulted from an act of incest or sexual assault, the pregnant woman has reported the incest or sexual assault to a law enforcement agency, and she provides a copy of the law enforcement agency report to the physician.

- The exception in § 35-6-124 (a)(iv) would apply without question in a situation where the physician determines in his or her reasonable medical judgment that there is a substantial likelihood that the unborn baby has a lethal fetal anomaly. In such a circumstance, the physician, using his or her education, knowledge, experience, and training, would examine the pregnant woman and determine whether a reasonably prudent physician who is knowledgeable about the case would believe that it is substantially likely that the unborn baby has a lethal fetal anomaly.

Turning to the chemical abortion statute, this statute plainly specifies a standard of conduct that applies without question to certain activities. This statute unambiguously prohibits the acts of prescribing, dispensing, distributing selling or using "any drug for the purpose of procuring or performing an abortion on any person." Wyo. Stat. Ann. § 35-6-139(a). This provision unquestionably prohibits chemical abortions, subject to the exceptions set out in § 35-6-139(b)(iii).

The exceptions in § 35-6-139(b)(iii) also plainly specify a standards of conduct that apply without question to certain activities. To survive a facial challenge, each exception need only apply with certainty in one or more instances. *Alcalde,* ¶ 15, 74 P.3d at 1260-61. Each of the exceptions in § 35-6-139(b)(iii) would apply with certainty in at least one circumstance:

- The exception that allows for a chemical abortion to preserve the life or health of the pregnant woman would apply without question when the physician, exercising appropriate medical judgment, concludes that the pregnancy is causing a physical condition for the pregnant woman that exposes her to a realistic risk of death or injury and that a chemical abortion likely will prevent the physical condition from killing or injuring the pregnant woman; and

- The exception that allows for a chemical abortion when the pregnancy results from incest or sexual assault would apply without question when a pregnant woman provides the physician with information sufficient to allow the physical to determine with reasonable certainty that the pregnancy resulted from an act of sexual assault or incest.

Plaintiffs take a parse and conquer approach to their unconstitutional vagueness argument. First, they assert that the specific words and phrases in the Life Act or the chemical abortion statute are not medical terms and that "there is no medical literature or guidance on how to apply them." (Pls.' Summ. J. Mem. at 53, 56). They then focus their ire on some of the State Defendants' interrogatory answers. Plaintiffs cite extensively to the declarations of Dr. Moayedi, Dr. Anthony, and Dr. Hinkle in an attempt to show that that the State Defendants' interpretations of language in in the Life Act or the chemical abortion statute, as reflected in the interrogatory answers, prove the statutes are unconstitutionally vague. (Pls.' Summ. J. Mem. at 53-59). These arguments fail in many respects.

First and foremost, Plaintiffs have not shown that the Life Act or the chemical abortion statute are impermissibly vague in all of their applications. *Alcalde v. State,* ¶ 15,

74 P.3d at 1260-61. Plaintiffs list eight examples of how they think that the Life Act or the chemical abortion statute are impermissibly vague. (Pls.' Summ. J. Mem. at 52-53). This list does not include any concerns with the exceptions in Wyo. Stat. Ann. § 35-6-124(a)(ii) or (iii). (*Id.*). And, as explained above, all of the pertinent exceptions apply with certainty in at least one circumstance. As a result, Plaintiffs' unconstitutional vagueness argument lacks merit as a matter of law.

Plaintiffs' unconstitutional vagueness argument suffers from other legal infirmities as well. They do not explain how or why the Life Act or the chemical abortion statute reach "a substantial amount of constitutionally protected conduct" or specify "no standard of conduct at all." *Jones*, ¶ 24, 384 P.3d at 266. They thus have not made a cogent legal argument to explain why the statutes are unconstitutionally vague. Instead, they cite extensively to written declaration testimony in an attempt to establish that the Life Act and the chemical abortion statute are confusing, and then make the conclusory statement that "[t]he statutes provide no standard at all." (Pls.' Summ. J. Mem. at 52-58). Their argument thus does not satisfy the substantial amount of protected conduct standard.

Even if some semblance of cogency may be gleaned from Plaintiffs' argument, they still have not demonstrated that the Life Act and the chemical abortion statute are unconstitutionally vague. Plaintiffs focus the majority of their vagueness argument on the exceptions in Wyo. Stat. Ann. § 35-6-124(a)(i) and Wyo. Stat. Ann. § 35-6-139(b)(iii). (Pls.' Summ. J. Mem. at 53, 56).

For § 35-6-124(a)(i), Plaintiffs say that a physician applying the exception "must interpret the following words and phrases: 'necessary,' 'prevent the death,' 'substantial

risk,' 'serious and permanent impairment,' and 'life-sustaining organ.'" (Pls.' Summ. J. Mem. at 53). They then argue that the words and phrases are not medical terms and "there is no medical guidance on how to apply them." (Pls.' Summ. J. Mem. at 53).

This argument assumes that the exception must be written exclusively in medical terms. Plaintiffs, however, have cited no legal authority that supports such an assumption. This argument further assumes that the exception must provide precise medical guidance. But "lack of precision is not itself offensive to the requirements of due process" and does not make a statute impermissibly vague. *Browning*, ¶ 12, 32 P.3d at 1066.

Plaintiffs also argue that the State Defendants' answers to certain interrogatories prove that the exception in § 35-6-124(a)(i) is unconstitutionally vague. (Pls.' Summ. J. Mem. at 53-56). In this argument, they essentially rehash their concern that the exception is not written in medical terminology. (*Id.*). Plaintiffs posit several rhetorical questions (with many based on worst case scenarios) in an effort to sow confusion from the plain language of the exception. (*Id.*). But they do not explain why a physician of common intelligence cannot read the exception and "comprehend what conduct is prohibited" by the exception. *Browning*, ¶ 11, 32 P.3d at 1066.

For § 35-6-139(b)(iii), Plaintiffs say that a physician applying the exception "must divine the meaning of the terms 'necessary to preserve,' 'imminent peril,' 'substantially endangers' and 'health.'" (Pls.' Summ. J. Mem. at 56). They argue that the words and phrases are not medical terms and "there is no medical guidance on how a physician should to apply them to the circumstances of a particular patient." (Pls.' Summ. J. Mem. at 56).

As explained above, a statute does not need to be written in technical jargon and does not need to be categorically precise. *Browning*, ¶¶ 11, 12, 32 P.3d at 1066.

Next, Plaintiffs assert that the State Defendants' "efforts to explain the meaning" of the words and phrases "fails to clarify anything." (Pls.' Summ. J. Mem. at 56). They cite the State Defendants' answer to Interrogatory Number 15 as evidence of this alleged failing. (*Id.*). In essence, Plaintiffs fault the State Defendants for giving the language used in the exception its plain and ordinary meaning. Or, stated differently, they fault the State Defendants for applying the applicable rule of statutory interpretation. This argument fails because Plaintiffs have the burden to show beyond a reasonable doubt that the exception is impermissibly vague – the State Defendants do not have that burden.

Another legal infirmity with Plaintiffs' unconstitutional vagueness argument has to do with the evidence they rely on in making the argument. The declaration testimony of Dr. Moayedi, Dr. Anthony, and Dr. Hinkle is not material or relevant to the question of whether the Life Act and the chemical abortion statute are unconstitutionally vague. The declaration testimony cited in support of this argument cannot be considered in addressing the facial constitutionality of the Life Act. And, to the extent that Plaintiffs rely on written testimony from their expert witnesses, this Court should not consider their testimony for the reasons stated in the State's motion to strike expert witnesses.

Plaintiffs argue that, "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." (Pls.' Summ. J. Mem. at 58) (citing *United States v. Richter*, 796 F.3d 1173, 1189 (10th Cir. 2015)). Specifically, Plaintiffs rely on the following statement in

Richter: "[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." (*Id.*).

Richter does not say that evidence of how individual physicians commonly understand the terms in a statute directed at them is relevant in assessing whether the statute is unconstitutionally vague. To the contrary, it defies logic to suggest that the declaration testimony of three physicians who clearly do not agree with the policies embodied in the Life Act and the chemical abortion statute in any way reflects the common understanding of physicians as a group regarding the language in those statutes. In a facial constitutional challenge, the common understanding of the class with specialized knowledge must be determined by looking to legislative facts, not the personal opinions of individual physicians.

Taking a different approach, Plaintiffs argue that the declaration testimony Dr. Moayedi, Dr. Anthony, and Dr. Hinkle is relevant because the question of whether a statutory term has a technical meaning is a question of fact that must be proved. (Pls.' Summ. J. Mem. at 58) (citing *Powder River Coal Co. v. Wyo. Dep't of Revenue*, 2006 WY 137, ¶ 16, 145 P.3d 442, 448 (Wyo. 2006)). However, the question of whether a statutory term has a technical meaning must be answered with legislative facts, not the written testimony of a third party witness. *See, e.g., Powder River Coal Co.*, ¶ 17, 145 P.3d at 448 (affirming a finding of fact from a state adjudicatory board where the board relied on legislative facts and rejected the testimony of an expert witness because it reflected the witness' personal opinion).

Separate from their substantive arguments, Plaintiffs argue against severability if this Court deems some parts of the Life Act or the chemical abortion statute to be unconstitutionally vague. (Pls.' Summ. J. Mem. at 58-59). They basically argue that all of the exceptions to the statutes are unconstitutionally vague and, without the exceptions, the statutes would not be workable because the Wyoming Legislature did not intend to have a blanket prohibition on abortion. (Pls.' Summ. J. Mem. at 59). This argument falls far short of Plaintiffs' burden of proof to demonstrate that the Life Act and the chemical abortion statute are unconstitutional beyond a reasonable doubt. Plaintiffs must show that all of the exceptions in the statutes are impermissibly vague. They have not done so, if for no other reasons than they do not challenge two of the exceptions in the Life Act.

V. This Court should grant summary judgment in favor of the State Defendants with respect to Plaintiffs' article 1, section 33 and 34 claims.

In the amended complaint, Plaintiffs allege that the Life Act and the chemical abortion statute violate article 1, sections 33 and 34 of the Wyoming Constitution. (Am. Compl. ¶ xxxvii). They have not, however, asked this Court to grant summary judgment in their favor on the section 33 and 34 claims. (Pls.' Mot. for Summ. J. ¶ 6). For the reasons explained below, this Court should grant summary judgment in favor of the State Defendants on those claims.

A. The Life Act and the chemical abortion statute do not violate article 1, section 33.

Section 33 dictates that "[p]rivate property shall not be taken or damaged for public or private use without just compensation." Wyo. Const. art. 1, § 33. Plaintiffs have not

asserted an as applied takings claim, so their takings claim challenges the constitutionality of the Life Act and the chemical abortion statute on their face.

To succeed on a facial takings claim, a plaintiff must prove that the "'mere enactment'" of the challenged statute or regulation "constitutes a taking." *Hodell v. Vir. Surface & Mining Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981) (citation omitted). The Wyoming Supreme Court has

> recognized three general types of takings: **one** involves direct government (or private) seizure of property or physical occupation that amounts to a stripping of the owner's possession; **the second** is known as a per se regulatory taking and occurs when a regulation either causes a physical occupation of property or deprives the owner of all economically beneficial use of his property; and **the third** occurs in those situations where the impact of a regulation is deemed to be too severe to be borne without payment of just compensation.

Monaghan Farms, Inc. v. Bd. of Cnty. Comm'rs of Albany Cnty., 2023 WY 31, ¶ 63, 527 P.3d 1195, 1216 (Wyo. 2023) (internal quotation marks and citation omitted).

Plaintiffs did not allege any facts in the amended complaint that illuminate the nature of their takings claims. They apparently contend that the Life Act and the chemical abortion statute "take" the reproductive system of a pregnant woman by forcing her to carry an unborn baby to term. Plaintiffs' novel taking theory fails because a woman's reproductive system does not constitute "private property" under section 33. The Wyoming Supreme Court has held that the word "property" in section 33 "is treated as a word of most general import and is liberally construed. It is addressed to every sort of interest the citizen may possess[.]" *State Highway Comm'n v. Rollins*, 471 P.2d 324, 328 (Wyo. 1970) (cleaned up) (alteration added). The State Defendants have not found a court decision

holding that a person's body is private property for purposes of a constitutional provision prohibiting the taking of private property without just compensation. To the contrary, one federal court has held that the term "private property" in the federal takings clause "does not include a person's body or the use of a person's body." *Harris v. United States*, No. 16-658C (Pro Se), 2016 WL 6236606, at *3 (Fed. Cl. Oct. 25, 2016), *aff'd* 686 Fed. Appx. 895 (Fed. Cir. 2017).

Plaintiffs' claim that the Life Act and the chemical abortion statute on their face take property without just compensation fails as a matter of law. As a result, this Court should grant summary judgment in favor of the State Defendants on the section 33 claim.

B. The Life Act and the chemical abortion statute do not violate article 1, section 34.

Section 34 is entitled "Uniform operation of general law." Section 34 dictates that "[a]ll laws of a general nature shall have a uniform operation." Wyo. Const. art. 1, § 34. This section "demands that these statutes be applied uniformly throughout the state." *Longfellow v. State*, 803 P.2d 1383, 1389 (Wyo. 1991). Nothing in the plain language of the Life Act or the chemical abortion statute suggests that these statutes will not be applied uniformly throughout Wyoming. Accordingly, this Court should grant summary judgment in favor of the State Defendants on the section 34 claim.

VI. Plaintiffs are not entitled to a permanent injunction.

Plaintiffs devote the first part of the argument section in their summary judgment memorandum (approximately fourteen pages) to argue that they are entitled to a permanent injunction to enjoin the enforcement of the Life Act and the chemical abortion statute. (Pls.'

Summ. J. Mem. at 8-23). In support of this argument, they argue only one legal point typically associated with injunctive relief – irreparable injury. (*Id.*). In doing so, Plaintiffs put the cart before the horse.

Plaintiffs are not entitled to the requested permanent injunction unless they can show actual success on the merits. For a preliminary injunction, they had to show "probable success" or a "likelihood of success on the merits." *CBM Geosolutions, Inc. v. Gas Sensing Tech., Inc.*, 2009 WY 113, ¶¶ 7-8, 215 P.3d 1054, 1057 (Wyo. 2009). For a permanent injunction, however, they must show "actual success on the merits." *Dallman v. Ritter*, 225 P.3d 610, 621 (Colo. 2010) (en banc). To do so, Plaintiffs must show beyond a reasonable doubt that the Life Act and the chemical abortion statute are unconstitutional in all of their applications. Absent such a showing, they have not demonstrated actual success on the merits. As explained above, Plaintiffs have not made the necessary showing, so they are not entitled to a permanent injunction.

Even if this Court concludes that the Life Act and the chemical abortion statute are unconstitutional, issuing a permanent injunction is not the appropriate remedy. When a court concludes that a Wyoming statute is facially unconstitutional, it should declare so and also declare the statute to be void and of no effect. *See, e.g., Doe*, 513 P.2d at 645 (ordering the district court to declare the pre-*Roe* Wyoming criminal abortion statute "unconstitutional and of no force or effect").

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court deny Plaintiffs' motion for summary judgment in its entirety, grant the State Defendants'

cross-motion for summary judgment in its entirety, and dismiss the amended complaint in its entirety with prejudice.

Dated this 5th day of October 2023.

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CERTIFICATE OF SERVICE

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

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