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

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

**PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' REQUEST FOR THIS
COURT TO TAKE JUDICIAL NOTICE OF LEGISLATIVE FACTS**

COME NOW Plaintiffs, by and through undersigned counsel, in support of their *Opposition to State Defendants' Request for this Court to Take Judicial Notice of Legislative Facts*, hereby state as follows:

The State Defendants request that this Court take judicial notice of “legislative facts” in support of their opposition to Plaintiffs’ motion for summary judgment and their cross-motion for summary judgment. The State fails to show that certain of these so-called “legislative facts” are proper subjects of judicial notice.

The State’s request rests on its assertion that the facts for which it seeks judicial notice are legislative—as opposed to adjudicative—facts. “Legislative facts are the facts which help the tribunal determine the content of law and of policy.” *Walker v. Karpan*, 726 P.2d 82, 86 (Wyo. 1986) (citations omitted, emphasis added). By contrast, “[a]djudicative facts are simply the facts of [a] particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process” Fed. R. Evid. 201 (Advisory Comm. note to subsection (a) in 1972 proposed rule). As discussed in Plaintiffs’ opposition/reply brief, the facts for which the State Defendants seek judicial notice are adjudicative, not legislative. Plaintiffs’ Memorandum In Opposition To State Defendants’ Motion For Summary Judgment And Reply In Support Of Plaintiffs’ Motion For Summary Judgment at 4–5.

To the extent the State Defendants are nonetheless correct that their proffered facts are legislative, there is no rule authorizing the Court to judicially notice them. Rule 201 to the Wyoming Rules of Evidence, which concerns judicial notice, expressly applies only to adjudicative facts. Wyo. R. Evid. 201(a). Federal Rule of Evidence 201(a) expressly distinguishes between legislative facts and adjudicative facts. Fed. R. Evid. 201(a). The State nonetheless contends that the Court may take judicial notice of these facts because neither Rule 201 “nor [any]

other evidentiary rules preclude” the Court from taking judicial notice of these facts. Defendants’ Request For Judicial Notice at 10. That no rule expressly bars judicial notice of legislative facts does not constitute authority for the Court to do so. Moreover, much of the evidence submitted by the State is of a type that is not subject to judicial notice, regardless of whether it relates to legislative or adjudicative facts. Under Rule of Evidence 201, a court may only judicially notice facts “not subject to reasonable dispute,” because they are either “generally known,” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Wyo. R. Evid. 201(b). Here, the State Defendants request judicial notice of newspaper articles, polls and website articles for the truth of the matter asserted. (Item 12.)

Federal courts routinely refuse to take judicial notice of facts from these sources.¹ *See, e.g., Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1028–30 (C.D. Cal. 2015) (refusing to take judicial notice of the truth of the facts contained within various press releases and newspaper articles); *United States v. Friday*, 525 F.3d 938, 958 n.10 (10th Cir. 2008) (refusing to take judicial notice of facts contained in newspaper article). This Court should likewise reject the request for judicial notice as to articles, polls and websites, given that they are not sources “whose accuracy cannot reasonably be questioned.”

The court also should not take judicial notice of various legal treatises offered by the State (Items 7–9): T.A. Larson, *History of Wyoming* (Univ. of Neb. Press 1965), Robert B. Keiter, *The Wyoming State Constitution* (2d ed. 2017), Richard K. Prien, *The Background of the Wyoming Constitution* (Aug. 1956) (unpublished M.A. Thesis, Univ. of Wyo.), and Thomas M. Cooley, *A*

¹ The substantive requirements for judicial notice under Federal Rule of Evidence 201 and Wyoming Rule of Evidence 201 are virtually identical. As a result, federal caselaw on judicial notice is persuasive for application of Wyoming Rule of Evidence 201. *See Leach v. State*, 2013 WY 139, ¶ 30, 312 P.3d 795, 801 (Wyo. 2013).

Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (1868). These academic articles may certainly be cited as legal authority, but there is no basis to judicially notice them for the truth of the matter asserted. These sources have all been cited by courts as legal authority without expressly taking judicial notice of any facts. *See, e.g., Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, ¶ 38, 413 P.3d 1093, 1104 (Wyo. 2018) (citing Keiter); *Allred v. Bebout*, 2018 WY 8, ¶ 35, 409 P.3d 260, 269 (Wyo. 2018) (same); *Johnson v. State*, 2006 WY 79, ¶ 23, 137 P.3d 903, 908 (Wyo. 2006)) (citing later edition of Larson); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 911 (Wyo. 1992) (citing Larson and Prien); *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1241 (11th Cir. 2020) (citing later edition of Cooley); *United States v. Ackerman*, 831 F.3d 1292, 1307–08 (10th Cir. 2016) (citing Cooley).²

Plaintiffs do not object to the Court judicially noticing the remaining, identified items as adjudicative facts, including certain legislative history (Items 1–6), information from the Wyoming Secretary of State website (Item 10) and information from the Cleveland Clinic Website (Item 13).³ However, the Court should not take judicial notice of “any other legislative facts” (Item 14) without any showing by the State Defendants.

WHEREFORE Plaintiffs request this Court deny the State Defendants’ request that this Court take judicial notice of items 7, 8, 9, 12, and 14 as these items were identified in the State Defendants’ request.

² Although labeled “Magazine, Newspaper, or Website Articles,” the Court may similarly consider the legal history and analysis offered in Allison Connelly, *A Sleeping Giant: § II of the Kentucky Bill of Rights*, 114 The Advocate Newsletter 115 (June 1992), without taking judicial notice of the same.

³ The State Defendants’ request seeks judicial notice of facts listed as Items 1–14, but omits Item 11.

RESPECTFULLY SUBMITTED this 3rd
day of November 2023.

By: 

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CERTIFICATE OF SERVICE

This is to certify that this 3rd day of November 2023, a true and correct copy of the foregoing was served as follows:

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