John H. Robinson, WSB #6 – 2828
Marci C. Bramlet, WSB #7 – 5164
ROBINSON BRAMLET LLC
400 E. 1st Street, Suite 202
Casper, WY 82601
Telephone: 307.733.7703
Facsimile: 307.201.5546
john@jrmcb.com
marci@jrmcb.com

Peter S. Modlin (Cal. Bar # 151453)
Admitted pro hac vice
GIBSON DUNN & CRUTCHER, LLP
555 Mission Street, Suite 3000
San Francisco, California 94105
Telephone: 415.393.8392
pmodlin@gibsondunn.com

Megan Cooney (Cal. Bar # 295174)
Admitted pro hac vice
GIBSON DUNN & CRUTCHER, LLP
3161 Michelson Drive
Irvine, California 92612-4412
Telephone: 949.451.4087
mcooney@gibsondunn.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

IN AND FOR TETON COUNTY, WYOMING

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION vi

ARGUMENT 2

I. THE STATE DEFENDANTS DO NOT DISPUTE SEVERAL ELEMENTS OF PLAINTIFFS' CLAIMS 2

II. THE STATE DEFENDANTS' GENERAL ARGUMENTS LACK MERIT 3

A. The State's Objections to Plaintiffs' Evidence Should be Overruled 3

B. The State Misconstrues the Nature and Relevance of Legislative Facts 4

C. This Case Is Not About Whether There Is A Right To Abortion Under The Wyoming Constitution 6

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CONSTITUTIONAL CLAIMS 7

A. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 38—Health Care 7

B. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Are Void for Vagueness 23

C. Wyoming's Criminal Abortion Ban and Criminal Medication Ban violate Wyo. Const. article I, sections 18 & 19; article VII, section 12; article XXI, section 25—Establishment of Religion 27

D. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 18 and article XXI, section 25—Free Exercise of Religion 37

E. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 3 and article I, section 34—Equal Protection 40

F. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Unenumerated Rights Under Wyo. Const. article I, sections 2, 7, and 36 45

CONCLUSION 48

TABLE OF AUTHORITIES

Cases

In re Adoption of MAJB,
2020 WY 157, 478 P.3d 196 (Wyo. 2020) 46

Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.,
898 P.2d 878 (Wyo. 1995) 22, 43, 45

Anderson v. City of New York,
657 F. Supp. 1571 (S.D.N.Y. 1987) 31

Aramark Facility Servs. v. Serv. Emps. Int'l Union, Loc. 1877, AFL CIO,
530 F.3d 817 (9th Cir. 2008) 5

Armstrong v. State,
989 P.2d 364 (Mont. 1999) 46, 47

Bird v. Wyo. Bd. of Parole,
2016 WY 100, 382 P.3d 56 (Wyo. 2016) 44

Burwell v. Hobby Lobby,
573 U.S. 682 (2014) 29

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 39

Dobbs v. Jackson Women's Health Org.,
142 S. Ct. 2228 (2022) 34, 46

DS v. Dep't of Pub. Assistance & Soc. Servs.,
607 P.2d 911 (Wyo. 1980) 46

Employment Security Commission of Wyoming v. Western Gas Processors, Ltd.,
786 P.2d 866 (Wyo. 1990) 45

First Covenant Church of Seattle v. City of Seattle,
840 P.2d 174 (Wash. 1992) 38

Foster v. State Farm Mut. Auto. Ins. Co.,
843 F. Supp. 89 (W.D.N.Y. 1994) 30, 31

*Geringer v. Bebou*t,
10 P.3d 514 (Wyo. 2000) 39

Greenwalt v. Ram Restaurant Corp. of Wyo.,
2003 WY 77, 71 P.3d 717 (Wyo. 2003) 42, 44

Hardison v. State,
2022 WY 45, 507 P.3d 36 (Wyo. 2022) 22

Harris v. McCrae,
448 U.S. 297 (1980)....28

Hodes & Nauser, MDs, P.A. v. Schmidt,
440 P.3d 461 (Kan. 2019)....46, 47

Howard v. Aspen Way Entertainers, Inc.,
2017 WL 152, 406 P.3d 1271 (Wyo. 2017)....45

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987)....18, 20

Int. of ASM v. State,
2021 WY 109, 496 P.3d 764 (Wyo. 2021)....39

Jane L. v. Bangerter,
61 F.3d 1505 (10th Cir. 1995)....29

Johnson v. State Hearing Examiner's Off.,
838 P.2d 158 (Wyo. 1992)....41, 43, 45, 46

Kautza v. City of Cody,
812 P.2d 143 (Wyo. 1991)....43

Knight Pub. Co. v. U.S. Dept. of Justice,
631 F. Supp. 1175 (W.D.N.C. 1986)....31

Lopez v. Stages of Beauty, LLC,
307 F. Supp. 3d 1058 (S.D. Cal. 2018)....5

Nealis v. Baird,
996 P.2d 438 (Okla. 1999)....30, 32

In re Neely,
2017 WY 25, 390 P.3d 728 (Wyo. 2017)....28, 37, 38, 42, 45

North Dakota v. Burckhard,
579 N.W.2d 194 (N.D. 1998)....38

Olmstead v. United States,
277 U.S. 438 (1928)....45

Parker Land & Cattle Co.,
845 P.2d 1040 (Wyo. 1993)....18, 20

Powers v. State,
2014 WY 15, 318 P.3d 300 (Wyo. 2014)....10, 39

State v. Heath,
485 P.3d 1121 (Idaho 2021)....39

State v. Hershberger,
462 N.W.2d 393 (Minn. 1990)....38

State v. Langley,
84 P.2d 767 (Wyo. 1938) 44

State v. Yazzie,
218 P.2d 482 (Wyo. 1950) 40

Vasquez v. State,
990 P.2d 476 (Wyo. 1999) 41, 42

Walker v. Karpan,
726 P.2d 82 (Wyo. 1986) 4, 5

Washakie Cnty. Sch. Distt. No. One v. Herschler,
606 P.2d 310 (Wyo. 1980) 22, 43, 44

Watt v. Watt,
971 P.2d 608 (Wyo. 1999) 45

Webster v. Reproductive Health Servs.,
492 U.S. 490 (1989) 29, 32, 33

White v. State,
784 P.2d 1313 (Wyo. 1989) 40

Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.,
575 P.2d 1100 (Wyo. 1978) 9, 16

Statutes

21 U.S.C. § 812 20

21 U.S.C. § 841 20

Wyo. Stat. § 2-4-103 34

Wyo. Stat. § 2-4-104 34

Wyo. Stat. § 35-6-121 .... 9, 33

Wyo. Stat. § 35-6-122 12

Wyo. Stat. § 35-6-123 12

Wyo. Stat. § 35-6-124 .... 8, 11, 12

Wyo. Stat. § 35-6-139 .... 8, 11, 12

Wyo. Stat. § 35-22-402 8

Legislative Materials

S. 158, 97th Cong. (1981) 31

Other Authorities

Committee of the Whole in the House of Representatives, *House Floor Session-Day 19*, YouTube, (Feb. 6, 2023), https://www.youtube.com/watch?v=ynn-N0JNa48 36

Committee of the Whole in the Senate, *Senate Floor Session-Day 33*, YouTube (Feb. 27, 2023), https://www.youtube.com/watch?v=8O2bRdO_F5U 36

Health Care Freedom Const. Amendment, S.J. Res. No. 2, Amendment No. 1 Before Sen. Comm. of the Whole, 61st Leg., Gen. Sess., https://wyoleg.gov/2011/Audio/senate/s0128am1.mp3 19

Health Care Freedom Const. Amendment, S.J. Res. No. 2, Second Reading, Amendment No. 1 Before Sen. Comm. of the Whole, 61st Leg., Gen. Sess., (Wyo. 2011) https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 ....18, 19

S.158—A bill to provide that human life shall be deemed to exist from conception, U.S. Cong., https://www.congress.gov/bill/97th-congress/senate-bill/158?s=4&r=1&q=%7B%22search%22 %3A%22s158%22%7D 31

Rules

Fed. R. Evid. 201 ....4, 5

Wyo. R. Evid. 801 31

Wyo. R. Evid. 803 31

Wyo. R. Evid. 805 31

Constitutional Provisions

Idaho Const. art. I, § 4 39

Idaho Const. art. XXI, § 19 38

Wyo. Const. art. I, § 2 45

Wyo. Const. art. I, § 4 40

Wyo. Const. art. I, § 7 45

Wyo. Const. art. I, § 18 ....27, 38

Wyo. Const. art. I, § 19 27

Wyo. Const. art. I, § 34 40

Wyo. Const. art. I, § 36 .... 45, 46

Wyo. Const. art. I, § 38 .... 6–10, 15–22, 41

Wyo. Const. art. VII, § 12 27

Wyo. Const. art. XXI, § 25 .... 38, 39

INTRODUCTION

Rather than attempt to show that the Criminal Abortion Ban and Criminal Medication Ban satisfy the applicable constitutional tests, the State denies that the Constitution means what is says, argues that the Legislature is not bound by—and may re-write—the Constitution, mischaracterizes Plaintiffs' claims, and asks the Court both to ignore reality and to reject binding Wyoming Supreme Court precedent. Not until nearly halfway through its 140-page brief does the State finally devote a mere three pages to the key issue—whether the abortion bans actually further any governmental interests—but in doing so, the State offers no evidence or analysis and makes no attempt to rebut Plaintiffs' detailed, specific showing of the statutes' constitutional infirmities. And when the State finally gets around (at page 125) to addressing the ambiguous language of the statutes, it once again offers no response to Plaintiffs' showing that the statutes are unconstitutionally vague.

The State's efforts at misdirection cannot obscure what the undisputed facts show: 1) the Criminal Abortion Ban and Criminal Medication Ban undermine—rather than further—the asserted governmental interests and unduly infringe on the right to make health-care decisions; 2) the key provisions of the statutes are hopelessly vague, and physicians, pharmacists and prosecutors have no way to know when an abortion is or is not legal; 3) the statutes impose on Wyoming citizens a sectarian religious viewpoint that life begins at conception and impair observance of other religious (or non-religious) views; 4) the statutes discriminate against women and violate their fundamental rights to control their family and bodies; and 5) Plaintiffs and other Wyoming physicians and women will be irreparably injured if the abortion bans go into effect.

Having failed to offer any rebuttal to Plaintiffs' proof of these constitutional violations, the State cannot meet its burden of showing any genuine issues of material fact for trial, and Plaintiffs

are entitled to judgment as a matter of law on their claims for declaratory and injunctive relief, both facially and as applied to Plaintiffs.

ARGUMENT

I. THE STATE DEFENDANTS DO NOT DISPUTE SEVERAL ELEMENTS OF PLAINTIFFS' CLAIMS

The State does not dispute a number of bases for Plaintiffs' summary judgment motion. First, the State has not provided any evidence to rebut any of the Plaintiffs' factual showings, and the State's Rule 56.1 Statement of Disputed Facts does not cite to any evidence at all. As a result, there are no disputed issues of fact with respect to Plaintiffs' motion.

Second, the State has not opposed Plaintiffs' motion on their "as applied" claims. Throughout its brief, the State limits its arguments to facial claims, repeatedly asserting that the Plaintiffs must show the abortion bans are unconstitutional in all of their applications. The State's assertion that Plaintiffs have not alleged any as applied claims is wrong, as the Court has already found. *See* August 16, 2023 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel, at ¶ 10. The amended complaint includes a lengthy discussion of the ways in which the abortion bans deprive Plaintiffs of their constitutional rights and specifically requests relief as to Plaintiffs. *See* Am. Compl. at 19–32, 35. In their summary judgment motion, Plaintiffs expressly request relief on both their facial and as applied claims. Plaintiffs' MSJ Br. at 8, 24, 51–52, 60 n.9, 72. The Court therefore should grant, as unopposed, Plaintiffs' motion on the as applied claims.

Third, the State does not dispute that Plaintiffs have established irreparable injury for purposes of a permanent injunction. State MSJ Br. at 137–38. Plaintiffs included a detailed, factual showing that both they and Wyoming citizens in general will suffer irreparable injury if

the abortion bans are permitted to take effect. Plaintiffs' MSJ Br. at 8–23. It therefore is undisputed that Plaintiffs have established this element of their claim for injunctive relief.

Fourth, the State has not attempted to make a showing that the abortion bans can withstand strict scrutiny. Virtually its entire brief is based on the assumption that rational basis review applies to all of Plaintiffs' claims. Not until page 109 does the State briefly address strict scrutiny. As to the requirement that the bans be narrowly tailored to achieve a compelling government interest, the State simply recites the legal standard and claims in conclusory fashion that the bans meet that standard because they include exceptions that allegedly protect women. State MSJ Br. at 109–10. The State does not address the myriad ways in which the bans are either under or overinclusive, as demonstrated at length in Plaintiffs' brief and declarations. Plaintiffs' MSJ Br. at 27–47. The State therefore has effectively conceded that the bans cannot satisfy the test for strict scrutiny which, as demonstrated below, applies to several of Plaintiffs' claims.

II. THE STATE DEFENDANTS' GENERAL ARGUMENTS LACK MERIT

The State makes a number of arguments throughout its brief that apply to most or all of Plaintiffs' claims. None of these arguments has merit.

A. The State's Objections to Plaintiffs' Evidence Should be Overruled

As it has throughout this proceeding, the State once again urges the Court to find that all of Plaintiffs' claims raise purely legal issues and that none of the voluminous evidence submitted by Plaintiffs is relevant. State MSJ Br. at 37–40. The Court has already rejected this argument in ruling on Plaintiffs' Motion to Compel. *See* August 16, 2023 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel at ¶¶ 10–11 ("As applied challenges require a factual record. . . . [A]n evidentiary record is also necessary for courts to assess facial challenges in many instances.").

These issues have been thoroughly briefed on Plaintiffs' Motion to Compel, the State's Motion to Strike Plaintiffs' Experts, and in Plaintiffs' opening summary judgment brief. The State's brief offers no new arguments and no basis for the Court to reconsider its prior ruling. Rather than burden the Court with yet another brief containing the same arguments and authorities, Plaintiffs incorporate by reference their prior briefs on this subject. *See* Plaintiffs' MSJ Br. at 47–51, 58, 62–64; Memorandum in Opposition to Motion to Strike Plaintiffs' Experts, at 5–17; Reply in Support of Plaintiffs' Motion to Compel, at 3–7. As demonstrated in those briefs, all of Plaintiffs' evidentiary submissions are relevant and admissible to prove their claims, both facial and as applied.

B. The State Misconstrues the Nature and Relevance of Legislative Facts

Although claiming there are no relevant facts raised by Plaintiffs' claims, the State nonetheless seeks to introduce its own evidence, purportedly in the form of "legislative facts." The State has raised the same arguments in its Motion to Strike Plaintiffs' Experts, but the Court has not yet had an opportunity to comment on this issue. The State has misconstrued the nature and role of legislative facts.

The Wyoming Supreme Court has commented that "[l]egislative 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). Federal Rule of Evidence 201(a) expressly distinguishes between legislative facts and adjudicative facts. The advisory committee notes to that rule to elaborate on this distinction: "Adjudicative 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).

Nothing in these descriptions even remotely suggests that evidence relevant to Plaintiffs' claims consists solely of legislative facts. In general, Plaintiffs' claims raise issues concerning 1) whether the abortion bans meet the applicable constitutional tests, 2) are unconstitutionally vague, and 3) violate constitutional provisions on religion. Facts relevant to resolving these issues have nothing to do with the "content of law and of policy," *Karpan*, 726 P.2d. at 86, or "legal reasoning and the lawmaking process." Fed. R. Evid. 201 (Advisory Comm. note to subsection (a) in 1972 proposed rule). They are plainly "the facts of [this] particular case." *Id.*

Nor has the State sought to introduce any evidence qualifying as legislative facts. The "facts" that the State relies on are primarily irrelevant snippets of legislative history. *See, e.g.*, State MSJ Br. at 11, 81. Courts judicially notice legislative history under Federal Rule of Evidence 201(b), which exclusively pertains to ***adjudicative*** facts. *See e.g.*, *Aramark Facility Servs. v. Serv. Emps. Int'l Union, Loc. 1877, AFL CIO*, 530 F.3d 817, 826 n.4 (9th Cir. 2008); *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1064 (S.D. Cal. 2018) ("Judicial notice of legislative history materials is proper pursuant to Federal Rule of Evidence 201(b)."). For this reason, Plaintiffs have not objected to the State's request for judicial notice of legislative history under Wyoming Rule of Evidence 201.[1]

Even if the State could identify relevant legislative facts, it fails to explain how that would preclude the Plaintiffs from also presenting relevant adjudicative facts. None of the authorities cited by the State holds otherwise. In short, the State's entire argument on legislative facts is a pointless distraction.

[1] Although not objecting to judicial notice, Plaintiffs dispute the relevance of some legislative history offered by the State. As described below, the State improperly invokes legislative history in an effort to alter unambiguous constitutional language.

C. This Case Is Not About Whether There Is A Right To Abortion Under The Wyoming Constitution

Throughout its brief, the State repeatedly mischaracterizes Plaintiffs' claims as focusing on whether there is a right to abortion under the Wyoming Constitution. According to the State, "[b]oth of the challenged statutes regulate abortion, so Plaintiffs must demonstrate that the Wyoming Constitution confers or protects fundamental right to abortion." State MSJ Br. at 41. The State is wrong.

Under Section 38, the question is not whether there is a constitutional right to abortion, but instead whether the abortion bans are reasonable and necessary to protect public health and welfare, and/or unduly infringe on women's right to make their own health care decisions. Wyo. Const. art. I, § 38(c), (d). Plaintiffs' vagueness claims raise the question of whether the terms of the abortion bans are too vague for physicians to understand what conduct is proscribed, and whether they fail to specify a standard of conduct. Plaintiffs' MSJ Br. at 51–59. Plaintiffs' establishment-clause claim focuses on whether the State's legislative declaration that life begins at conception is an effort to impose a religious viewpoint, and the free-exercise claim hinges on whether the abortion bans impermissibly infringe on Plaintiff Kathleen Dow's sincerely held religious beliefs. Plaintiffs' MSJ Br. at 59–79. The equal protection claim raises the question of whether the abortion bans impermissibly discriminate against women. Plaintiffs' MSJ Br. at 79–81. The cause of action for unenumerated rights turns on the rights to control one's family composition and bodily integrity—not on abortion *per se*. Plaintiffs' MSJ Br. at 82–85.

Thus, the existence of a specific constitutional right to abortion is not a prerequisite for any of Plaintiffs' claims. By repeatedly mischaracterizing Plaintiffs' claims, the State apparently seeks to distract the Court from its complete failure of proof on the relevant issues.

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

For each of their claims, Plaintiffs have offered undisputed evidence showing that the Criminal Abortion Ban and Criminal Medication Ban violate the Wyoming Constitution. Because the State has not attempted to rebut any of Plaintiffs' showing, there are no genuine issues of material fact, and Plaintiffs are entitled to judgment as a matter of law. For the same reason, the Court should deny the State's motion for summary judgment, except as it relates to Plaintiffs' takings claim, which Plaintiffs agree to dismiss.

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

Under Section 38, Wyomingites have the constitutional right to make their own health care decisions, subject only to the State's authority to enact measures that are reasonable and necessary to protect public health and welfare and that do not unduly infringe upon these rights. Plaintiffs made a detailed showing that the abortion bans do not satisfy either of these requirements, and the State made no attempt to rebut these showings. Instead, the State argues that the unambiguous language of Section 38 does not mean what it says. The Court should reject the State's attempt to re-write Section 38.

1. Abortion Is Health Care Under Section 38

The State first argues that the term "health care," as used in Section 38, does not include abortion. State MSJ Br. at 47–54. The Court has already found that the term "health care" encompasses abortion, because "abortions are utilized by medical professionals to restore and maintain the health of their patients." April 17, 2023 Order Granting Plaintiffs' Motion for Temporary Restraining Order, at ¶ 39 ("Abortion Ban TRO Order"). In its summary judgment brief, the State concedes that "[w]ithout 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." State MSJ Br. at 49. Nonetheless, the State claims that to qualify as health care, "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." *Id.* According to the State, "[i]f 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)." *Id.*

The State's argument fails for four separate reasons. First, no definition of health care, including that offered by the State, is contingent on the reasons for which a person undergoes medical treatment. Second, the State's definition of health care is inconsistent with Wyoming law. Under the Wyoming Health Care Decisions Act, "health care" is broadly defined as "any care, treatment, service or procedure ***to maintain, diagnose or otherwise affect an individual's physical or mental condition***." Wyo. Stat. § 35-22-402(a)(viii) (emphasis added). Nothing in this definition requires 1) a physical illness, pain or disease, or 2) a particular intent. And the abortion bans themselves refer to abortion as "medical treatment," and require the exercise of medical judgment in applying the statutes. Wyo. Stat. §§ 35-6-124 & 35-6-139.

Third, the dictionary definitions of "health care" and "health" upon which the State relies refute its argument. The State references the Black's Law Dictionary definition of "health care" as "[e]fforts made to maintain or restore health, esp. by trained and licensed professionals." State MSJ Br. at 48. The State then looks to a *different* dictionary (Merriam-Webster) to find a definition of "health" as "[t]he condition of being sound in body, mind, or spirit, *esp.:* freedom from physical disease or pain." *Id.* From this mixing and matching, the State asserts that to establish that abortion

is health care, the "Court would have to find that abortion frees a pregnant woman from the physical disease or sickness of pregnancy." *Id.*

However, the State's proffered test for health care is contrary to the actual definitions it references. Most significantly, those definitions do not require that health care be addressed to "physical disease or sickness." Rather, Merriam-Webster broadly defines "health" as being "sound or whole in body, mind, or soul." State MSJ Br. at 48. The words "freedom from physical disease or pain" are provided ***as an example*** of health, not as a requirement of the definition. This is apparent not only from the notation that precedes the phrase ("esp.:") but also by the definition itself, which includes being sound in mind and soul, which plainly goes well beyond physical disease or sickness. Read as they actually appear, the definitions the State offers include any medical treatment to restore the soundness of a woman's body, mind or soul—a definition that easily encompasses any and all abortions.

Finally, even accepting the State's overly narrow construction of the term "health care" leads to the same conclusion. Any person who has endured pregnancy or childbirth can attest to the physical changes, discomfort and pain that are present in even a healthy pregnancy or birth. Every pregnancy involves significant physical changes to the woman and every pregnancy carries a significant risk of morbidity and mortality. Ex. 1, Anthony at ¶¶ 28–31; Ex. 2, Hinkle at ¶¶ 12–23; Ex. 7, Moayedi at ¶¶ 53, 55. Abortion therefore qualifies as health care even under the State's manufactured definition.

Nor can the State rely on the provision in the Criminal Abortion Ban purporting to legislate that abortion is not health care for purposes of Section 38. Wyo. Stat. § 35-6-121(a)(iv). The Legislature may not dictate to the courts what the Wyoming Constitution means. *E.g.*, *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1124 (Wyo. 1978). In doing

so, the Legislature seeks to usurp the judicial power to construe the Constitution. *Id.* And because abortion is unambiguously health care, no deference is owed to the Legislature's "interpretation" of the Constitution in a manner inconsistent with the Constitution's express terms. The Court already has found the language of Section 38 to be unambiguous and therefore resorting to extrinsic evidence is not warranted. *See* Abortion Ban TRO at ¶ 36 (citing *Powers v. State*, 2014 WY 15, ¶ 8, 318 P.3d 300, 304 (Wyo. 2014)).

2. The Abortion Bans Violate Section 38

In their opening brief, Plaintiffs demonstrated that the abortion bans violate Section 38, both because they are not reasonable and necessary to protect public health and welfare, and because they unduly infringe on the right to make health care decisions. Plaintiffs' MSJ Br. at 27–47. Not until page 61 of its brief does the State finally get around to addressing these central issues. State MSJ Br. at 61–68. The State devotes a total of three pages to asserting that by allegedly balancing the interests of women and fetuses, the State has satisfied the requirements of Section 38. *Id.* at 64–68. Entirely absent is any analysis of how the abortion bans are actually reasonable and necessary to protect public health and welfare and do not unduly infringe upon the right to make health care decisions.

This omission is especially glaring, as Plaintiffs made a detailed factual and legal showing of the complete disconnect between each of the State's asserted interests and what the abortion bans actually would do. Plaintiffs' MSJ Br. at 27–47. Among other things, Plaintiffs' showings included the following.

1. The abortion bans undermine, rather than protect, prenatal life because:

   - The Criminal Abortion Ban prohibits multi-fetal reduction, which increases the chance of fetuses surviving. Ex. 7, Moayedi at ¶ 18;

- It is not possible for physicians to determine whether the exception in the Criminal Abortion Ban for lethal fetal anomalies applies, with the result that the ban will have the effect of prohibiting abortions of fetuses with no potential for life. Ex. 7, Moayedi at ¶ 17; Ex. 1, Anthony at ¶¶ 4, 22, 38; Ex. 2, Hinkle at ¶¶ 10, 27, 34;
- The Criminal Medication Ban has no exception for lethal fetal anomalies and therefore applies to fetuses with no potential for life. Wyo. Stat. § 35-6-139(b);
- The Criminal Abortion Ban appears to prohibit abortions necessary to preserve a woman's reproductive organs—which according to the State are not "life-sustaining"—and therefore diminishes the potential for prenatal life. Wyo. Stat. §§ 35-6-124(a)(i) & 35-6-139(b); and
- The bans still allow abortions in all cases of sexual assault and incest victims, which represent prenatal life indistinguishable from fetuses resulting from consensual relations. Wyo. Stat. §§ 35-6-124(a)(iii) & 35-6-139(b)(iii).

2. The abortion bans harm, rather than protect, women because:

- Similar abortion bans are resulting in delay and denial of essential health care for women and higher morbidity for pregnant women. Ex. 7, Moayedi at ¶¶ 9–14; Ex. 11, Modlin at Attachment C (8/4/23 Temporary Injunction Order in *Zurawski v. Texas*);
- At every stage, pregnancy and childbirth carry higher risks to women than abortions. Ex. 7, Moayedi at ¶¶ 19 & 55; Ex. 1, Anthony at ¶¶ 28–31, Attachment F at p. 6 & Table 15, & Attachment H; Ex. 2, Hinkle at ¶¶ 17–23; Ex. 11, Modlin at Attachment F (2021 ITOP Report) & G (2022 ITOP Report);

- The Criminal Abortion Ban does not permit abortions to protect women from non-fatal injuries unrelated to "life sustaining organs." Wyo. Stat. § 35-6-124(a)(iii);
- The Criminal Abortion Ban includes exceptions for only some, but not all, ectopic and molar pregnancies. Wyo. Stat. § 35-6-122(a)(i)(C), (v) & (vii);
- The Criminal Medication Ban includes no exceptions for any specific health conditions. Wyo. Stat. § 35-6-139(b);
- Both bans prohibit abortion necessary to protect women from risk of death or injury due to mental health conditions—the leading cause of maternal death. Wyo. Stat. §§ 35-6-124(a) & 35-6-139(b); Ex. 7, Moayedi at ¶¶ 38–39;
- The Criminal Medication Ban prohibits use of abortion medication for abortions permitted by the Criminal Abortion Ban, including both medication and surgical abortion, even when this medication is medically necessary. Ex. 2, Hinkle at ¶¶ 41, 45–46; Ex. 7, Moayedi at ¶¶ 27–30; and
- Both bans prevent women, in consultation with their physicians, from choosing the medical treatment most appropriate for them. Wyo. Stat. §§ 35-6-123 & 35-6-139; Ex. 7, Moayedi at ¶ 45.

3. The abortion bans impair the integrity of the medical profession because they require physicians to violate both their ethical obligations and the medical standard of care. Ex. 7, Moayedi at ¶¶ 9–14, 45, 49–52, Ex. 1, Anthony at Attachment B (Am. Coll. of Obstetricians & Gynecologists Fact Sheet);
4. The abortion bans do not protect fetuses from pain and do not prevent "gruesome or barbaric" procedures. Ex. 7, Moayedi at ¶ 20; Ex. 2, Hinkle at ¶ 34.

Plaintiffs made further specific showings that the abortion bans would unduly infringe on the right of women to make their own health care decisions, including, among others, the following undisputed facts:

- The abortion bans would deprive women of necessary health care, as described above;
- The abortion bans are exacerbating the pre-existing shortage of OB/GYN physicians in Wyoming. Ex. 1, Anthony at ¶¶ 42–44;
- Virtually all abortions in Wyoming have been medication abortions and even surgical abortions often use medication, with the result that the Criminal Medication Ban would unreasonably interfere with women's ability to obtain otherwise legal abortions. Ex. 11, Modlin at Attachments F (2021 ITOP Report) & G (2022 ITOP Report);
- Medication abortions are less invasive and often medically-preferred—and at times medically required. Ex. 7, Moayedi at ¶¶ 27–30;
- Medication is sometimes used during legal surgical abortions, in treatment of ectopic pregnancies, and for miscarriage. Ex. 2, Hinkle at ¶¶ 41, 45–46;
- The Criminal Medication Ban would interfere with women's ability to obtain medication for reasons other than abortions. Ex. 7, Moayedi at ¶ 31; Ex. 1, Anthony at ¶¶ 43, 48;
- The Criminal Abortion Ban imposes unreasonable and harmful requirements on the victims of sexual crimes. Ex. 8, Blonigen at ¶¶ 23–28; Ex. 11, Modlin at Attachment H (2021 DOJ Criminal Victimization Survey) at Table 4; Ex. 1, Anthony at ¶ 39;

- The Criminal Abortion Ban does not include exceptions for numerous potentially harmful or fatal conditions, including pre-viability membrane rupture, caesarian scar ectopic pregnancy, certain molar pregnancies, and a host of other similarly dangerous medical conditions. Ex. 7, Moayedi at ¶¶ 11–13, 15–16; and
- The Criminal Medication Ban can be read—and likely will be read by some—to prohibit use of certain common contraceptives. Ex. 7, Moayedi at ¶ 41; Ex. 11, Modlin at Attachment I (Student's For Life Webpage).

In its summary judgment brief, the State does not dispute, rebut or even acknowledge these showings. The State simply ignores them, arguing instead that the bans "properly balance[] 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." State MSJ Br. at 64. For some of the State's asserted interests, it then repeats a version of this formulation, focusing on the alleged balance between the legal rights of a fetus and the woman. *Id.* at 64–67. Entirely missing is any attempt to show how this alleged balance demonstrates that the bans are reasonable and necessary to protect public health and welfare.

For example, although the State claims that the bans further the State's interest in preserving prenatal life by prohibiting some, but not all abortions, it offers no justification for 1) the prohibition on multi-fetal reduction in the Criminal Abortion Ban, 2) the absence of an exception for lethal fetal anomalies in the Criminal Medication Ban, and 3) the unworkable exception in the Criminal Abortion Ban for lethal fetal anomalies—all of which undermine the stated purpose of preserving prenatal life. Nor does the State explain how excepting abortions for victims of sexual assault or incest is consistent with preserving prenatal life or any of the State's

other asserted interests. There is no difference in prenatal life resulting from sexual crimes and prenatal life resulting from consensual relations. If the goal is to preserve prenatal life—as opposed to controlling women's reproductive health care decisions—then these exceptions make no sense.

The State similarly fails to engage at all with the evidence presented by Plaintiffs on the ways in which the bans undermine the State's claimed interest in protecting women. Once again, the State simply argues that the bans strike a balance between a woman and her fetus and asserts that the exceptions protect women. State MSJ Br. at 66. The State makes no attempt to justify the statutes' ban on abortions to preserve a woman's mental health—including preventing suicide—or to preserve a woman's physical health in the many circumstances where the exceptions do not apply. And the State wholly ignores the undisputed facts that the Criminal Abortion Ban only excepts some—but not all—ectopic and molar pregnancies and that the Criminal Medication Ban prohibits use of medication where it is medically indicated for an otherwise legal abortion.

The State makes no effort to support any argument that abortion bans further some of the other asserted governmental interests, including protecting medical ethics and preventing gruesome or barbaric procedures. State MSJ Br. at 64–67. Although the State takes issue with Plaintiffs' argument that the bans do not prevent discrimination, the State explains nowhere how the laws further this goal. *Id.* at 65–66. And in response to Plaintiffs' detailed factual showing that the abortion bans unduly infringe upon rights under Section 38, the State nonsensically claims "[t]his is a policy argument, plain and simple," and a "[d]eclaration of public policy is a matter for the legislature not the courts." *Id.* at 67.

Finally, the State argues that Plaintiffs may not pursue facial claims because the exceptions to the abortion bans provide protection for women's rights under Section 38 in some limited

number of circumstances. State MSJ Br. at 74–75. This argument is meritless for two reasons. First, that the bans do not interfere with some health care decisions cannot excuse the circumstances where they do deny women the right to make their own decisions. The bans can only be challenged to the extent they apply, and in every such circumstance the bans violate Section 38.

Second, as Plaintiffs demonstrate in their opening brief, the exceptions are illusory because they are impossibly vague. Plaintiffs' MSJ Br. at 51–59. Plaintiffs further demonstrate that in other states with similar exceptions to abortion bans, physicians and hospitals are unable to determine when abortions are permitted, with the result that the exceptions provide no protection at all. Ex. 7, Moayedi, ¶¶ 9–12, 35. As with all of Plaintiffs' other showing, the State makes no attempt to rebut this showing and therefore has conceded it. The unworkable, illusory exceptions to the abortion bans do not salvage the bans.

3. The Court Should Reject The State's Attempt To Re-Write Section 38

The bulk of the State's brief is devoted to a variety of arguments denying the import of the unambiguous terms of Section 38. Taken together, the State's arguments appear intended to re-write the Constitution to fit the abortion bans. But it is the Legislature that must conform its laws to the Constitution, not the other way around. *Witzenburger*, 575 P.2d at 1124 ("A state constitution is not a grant but a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State.").

First, the State claims that an abortion cannot constitute a woman's "own health care decision," because that decision impacts a fetus. State MSJ Br. at 51–52. According to the State, Section 38 only protects health care decisions "provided those decisions do not also affect others." *Id.* at 51. The express terms of Section 38 contain no such limitation, and to suggest that a woman's

decision to undergo an abortion does not relate to her "own" health care is absurd. A woman does not forfeit her rights under Section 38 the moment she becomes pregnant.

And if abortion is not a woman's health care, then whose health care is it? Surely it is not health care for the fetus.[2] At base, the claim that abortion is not a woman's own health care is just a repacking of the State's argument that abortion is not health care. The Court should reject it for the reasons stated above.

Second, the State argues that Section 38 was not intended to guarantee Wyoming citizens the right to make their own health care decisions at all, but instead was simply intended to "protect Wyoming citizens from requirements of the federal Affordable Care Act." State MSJ Br. at 71. In support of this argument, the State references legislative history of the bill that ultimately resulted in the Legislature's proposal to Wyoming voters, media commentary surrounding this proposal and polls. *Id.* at 71–73. The Court has already found these materials irrelevant in light of the unambiguous language of Section 38. Abortion Ban TRO Order at ¶ 36.

Nor does the State explain how the *legislative* history, media reports or polls can have any bearing on the intent of the nearly 200,000 Wyomingites who voted to adopt Section 38. There is no evidence that the voters were even aware of these materials, much less that they reflect the views of the voters who adopted Section 38. And as the State concedes, neither the official Secretary of State's voter guide nor the ballot for the referendum makes any reference to an intent

[2] Under no definition of health care—including that advanced by the State—can abortion be considered health care for a fetus. Plainly, abortion cannot be considered an effort to restore the mind, body or soul of the fetus. And even if abortion constituted health care for the fetus (it does not), and if a fetus is deemed a "natural person" under Section 38 (as the State claims), then Section 38(a) expressly gives the mother the constitutional right to make such health care decisions for the fetus: "The parent . . . of any other natural person shall have the right to make health care decisions for that person."

to vitiate the Affordable Care Act. State MSJ Br. at 22–23. As a result, none of the materials offered by the State can possibly aid the Court in interpreting the unambiguous terms of Section 38.

Moreover, the extrinsic evidence offered by the State defeats its own argument. Some of the early versions of the bill that resulted in the proposed amendment included language expressly denying the federal government's power to regulate health care: "The right to make decisions regarding lawful health care services is not a power delegated to the United States government . . ." State MSJ Br., Ex. C, at 295. This language was dropped from the final amendment that was submitted to Wyoming voters, no doubt because any effort to limit the authority of the federal government would have run afoul of the Supremacy Clause of the United States Constitution.

Thus, the State claims that the purpose of Section 38 was to do something that was expressly considered and ***rejected*** by the Legislature, and was never voted upon by Wyomingites. By rejecting this language, the Legislature made clear that it was not proposing to limit the federal government's authority in its proposal to the voters. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." (citations omitted)); *Parker Land & Cattle Co.*, 845 P.2d 1040, 1065–66 (Wyo. 1993) (holding that legislature's rejection of prior broader version of bill "unmistakably reveals" legislature's intent to limit scope of statute).

The State's argument also ignores the many direct and clear statements during the Legislature's debate on the proposed amendment that its goal was to provide Wyoming citizens with the right to control their own health care, free from any undue government interference. Although the State discusses the Perkins Amendment, Senator Perkins could not have been clearer

on this point: "What we're really talking about is choice and freedom of choice." *Health Care Freedom Const. Amendment, S.J. Res. No. 2, Second Reading, Amendment No. 1 Before Sen. Comm. of the Whole*, 61st Leg., Gen. Sess., at 35:01 to 35:21 (Wyo. 2011) https://wyoleg.gov/2011/Audio/senate/s0131am1.mp3 (statement of Sen. Drew Perkins). Senator Schiffer expanded on this theme of individual choice:

> No matter what happens [in terms of future medical advancements], we are, with this amendment, we are endowing to the citizens of this state that [health care] is theirs. No carve outs. No prescription of what has to be done to curb the growth of health care or to recede it, or to direct research in any direction. We're saying, "Folks, that's yours." Plain and simple . . . if you pass this amendment, the citizens of this state will be assured that, "What is good for me, in terms of my health care" – and each of us is different, and we should be, and we should be held accountable for making those decisions. This amendment does it.

Health Care Freedom Const. Amendment, S.J. Res. No. 2, Amendment No. 1 Before Sen. Comm. of the Whole, 61st Leg., Gen. Sess., at 37:52 to 39:00, https://wyoleg.gov/2011/Audio/senate/s0128am1.mp3 (statement of Sen. John Schiffer).

The legislative history offered by the State therefore defeats its own argument that Section 38 was never intended to provide Wyoming citizens with the right to make their own health care decisions. Of course, regardless of what the extrinsic evidence shows, it cannot override the unambiguous language of Section 38, which refers neither to the Affordable Care Act nor to the federal government, but instead broadly confers upon Wyoming citizens the right to control their own health care decisions. *See* Abortion Ban TRO Order at ¶¶ 36–37.

Third, the State attempts to revise the equally unambiguous language in subsection (d) of Section 38. According to the State, its duty to protect Wyomingites "from undue government infringement" applies only to infringement from the ***federal*** government. State MSJ Br. at 73. But Section 38(d) applies to "undue government infringement," not to "undue federal government infringement." Wyo. Const. art. 1 § 38(d).

And the same legislative history upon which the State relies shows that the Legislature knew how to reference infringement of rights by the federal government when it so intended. An early version of the proposed amendment provided that "the attorney general may . . . provide any resident of the state with assistance . . . to protect the right to make health care decisions from being abridged by the ***federal government*** or its agents." State MSJ Br., Ex. C at 295 (emphasis added). That the final version of the amendment did not include this language provides clear evidence that the Legislature did not intend to limit proposed Section 38(d) to infringement by the federal government. *See I.N.S.*, 480 U.S. at 442–43 (1987); *Parker Land & Cattle Co.*, 845 P.2d at 1065–66.

Fourth, the State argues that it has plenary power to adopt any restrictions on health care, without limitation. State MSJ Br. at 54–57. According to the State, this is because it may determine what medical services are legally available, and Wyoming citizens may only make health care decisions concerning those services that the Legislature decides should be available. *Id.* As the State puts it, "[a]s consumers of medical services, patients have no direct role in determining what services are offered." *Id.* at 55.[3]

[3] While asserting that it routinely determines what medical procedures are legally available, research has revealed no state law prohibiting any medical procedure other than abortions. The only purported example the State offers of such regulations is the designation of marijuana as a Schedule 1 substance under Wyoming law. Wyo. Stat. §§ 35-7-1014(d)(xiii) & 35-7-1031(c). This is inapposite for several reasons. First, physicians may prescribe any number of medications other than marijuana to alleviate pain and therefore are not precluded from offering medical treatment for pain. Second, marijuana currently is listed as a Schedule 1 substance under federal law, and therefore a physician may not lawfully prescribe it under ***federal law***. *See* 21 U.S.C. §§ 812 & 841(a)(1). Wyoming has no authority to override this federal law, just as it will have no authority to prohibit physicians from prescribing marijuana should federal law be changed to permit that.

The State's argument ignores subsections (c) and (d) of Section 38, which impose significant limitations on the State's power to restrict a woman's health care: such regulation must be both reasonable and necessary to protect public health and welfare ***and*** may not unduly infringe upon the right to make one's own health care decisions. If the State may evade these limitations by simply declaring a particular medical procedure to be illegal, then Section 38 would be rendered a nullity. Indeed, after devoting many pages to arguing that the State has the power to regulate what medical procedures are available, it then admits that any such regulations must comply with the limitations in Section 38 in order to pass constitutional muster. State MSJ Br. at 58–59. By its own admission, the State's argument on the Legislature's authority to regulate health care is therefore beside the point.

And yet again, the State's argument is contradicted by the legislative history it relies upon. An early version of the amendment expressly gave the Legislature the right to determine what health care would be available to Wyoming citizens: "The right to health care access as defined by the legislature is reserved to the citizens of the state of Wyoming." State MSJ Br., Ex. C at 296. That version of the proposed amendment also included the term "lawful health care." *Id.* at 295. These terms were all dropped from the final proposed amendment, demonstrating that Section 38 was not intended to empower the Legislature to specify what medical procedures were legally available.

Fifth, the State attempts to substitute the rational basis test for Section 38's more demanding standard. Although claiming that Section 38 imposes a unique constitutional test, State MSJ Br. at 59–60, the State nonetheless asserts that the Section 38 test is "equivalent to the rational basis test." *Id.* at 60. The State argues that the terms "reasonable and ***necessary***" and "undue governmental infringement" in subsections (c) and (d) do not have their ordinary meaning. *Id.* at

60–61 (emphasis added). Instead, the State urges the Court to find that these terms are "substantially similar" to the terms "rationally related" or "legitimate state objective," as used in the rational basis legal test. *Id*. at 60. Not only does the State offer no basis for re-writing Section 38 in this manner, but its effort to do so is contrary to the plain meaning of the constitution.

To satisfy the rational basis test, the State must show that a statute is "related to a legitimate government interest." *Hardison v. State*, 2022 WY 45, ¶ 10, 507 P.3d 36, 40 (Wyo. 2022). This test bears no resemblance to the more exacting requirements of Section 38: that a statute be reasonable and necessary to protect public health and welfare ***and*** not unduly infringe on the right of Wyoming citizens to control their own health care. The language of Section 38 more closely aligns with the strict scrutiny test, under which the State must show that the statute "is necessary to achieve a compelling state interest," *Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 885 (Wyo. 1995), and that "there is no less onerous alternative by which its objective may be achieved," *Washakie Cnty. Sch. Distt. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980). Because protection of public health and welfare undoubtedly is a compelling governmental interest, the first element of both Section 38 and strict scrutiny are identical—*i.e.*, that the statute is necessary to achieve a compelling state interest. And avoiding "undue infringement" of the right to control health care under Section 38 is akin to narrowly tailoring a statute to further that state interest, as required by the strict scrutiny test.

While the Court should reject the State's attempt to re-write Section 38, in the end it makes no difference, because the bans cannot survive any level of scrutiny, as demonstrated above and in Plaintiff's opening brief. Plaintiffs' MSJ Br. at 6, 28–37. Because the State does not rebut Plaintiffs' showing that the Criminal Abortion Ban and Criminal Medication Ban violate Section 38, the Court should grant Plaintiffs summary judgment.

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

As with the Section 38 claim, the State makes no attempt to rebut the Plaintiffs' showing that the abortion bans are so vague that they provide no workable standard. In support of their vagueness claim, Plaintiffs provide detailed, factual evidence demonstrating that the key terms of both bans have no medical meaning or guidance, and that there is no way for physicians or pharmacists to determine when abortion is legal under the laws. Plaintiffs' MSJ Br. at 51–59; Ex. 1, Anthony ¶¶ 23, 47, 51; Ex. 2, Hinkle ¶¶ 9, 28, 35, 47, 51; Ex. 7, Moayedi ¶¶ 7–12, 34–37, 49–66. Among other things, this showing includes:

- With respect to the Criminal Abortion Ban, there is no medical meaning or guidance for, and no way for a physician to determine the following: 1) what constitutes a "substantial risk of death;" 2) what qualifies as a "serious and permanent impairment of a life sustaining organ;" 3) when a fetus has a "substantial likelihood of death . . . within hours of the child's birth" for purpose of a lethal fetal anomaly; 4) what it means to make "reasonable efforts . . . to preserve . . . the life of the unborn baby . . ." where the fetus has no prospect of sustained life; and 5) how to determine if a woman has filed an adequate report with the correct agency for purposes of the exceptions for sexual assault and incest. Ex. 1, Anthony ¶¶ 39, 53; Ex. 2, Hinkle ¶ 35; Ex. 7, Moayedi ¶¶ 17, 52–53, 63–64;
- With respect to the Criminal Medication Ban, there is no medical meaning or guidance for, and no way for a physician to determine the following: 1) what constitutes an "imminent peril that substantially endangers [a woman's] life or health;" 2) how a physician or pharmacist can confirm that a woman is the victim of sexual assault or incest; and 3) whether common hormonal contraceptives are exempted from the

Medication Ban. Ex. 1, Anthony ¶¶ 47–48, 51; Ex. 2, Hinkle ¶¶ 47, 51; Ex. 7, Moayedi ¶¶ 41, 55–56;

- That in states with similarly vague exceptions to abortion bans, necessary medical care is being delayed or denied because of confusion among health care providers on when abortion is legal, with the result that women are experiencing unnecessary pain, injury and risk of death. Ex. 7, Moayedi at ¶¶ 10–12; Ex. 11, Modlin at Attachment C (8/4/23 Temporary Injunction Order in *Zurawski v. Texas*); and
- That both bans use a variety of invented terms that have no medical or non-medical meaning, including "separation procedure," "natural miscarriage," and "chemical abortion." And the Criminal Medication Ban does not even define pregnancy in a way that is medically correct. Ex. 2, Hinkle ¶ 43; Ex. 7, Moayedi ¶¶ 20–21, 66.

The State neither acknowledges nor responds to these showings, but insists that physicians can still exercise reasonable medical judgment in applying the bans, because "a person of ordinary intelligence can read the Life Act and the chemical abortion statute and comprehend the conduct prohibited." State MSJ Br. at 124. In support of this proposition, the State offers the same dictionary definitions set out in its interrogatory responses. *Id.* at 124–27. Plaintiffs already made a detailed showing that these definitions add no clarity, and in fact introduce further ambiguity. Plaintiffs' MSJ Br. at 53–57; Ex. 7, Moayedi ¶¶ 49–66. Among other things, Plaintiffs demonstrated:

- Construed literally, the State's definition of "substantial risk of death" as one that is "not imaginary or illusory; real or true," would include all pregnancies within the Criminal Abortion Ban's exception such that the statute would be rendered a nullity. Ex. 7, Moayedi ¶¶ 52–54;

- The State offered no clarification for the phrase "serious and permanent injury" in the Criminal Abortion Ban, and its definition of "life sustaining organ" was contrary to the statutory language and included some organs not necessary for life while excluding other organs that are necessary for life. Ex. 7, Moayedi ¶¶ 8, 64–65;
- The State's examples of conditions that purportedly fall within the Criminal Abortion Ban's exceptions exclude many conditions that can lead to serious injury or death. Ex. 7, Moayedi ¶¶ 54–55; and
- The State's definition of the Criminal Medication Ban's exception for abortions "necessary to preserve the woman from an imminent peril that substantially endangers her life or health" is incoherent. Ex. 7, Moayedi ¶ 56.

In its summary judgment brief, the State does not respond to Plaintiffs' showing. And while the State does attempt to provide examples of how the bans can be applied, these examples prove Plaintiffs' claims. In particular, the State offers three scenarios in which it claims the statutory exceptions would apply "without question." State MSJ Br. at 128–129. But in each case, the State uses terms that are themselves ambiguous without making any attempt at explaining what they mean or how they would be applied.

For example, the State claims that the Criminal Abortion Ban's exceptions "would apply without question . . . 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***." State MSJ Br. at 128 (emphasis added). What is missing is any clarification on the meaning of the phrases "***real*** threat to the life

of the pregnant woman" and "***likely will prevent*** the preeclampsia from causing the death of the pregnant woman," as well as how a physician can make this judgment. Is a "real threat" to life a 1% chance of death? A 25% chance of death? To be "likely [to] prevent . . . death," must there be a greater than 50% chance? And at what point is the threat sufficiently "real" or "likely" that a physician may act? The State offers no basis for answering these questions, leaving physicians to guess at the risk of losing their livelihood and freedom.

The State's other examples of exceptions that would "apply without question" also do nothing to clarify the laws' ambiguities. The State claims that sexual assault or incest would qualify for an exception if "reported," but does not explain what the report must consist of, whether it must be in writing, to what agency it must be submitted and how a physician or pharmacist is to determine that the report complies with the bans. State MSJ Br. at 129. And while the State notes that lethal fetal anomalies are excepted from the Criminal Abortion Ban (but not the Criminal Medication Ban), it does not explain how a physician can determine in advance if a fetus will die within hours of birth. *Id.* With respect to the Criminal Medication Ban, the State simply references the exceptions without attempting to provide any clarification. *Id.* at 130–31.

Rather than address Plaintiffs' showing of vagueness, the State once again asks the Court to simply ignore that evidence. First, the State claims that the Plaintiffs have not demonstrated why a physician cannot apply the exceptions. State MSJ Br. at 132. The State then directly contradicts itself by acknowledging the extensive physician testimony submitted by Plaintiffs on this subject, but asks the Court to ignore it because these physicians allegedly have personal views about the policy underlying the laws. *Id.* at 133–34. Whether this is or is not true is irrelevant. Plaintiffs have offered declarations that include sworn, detailed, factual showings that the State has not attempted to rebut. It therefore is undisputed that key statutory terms have no medical

meaning and cannot be applied by physicians in their "reasonable" or "appropriate" medical judgment.

Finally, the State attempts to salvage its defense by arguing that at least in some applications the bans may be clear, and therefore the bans are not facially unconstitutional. This ignores Plaintiffs' as applied claims. State MSJ Br. at 125–26. And as to the facial claims, the State does not dispute that the ambiguous terms are central to defining the conduct permitted under the bans and cannot be severed from them. Plaintiffs' MSJ Br. at 57–59. Because there is no way to determine when an abortion is and is not legal under the bans, they provide no standard at all and therefore are facially invalid. Plaintiffs are entitled to summary judgment on their vagueness claims.

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

In their summary judgment motion, Plaintiffs demonstrated that the abortion bans are based on the Legislature's pronouncement that a fertilized egg represents a fully formed, independent human being; that this pronouncement represents an attempt to legislate a sectarian religious viewpoint that is not shared by many religions; and that the actual motivation behind the legislation was religious. Plaintiffs' MSJ Br. at 59-72. The State does not attempt to rebut any of these showings and even invites the Court to take judicial notice of the divergent religious viewpoints on the question of when life begins. *See* Motion to Strike Plaintiffs' Expert Witnesses at 16.

The State opposes Plaintiffs' motion on two grounds. First, the State takes the position that the Wyoming Constitution does not provide greater protection against establishment of religion than the U.S. Constitution, State MSJ Br. at 77–79, and second, that there is a secular, scientific basis for the proposition that a single-celled zygote is a fully formed, independent human

being. *Id.* at 83–86. The State has offered no authority for either of these arguments, nor is there any.

The State's argument that the Wyoming Constitution does not go beyond the federal Establishment Clause consists entirely of their assertion that Plaintiffs have not attempted to address this issue. State MSJ Br. at 78. Contrary to the State's assertion, Plaintiffs directly addressed this issue. In particular, Plaintiffs cited the Wyoming Supreme Court's statement that the Wyoming Constitution contains a "variation" of the federal Establishment Clause that is based on language different from the U.S. Constitution. Plaintiffs' MSJ Br. at 60; *In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d 728, 744 (Wyo. 2017). Plaintiffs further analyzed the specific provisions of the Wyoming Constitution addressing religion and demonstrated that they aligned with the *Lemon* test, which is no longer applicable to the federal Establishment Clause. Plaintiffs' MSJ Br. at 61–62. Plaintiffs therefore offered an "articulable, reasonable and reasoned argument for considering" the Wyoming establishment provisions to provide greater protection than the US Constitution. *In re Neely*, 2017 WY 25 at ¶ 48, 390 P.3d at 741–42.

Next, the State leans heavily on the United States Supreme Court's decision in *Harris v. McCrae*, 448 U.S. 297 (1980) to claim that the Criminal Abortion Ban merely coincides with—rather than adopts—a religious viewpoint. State MSJ Br. at 79–81. The State misconstrues the *Harris* decision. In that case, the Supreme Court considered a number of constitutional challenges to the Hyde Amendment, which prohibited use of federal funds for medically necessary abortions. 448 U.S. 297.

In considering the Establishment Clause challenge, the *Harris* court applied the three-part test under *Lemon v. Kurtz*, which the State here argues should not apply. State MSJ Br. at 78. The first part of this test poses the question whether there is a secular purpose for the law. *Harris*, 448

U.S. at 319. The Supreme Court answered this question in the affirmative, finding that just because the policy behind the Hyde Act "may coincide with the religious tenets of the Roman Catholic Church does not, ***without more***, contravene the Establishment Clause." *Id.* at 319–20 (emphasis added).

But the Criminal Abortion Ban does not merely coincide with religious tenets—it expressly legislates a religious viewpoint: that a single-celled zygote is a fully formed, independent human being. This religious viewpoint is adopted as the basis for the abortion bans, as the State concedes when it describes the purpose of the abortion bans as "to define when life begins." State MSJ Br. at 106. The Hyde Amendment contained no such endorsement of a specific religious viewpoint—it simply implemented a policy that was consistent with the goals of a particular religion.

This distinction—between a statute that furthers a policy shared by a religious denomination and one that expressly adopts a religious viewpoint—was recognized by the Tenth Circuit in *Jane L. v. Bangerter*, 61 F.3d 1505 (10th Cir. 1995). In that case, the Court found *Harris* did not preclude an Establishment Clause challenge to a statute that expressly incorporated religious doctrine on abortion. 61 F.3d at 1516 n.10. United States Supreme Court Justice Stevens similarly observed that *Harris* did not apply where a statute restricting abortion expressly adopted the religious viewpoint that life begins at conception, because this legislative pronouncement had no secular purpose. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part).

Plaintiffs' establishment claim therefore comes down to the question of whether the belief that life begins at conception has a secular basis. It does not. The U.S. Supreme Court itself has acknowledged the religious basis for this viewpoint. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 702–03 (2014). Plaintiffs demonstrated that this belief is uniquely religious through the

expert testimony of Professor Rebecca Peters, who traced the religious roots of the belief in exhaustive detail. Ex. 9, Peters at ¶¶ 17, 65–83. This testimony is buttressed by Rabbi Ruttenberg. Ex. 10, Ruttenberg at ¶¶ 8–22. The State did not attempt to rebut Professor Peters' or Rabbi Ruttenberg's testimony and instead suggested that the Court take judicial notice of it. Motion to Strike Plaintiffs' Experts at 16, 18.

The State's entire argument on this point consists of referencing two court opinions that contain dicta on the question of whether there is a scientific basis for when life begins. State MSJ Br. at 82 (citing *Foster v. State Farm Mut. Auto. Ins. Co.*, 843 F. Supp. 89 (W.D.N.Y. 1994) and *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999)). Neither case involved an adjudicated dispute on this question. Nor does either case address the precise issue here: whether a fertilized egg has the status of a fully formed person, independent from the mother and equivalent to a living baby. Instead, both cases appear to address the question of whether an embryo or fetus represents biological human life—a different issue altogether.

As Professor Peters explains, "[t]o say that a fertilized egg is 'human' or that it belongs to the 'human species' is uncontested." Ex. 9, Peters at ¶ 13. But the claim that an "unborn baby" has an independent status equivalent to a living baby represents an attempt "to change our understanding of what a fertilized egg or an embryo or a fetus *is*—to shift our public, collective understanding away from the science of developmental biology toward a sectarian Christian belief that a fertilized egg is ontologically the same as a newborn baby." *Id.* at ¶ 16. These facts are undisputed, and the cases cited by the State do not come close to addressing—much less refuting—them.

In *Foster v. State Farm*, the court considered whether a health insurance policy covered treatment that was entirely for the benefit of a fetus. 843 F. Supp 89 (W.D.N.Y. 1994). The case

hinged on the language of the insurance plan. *Id.* at 93. In discussing whether the fetus was covered under the plan, the court cited a variety of studies concerning the stages of development of an embryo and fetus, concluding that "[w]hatever else we might call a human at eighteen weeks of gestation, and whatever else the Foster's acquired under their ERISA plan, it was also essentially a child." *Id.* at 98. The decision therefore did not concern the status of a single-celled zygote, but instead that of an 18-week-old fetus.

In a footnote to this conclusion, the *Foster* court cited to a report of a United States Senate subcommittee purporting to find that life begins at conception as a matter of science. 843 F. Supp at 98 n.2. This report was issued in support of a bill that sought to establish that "human life shall be deemed to exist from conception." S. 158, 97th Cong. (1981). The bill did not become law. *S.158—A bill to provide that human life shall be deemed to exist from conception*, U.S. Cong., https://www.congress.gov/bill/97th-congress/senate-bill/158?s=4&r=1&q=%7B%22search%22 %3A%22s158%22%7D (last visited Oct. 29, 2023) (indicating that last action on the bill was its introduction in the Subcommittee on the Separation of Powers on July 9, 1981).

A finding of a Senate subcommittee is itself not the result of an adjudicative process, is at least double hearsay, and has no evidentiary value. *See* Wyo. R. Evid. 801, 803(8), and 805; *Anderson v. City of New York*, 657 F. Supp. 1571, 1579–80 (S.D.N.Y. 1987) (declining to admit congressional report under exception to rule against hearsay because it lacked "ordinary indicias [sic] of reliability, is not based on the personal knowledge of the reporter, and contains the testimony of interested parties, not experts."); *Knight Pub. Co. v. U.S. Dept. of Justice*, 631 F. Supp. 1175, 1178 (W.D.N.C. 1986) ("The Court does not look to the [congressional subcommittee] reports of such activities as productive of any facts . . . .").

And as noted above, the *Foster* decision does not purport to address the precise question at issue here: whether there is a secular basis for the belief that a single-celled zygote is a fully formed, independent human being as stated in the Criminal Abortion Ban. The *Foster* case therefore provides no support for the State's claim of a secular purpose.

The second case cited by the State likewise has no persuasive value. In *Nealis*, the court considered whether a claim may be brought under Oklahoma's wrongful death statute on behalf of a non-viable fetus that was born alive but did not survive. 996 P.2d 438. After reviewing at length the history of Oklahoma's wrongful death statute, the court considered "the language and intent of Oklahoma's wrongful death statute" to find that "*once live birth occurs, the debate over whether the fetus is or is not a person ends and the live born child attains the legal status of*" a person. *Id.* at 452–53 (emphasis in original). Thus, the court was not called upon to consider the question of whether life begins at conception or even whether a fetus was comparable to a baby that is born, since the fetus in *Nealis* was actually born alive.

Nonetheless, in dicta, the court stated that "[c]ontemporary scientific precepts accept as a given that human life begins at conception." *Nealis*, 996 P.2d at 453. In a footnote to this statement, the *Nealis* decision referenced a variety of studies describing the various stages of embryonic and fetal development. *Id.* at 453 n.69 (noting that the unique, genetic composition of each individual is fixed at the time of fertilization, and reviewing the development of major organs and bodily functions from six weeks to 20 weeks of gestation). None of this provides support for the proposition that, as a scientific matter, a single-celled zygote is a fully formed, independent human being comparable to a live child. To the contrary, these studies make clear that critical aspects of human development necessary to support an independent existence take place weeks and months after conception.

By contrast, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the U.S. Supreme Court confronted the precise issue presented here. That case involved a Missouri statute restricting abortion that included a preamble declaring "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being." *Id.* at 504. This language is quite similar to that included in the Criminal Abortion Ban proclaiming that an "unborn baby [is] a member of the species homo sapiens from conception," and that "unborn babies from conception" are entitled to "equal protection for all human lives." Wyo. Stat. § 35-6-121(a)(i) & (v).

Plaintiffs in *Webster* asserted that the preamble violated the Establishment Clause, but the plurality opinion declined to reach this claim on ripeness grounds. 492 U.S. at 506–07. However, in a separate opinion, Justice Stevens squarely addressed this question, finding that the statutory language lacked any secular purpose, and therefore violated the Establishment Clause:

> Indeed, I am persuaded that ***the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause*** of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. ***Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.***

492 U.S. at 566–67 (Stevens, J., concurring in part and dissenting in part) (citations omitted) (emphases added).

Nor does the Wyoming estate law referenced by the State do anything to buttress its claim. *See* State MSJ Br. at 86, 106. That a baby conceived prior to the death of a parent may have intestate inheritance rights after birth says nothing about the status of a single-celled zygote as a

fully formed, independent human being. To the contrary, the relevant statute expressly requires the baby to ***be born*** before it can inherit: "Persons conceived before the decedent's death ***but born thereafter*** inherit as if they had been born in the lifetime of the decent." Wyo. Stat. § 2-4-103 (emphasis added).[4]

And the criminal statutes that make killing a fetus a crime affirmatively contradict the State's position that Wyoming has a long-standing legal tradition of treating an embryo the same as a live person. As demonstrated in Plaintiffs' opening brief, from the nineteenth century until 2021, Wyoming law did not treat killing a fetus as murder, but instead as a distinct criminal act. Plaintiffs' MSJ Br. at 68. The State does not dispute that historically Wyoming law had separate offenses for killing a person and killing a fetus. State MSJ Br. at 84–86. In fact, the State highlights that for a long time, Wyoming only criminalized killing a "quick" fetus. State MSJ Br. at 84. Quickening refers to when a woman could first feel movement of the fetus, usually between 16 and 18 weeks of pregnancy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249 (2022). Thus, Wyoming law historically has not treated a fertilized egg the same as a live human being.

Finally, the State does nothing to rebut the substantial evidence submitted by Plaintiffs showing the religious motivation behind the abortion bans. This evidence includes the legislative history of the Criminal Abortion Ban, statements by the sponsors of the abortion bans, and a lengthy meeting of the Freedom Caucus discussing the religious origins of the Trigger Ban—the predecessor to the bans at issue in this case. Plaintiffs' MSJ Br. at 68–72.

[4] It appears that the State inadvertently cited to Wyo. Stat. § 2-4-104, which concerns inheritance rights of half-siblings and step-children, but meant to cite § 2-4-103.

In its summary judgment brief, the State attempts to downplay these statements of religious motivation, claiming that during the floor debates over the Criminal Abortion Ban legislators denied any religious motivation behind the law. State MSJ Br. at 81. A review of the legislative hearings referenced by the State shows that the religious underpinnings of the bill were discussed at length during the legislative process. While some supporters of the law attempted to argue that the belief that life begins at conception was not religious, far more acknowledged and/or embraced the religious motivation behind the law, as described below.

1. The following statements were made during the February 6, 2023 House Floor Session in the House Committee of the Whole:

- Representative Oakley objected that the bill was unconstitutional because of its references to religious provisions of the constitution (2:06:55 to 2:07:09). She further noted that the bill is "tie[d]" "to provision that are religious." (2:45:03 to 2:45:50);
- Representative Conrad supported the bill because "human life is a sacred gift from God," and elective abortion is "contrary to the rule and commandments of God." (2:12:20 to 2:12:40);
- Representative Hornok declared that "when I stand before God . . . I'm more concerned with the question that He is going to ask me, and that's what we're doing here today." (2:24:54 to 2:25:14);
- Representative Chestek voiced concern that the bill "offends the First Amendment of the Constitution," because "clearly the intention of this bill, it's an intention to declare that life begins at fertilization. That is a view of certain people and certain religious traditions . . . Other faith traditions hold that life begins at birth. Science

has no position on this . . . We are being asked to choose . . . [and] impose that [religious belief] over others who don't share that belief." (2:27:03 to 2:28:30);

- Representative Provenza voiced concern that the bill was "unconstitutional legislation, especially in ways that attack separation of powers and separation of church and state." (2:41:39 to 2:42:08); and
- Representative Crago noted that "if we're saying that we're passing this bill on religious grounds, its unconstitutional on its face right off the bat." (2:58:48 to 3:02:27).

Committee of the Whole in the House of Representatives, *House Floor Session—Day 19*, YouTube, at 1:53:02 to 3:26:36 (Feb. 6, 2023), https://www.youtube.com/watch?v=ynn-N0JNa48.

2. The following statements were made at the February 27, 2023 Senate Floor Session of the Committee of the Whole:

- Senator Scott asserted that "this bill crosses the line and imposes the will of one set of religions." (1:22:59 to 1:24:30);
- Senator Rothfuss noted that the bill's purpose was to "enshrine[e] those religious beliefs into statute." (1:26:16 to 1:28:48);
- Senator Hicks attempted to claim that he supported the bill for non-religious reasons, but then noted that "we were founded as a Christian nation," and that the bill was about a "fundamental belief . . . [in] God" and a "fundamental belief about whether there is a Supreme Being." (1:48:15 to 1:50:25); and
- Senator Cooper stated that "my personal religious beliefs tell me that life begins at fertilization, but I can't ethically tell another senator . . . that that's what they have to believe religiously." (2:05:31 to 2:05:53).

Committee of the Whole in the Senate, *Senate Floor Session—Day 33*, YouTube (Feb. 27, 2023), https://www.youtube.com/watch?v=8O2bRdO_F5U.

The evidence before this Court overwhelmingly establishes not only that the abortion bans expressly endorse a particular sectarian religious viewpoint, but that the sponsors and other legislators embraced this religious motivation. This attempt to legislate religious beliefs and practices violates the prohibition on establishment of religion in the Wyoming Constitution. The Court should grant Plaintiffs summary judgment on their establishment claim.

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

Plaintiffs' opening brief demonstrates that the Criminal Abortion Ban and Criminal Medication Ban directly burden Kathleen Dow's observance of her sincerely held religious beliefs concerning when life begins and when abortion is permissible. The laws therefore must survive strict scrutiny, which the State makes no serious effort to demonstrate. Plaintiffs are entitled to summary judgment.

As with all other claims, the State offers no rebuttal to Plaintiffs' factual showing of Dow's sincerely held religious beliefs and the ways in which the abortion bans infringe on them. Instead, the State devotes most of its response to arguing that this Court should not follow binding precedent from the Wyoming Supreme Court and to mischaracterizing Plaintiffs' claim. The Court should reject these efforts at obfuscation.

First, the State asserts that the free exercise provisions of the Wyoming Constitution provide no protection greater than the federal free exercise clause. This argument seeks to evade the Wyoming Supreme Court's decision in *In re Neely*. 2017 WY 25 at ¶ 1, 390 P.3d at 728. In that case, the Supreme Court found there is "an articulable, reasonable, and reasoned argument for

considering whether Wyoming Constitution, article 1, section 18 and article 21, section 25 provide greater protection than does the United States Constitution." *Id.* at ¶ 40, 741–42. The Supreme Court based this finding on the differences in the state and federal constitutional language and the fact that "[c]ourts of other states with similar constitutional language have held that their state constitutions provided stronger protection than the federal constitution." *Id.* at ¶ 41, 742 (citing *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 224 (Wash. 1992) and *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)).[5]

The State takes the position that the Wyoming Supreme Court's observations were flawed and should be rejected by this Court. First, the State urges this Court to find the Supreme Court was mistaken in referencing the Washington and Minnesota constitutions as similar to Wyoming's. Instead, the State claims that the Supreme Court should have focused on the North Dakota constitution, which the North Dakota Supreme Court has found "affords protections similar to those provided by the [federal] Establishment Clause." State MSJ Br. at 92 (citing *North Dakota v. Burckhard*, 579 N.W.2d 194, 196 (N.D. 1998)).

Aside from the fact that it is contrary to the Wyoming Supreme Court's explicit findings, the fundamental problem with this argument is that while the North Dakota constitution has a provision similar to article I, section 18 of the Wyoming Constitution, North Dakota has no provision comparable to article XXI, section 25 of Wyoming's Constitution. *See Burckhard*, 579

[5] The Supreme Court in *In re Neely* stopped short of explicitly holding that the Wyoming Constitution offered broader protections than the U.S. Constitution because it was unnecessary to resolve the dispute before the Court: "The language of Wyoming Constitution article 1, Section 18 and article 21, section 25 may offer broader protections than does the United States Constitution, but we do not find that the protections they may offer are applicable to Judge Neely's circumstances here." 2017 WY 25 at ¶ 42, 390 P.3d at 742.

N.W.2d at 196. Caselaw concerning the North Dakota constitution therefore has no relevance to interpreting Wyoming's free exercise provisions.

The State attempts to bridge this gap first by arguing that article XXI, section 25 is a nullity with no import, because it was required as a precondition for Wyoming's admittance as a state. State MSJ Br. at 93–95. The State nowhere explains how this history renders Section 25 meaningless, nor can it possibly do so. *Powers*, 2014 WY 15 at ¶ 9, 318 P.3d at 304 ("[T]he 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." (quoting *Geringer v. Bebou*t, 10 P.3d 514, 520 (Wyo. 2000)).

Perhaps recognizing this obvious flaw in its argument, the State goes on to reference the Idaho Constitution, which does include language similar to Section 25, and claims that the Idaho Supreme Court held that this language "does not afford greater protections than the religious liberty provision in the bill of rights article." State MSJ Br. at 96 (citing *State v. Heath*, 485 P.3d 1121, 1127 (Idaho 2021)). The *Heath* decision says nothing of the kind, and did not address the federal free exercise clause at all. Instead, the Idaho Supreme Court found that the language in article 21, section 19 of the Idaho constitution (which is similar to Section 25 of the Wyoming Constitution) did not expand the religious freedom protections in article I, section 4 of the ***Idaho Constitution***. *Id.* at 1126–27. The Idaho constitution and the *Heath* decision therefore provide no support for the State's request that this Court ignore binding precedent of the Wyoming Supreme Court.

Finally, the State argues that the abortion bans do not violate the constitutional guarantee of religious freedom, because they do not infringe on religious liberty in all circumstances, only in some. State MSJ Br. at 98–99. This argument appears to assume that the free exercise claim is a

facial claim. But free exercise claims are by their nature as applied, because they require proof that a statute burdens a particular plaintiff's observance of her sincerely held religious beliefs. *Int. of ASM v. State*, 2021 WY 109, ¶ 23, 496 P.3d 764, 769 (Wyo. 2021) (collecting cases). As the U.S. Supreme Court observed, "[t]he Free Exercise Clause . . . extends beyond facial discrimination." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (reviewing the evidentiary record to find that a facially neutral statute targeted a particular religious practice). The free-exercise claim in the present case is exclusively an as applied claim and not a facial claim. The State's argument that the bans do not infringe on religious beliefs in all circumstances therefore is beside the point.

Because there is no genuine dispute that the abortion bans burden Ms. Dow's sincerely held religious beliefs, the State has the burden of demonstrating that the bans are narrowly tailored to a compelling government interest. Plaintiffs' MSJ Br. at 74-76. The State has not attempted to make this showing, nor could it for the reasons described above. The Court should grant Ms. Dow summary judgment on her free-exercise claims.

E. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. article I, section 3 and article I, section 34—Equal Protection

The Wyoming Supreme Court has emphasized that "women in Wyoming are men's equals before the law." *State v. Yazzie*, 218 P.2d 482, 483 (Wyo. 1950). The bans infringe on this right by targeting women and limiting their right to choose their own health care, while men suffer no such restrictions. Making women inferior to men—and without constitutional rights—during the approximate nine months of a pregnancy should not be countenanced. In its attempt to avoid

summary judgment, the State again misconstrues Plaintiffs' arguments, the Wyoming Constitution, and the impact of the Bans.[6]

To start, the State argues that Wyoming's protections apply only to "political rights and privileges" and asserts Plaintiffs have not demonstrated that any political rights and privileges are implicated by the abortion bans. State MSJ Br. at 100. The State neglects to describe what is included within the phrase "political rights and privileges," and with good reason: the constitutionally protected right to control one's own health care decisions under Section 38 is unquestionably a "political right," since it is guaranteed in Wyoming's Constitution. Nor does the State cite any legal authority on this issue.

In fact, the Wyoming Supreme Court has made clear that the right to equality under the state constitution broadly applies to "laws affecting rights and privileges. . ." *Johnson v. State Hearing Examiner's Off.*, 838 P.2d 158, 164–65 (Wyo. 1992). *Johnson* involved a challenge to a statute that required suspension of a driver's license for minors convicted of possessing alcohol, finding these were rights and privileges to which the equal rights provisions of the Constitution applied. *Id.* If the right to drive and to drink alcohol are "political rights and privileges" then so must be the right to control one's own health care.

Next, the State argues that the equal rights provisions of the Wyoming Constitution do not afford greater rights than the Equal Protection Clause of the Fourteenth Amendment. State MSJ Br. at 100–02. But *Johnson* definitively resolves that issue against the State, expressly finding that

---

[6] Plaintiffs' motion for summary judgment relies on article I, section 3 for its equal protection claim. Plaintiffs' MSJ Br. at 79–81. In its motion, the State also requests summary judgment on Plaintiffs' claim under article I, section 34. *Id.* at 137. The Wyoming Supreme Court has found that section 34's requirement for uniform application of laws also guarantees equal protection. *White v. State*, 784 P.2d 1313, 1316 (Wyo. 1989).

"the Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution." 838 P.2d at 165. The State attempts to avoid this holding by suggesting that *Johnson* was overruled by the later Wyoming Supreme Court decision in *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999). The *Vasquez* decision does not even address this question, much less overrule *Johnson*. *Vasquez* did not concern the equality provisions of the Wyoming Constitution, but instead considered a claim of unlawful search and seizure under article I, section 4.

And the *Vasquez* court announced no uniform rule on whether the Wyoming Constitution afforded rights beyond the federal constitution, but instead emphasized that each provision of the Wyoming Constitution must be independently evaluated under ***state law*** to determine the scope of rights it conferred:

> In general, the Wyoming Constitution does contain a longer list of rights using more detailed and more specific language that positively declares rights in contrast to the Federal Constitution's use of prohibitory language. The Wyoming Constitution also contains language and rights not provided for in the Federal Constitution. It is a unique document, the supreme law of our state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated. Just as we have done with other state constitutional provisions which have no federal counterpart, we think that Article I, § 4 deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement action despite its federal counterpart and the activity it generates for the United States Supreme Court. Development of sound constitutional principles on which to decide these issues may lead to decisions which parallel the United States Supreme Court; may provide greater protection than that Court; or may provide less, in which case the federal law would prevail; but whatever the result, a state constitutional analysis is required unless a party desires to have an issue decided solely under the Federal Constitution.

990 P.2d 485. *Vasquez* therefore does nothing to diminish the holding in *Johnson*.

The State also cites to the Wyoming Supreme Court's decision in *Greenwalt v. Ram Restaurant Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003). According to the

State, this case shows that "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." State MSJ Br. at 102. But the *Greenwalt* decision does not contain any such ruling and cites *Johnson* with approval. 2003 WY 77 at ¶ 39, 71 P.3d at 731. As the State concedes, fourteen years ***after*** *Greenwalt,* the Wyoming Supreme Court expressly re-affirmed *Johnson,* holding that "the Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution." *In re Neely*, 2017 WY 25 at ¶ 48, 390 P.3d at 744; *see* State MSJ Br. at 102, n. 58. The Wyoming Supreme Court therefore has repeatedly and consistently held that the equal rights provisions of the state constitution go beyond the guarantees of the U.S. Constitution. The State's argument to the contrary is false.

Finally, the State argues that the Court should not apply strict scrutiny to the equal rights claim. State MSJ Br. at 103. Once again, the State's argument runs afoul of the Supreme Court's decision in *Johnson*. There, the Court explained that:

> While the federal equal protection test of **strict scrutiny** appears designed to protect against the distinctions of race and color referred to in the Fifteenth Amendment, the test fails to protect equally against distinctions that are not specifically referred to in the Fifteenth Amendment. **On the other hand, the Wyoming Constitution requires that laws affecting rights and privileges shall be without distinction of race, color, sex, or *any circumstances or condition whatsoever other than individual competency*.**

Johnson, 838 P.2d at 164–65 (citations omitted) (bold emphases added, italic emphasis in original).

The State asks this Court to reject binding precedent on the grounds that there is no fundamental right to abortion under the Wyoming Constitution. State MSJ Br. at 103. This misses the point. Under Wyoming law, "[w]hen a 'suspect class' *or* a 'fundamental right' is involved in the classification, we apply a strict scrutiny test." *Allhusen*, 898 P.2d at 885 (quoting *Kautza v. City of Cody*, 812 P.2d 143, 147 (Wyo. 1991)) (emphasis added). There does not need to be a

fundamental right to *abortion* specifically in order for there to be a fundamental right, or a suspect class, impacted by the Criminal Abortion Ban and Criminal Medication Ban.

Washakie County School District Number One v. Herschler is instructive. There, the Supreme Court evaluated whether the financing system for Wyoming's public schools violated the equal protection provisions of the Constitution by allocating state education funds based on the property tax resources of the particular district. 606 P.2d at 333. The Court found there was no fundamental right to specific levels of educational funding, but nevertheless applied strict scrutiny based on both the fundamental right to an education and the statute's suspect classification on the basis of wealth. *Id.*

Here, the bans impact fundamental rights (health care decisions and religious liberty). *See supra* Parts III.A, C–D. Strict scrutiny therefore applies. In addition, the Wyoming Supreme Court has found that "[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Bird v. Wyo. Bd. of Parole*, 2016 WY 100, ¶ 7 n.1, 382 P.3d 56, 61 (Wyo. 2016) (explaining that gender-based discrimination is subject to heightened review). The Criminal Abortion Ban and Criminal Medication Ban fail both these tests, because, as demonstrated above, the State cannot demonstrate that the abortion bans are narrowly tailored to any compelling governmental interest or that they are substantially related to any of the State's asserted interests.

On strict scrutiny, the best the State can muster is to point to Plaintiffs' recognition that the "protection of prenatal life is undoubtedly a legitimate and compelling basis to regulate health care." State MSJ Br. at 110 (citing Plaintiffs' MSJ Br. at 29–30). That is not enough to meet strict scrutiny. The State must also show that the classification here is *necessary* to achieve that purpose

and that there is no less restrictive means of accomplishing the interest. *Allhusen*, 898 P.2d at 885 *Herschler*, 606 P.2d at 333. They have done neither because they cannot.

Even if the rational basis test applied, the State cannot clear that lower bar. As the State acknowledges, *rational* basis review is "not toothless." State MSJ Br. at 104 (citing *Greenwalt*, 2003 WY 77 at ¶ 39, 71 P.3d at 731). At a minimum, "there must be a substantial connection between the purpose in view and the actual provisions of the law." *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938). The State did not rebut Plaintiffs' showing that the bans do not further—and in fact affirmatively undermine—the State's asserted interests. *See* Plaintiffs' MSJ Br. at 28–47. Plaintiffs are entitled to summary judgment on their equal protection claim.

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

The Wyoming Constitution affirms through article 1, section 36 that Wyomingites have "fundamental personal rights, not specifically enumerated in the constitution," which are still "protected from governmental infringement." *Watt v. Watt*, 971 P.2d 608, 615 (Wyo. 1999), *overruled on other grounds by Arnott v. Arnott*, 2012 WY 167, 293 P.3d 440 (Wyo. 2012). As set forth in Section 36, all "rights not granted to the state by the constitution ***remain with the people***." *Watt*, 971 P.2d at 615 (emphasis added); *Johnson*, 838 P.2d at 165 (section 36 shows that "the rights noted in Article 1 [are] illustrative rather than exhaustive"). As demonstrated in Plaintiffs' opening brief, Plaintiffs and other Wyomingites retain the fundamental rights to privacy, to be left alone, and to choose their families—regardless of whether those specific rights appear in the Constitution. *See* Plaintiffs' MSJ Br. at 82–85.

First, the State asserts that there is no right to privacy or right to be left alone, while acknowledging that at least two Wyoming Supreme Court decisions—*Howard v. Aspen Way Entertainers, Inc.*, 2017 WL 152, ¶ 22, 406 P.3d 1271, 1277 (Wyo. 2017) and *Employment Security*

Commission of Wyoming v. Western Gas Processors, Ltd., 786 P.2d 866, 873 & nn. 10–11 (Wyo. 1990)—refer to such a right. State MSJ Br. at 118. As *Howard* explains, the right to be left alone is "***the most comprehensive of rights and the right most valued by civilized men***." 2017 WY 152 at ¶ 23, 406 P.3d at 1277 (citations omitted) (emphasis added).

The State attempts to minimize these decisions by arguing that they rely on dicta from *Olmstead v. United States*, 277 U.S. 438, 478 (1928), which was overruled in 1967. *See* State MSJ Br. at 117–19. But both *Howard* and *Employment Security* recognized the broad right to be left alone under Wyoming's natural law decades after *Olmstead* was overruled. Wyoming's strong protection of this right was also acknowledged in *Johnson*, where the Court cited to the "right to privacy located in Wyo. Const. art. [I], § 36." 838 P.2d at 165 (citing Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, XXI LAND & WATER L. REV. 527, 563 (1986)). The Court in *Johnson* did not rely on any federal principle, or *Olmstead*, to find this right is retained by Wyomingites.

As to the right to associate with one's family, the State acknowledges that "[u]nder the Wyoming Constitution" this "is a fundamental liberty." State MSJ Br. at 121 (citing *DS v. Dep't of Pub. Assistance & Soc. Servs.*, 607 P.2d 911, 918 (Wyo. 1980)). And the Wyoming Supreme Court has expressly recognized that this includes the "fundamental constitutional rights [of] parenthood and the right to procreate." *E.g.*, *In re Adoption of MAJB*, 2020 WY 157, ¶ 21, 478 P.3d 196, 204 (Wyo. 2020) (citations omitted).

The State contends, however, that abortion cannot be included within these rights because the right to abortion itself is not a natural right "deeply rooted in the history and tradition of the United States, let alone the history and tradition of humanity." State MSJ Br. at 121 (citing *Dobbs*, 142 S. Ct. at 2242–43). *Dobbs* is unavailing, as it does not address the question of fundamental

rights under the Wyoming Constitution. Nor did the U.S. Supreme Court in *Dobbs* consider whether the fundamental right to privacy, family composition, and bodily integrity extend to the right to control one's own decisions regarding whether to continue or terminate a pregnancy.

By contrast, several states have grappled with this precise issue. As outlined in Plaintiffs' motion, both the Kansas and Montana Supreme Courts, after exhaustive reviews, concluded that these fundamental, unenumerated rights protected women from laws that infringed on their ability to control their own bodily autonomy, including the right to decide for oneself whether to continue or terminate a pregnancy. *See* Plaintiffs' MSJ Br. at 83–85 (citing *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) and *Armstrong v. State*, 989 P.2d 364 (Mont. 1999)).

For instance, *Armstrong* analyzed the way in which the right to control one's own medical decisions is "an aspect of the right of self-determination and personal autonomy that is 'deeply rooted in this Nation's history and tradition.'" 989 P.2d at 383 (citations omitted). To afford these natural rights to bodily autonomy, privacy, and family association anything less than strict scrutiny protection—regardless of what type of state regulation threatens them—"cheapens the rights at stake" and "risks allowing the State to then intrude into *all decisions* about childbearing, our families, and our medical decision-making." *Hodes*, 440 P.3d at 498 (emphasis added).

The Wyoming Constitution already makes clear that these types of intrusions into medical choice are not permitted and that the *people*—not the State—retain all rights even if not expressly enumerated. As discussed at length, the bans cannot withstand any level of scrutiny given the complete disconnect "between the purpose in view and the actual provisions of the law." The Court

should grant summary judgment on Plaintiffs' claims for breach of unenumerated, fundamental rights.

CONCLUSION

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

WHEREFORE Plaintiffs request entry of a final judgment declaring that the Wyoming Criminal Abortion Ban and Criminal Medication Ban violate the Wyoming Constitution both facially and as applied to Plaintiffs and their patients and employees, and entering a permanent injunction against enforcement of the Wyoming Criminal Abortion Ban and Criminal Medication Ban both as to Plaintiffs and all other Wyomingites.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

RESPECTFULLY SUBMITTED this 3rd day of November 2023.

By:

John H. Robinson, WSB #6 – 2828
Marci C. Bramlet, WSB #7 – 5164
ROBINSON BRAMLET LLC
400 E. 1st Street, Suite 202
Casper, WY 82601
Telephone: 307.733.7703
Facsimile: 307.201.5546
john@jrmcb.com
marci@jrmcb.com

Peter S. Modlin (Cal. Bar # 151453)
Admitted pro hac vice
GIBSON DUNN & CRUTCHER, LLP
555 Mission Street, Suite 3000
San Francisco, California 94105
Telephone: 415.393.8392
pmodlin@gibsondunn.com

Megan Cooney (Cal. Bar # 295174)
Admitted pro hac vice
GIBSON DUNN & CRUTCHER, LLP
3161 Michelson Drive,
Irvine, CA 92612-4412
Telephone: 949.451.4087
mcooney@gibsondunn.com

Attorneys for Plaintiffs

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:

Jay Arthur Jerde Wyoming Attorney General's Office 109 State Capitol Cheyenne, WY 82001 Jay.jerde@wyo.gov *Attorney for Defendants Mark Gordon, Bridget Hill*	[ ] U.S. MAIL [ ] FED EX [ ] FAX [ ] ECF [✓] EMAIL
Erin E. Weisman Teton County Attorney's Office P.O Box 4068 Jackson, WY 83002 eweisman@tetoncountywy.gov *Attorney for Defendant Matthew Carr*	[ ] U.S. MAIL [ ] FED EX [ ] FAX [ ] ECF [✓] EMAIL
Lea M. Colasuonno Town of Jackson P.O Box 1687 Jackson, WY 83001 lcolasuonno@jacksonwy.gov *Attorney for Defendant Michelle Weber*	[ ] U.S. MAIL [ ] FED EX [ ] FAX [ ] ECF [✓] EMAIL

John H. Robinson
Marci Crank Bramlet