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IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

IN AND FOR TETON COUNTY, WYOMING

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

MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

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

INTRODUCTION AND DISPOSITION REQUESTED

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

These fundamental rights are now jeopardized by efforts of the State to deprive Wyoming women of their right to control their bodies, their families and their health care. On July 27, 2022, HB 0092 ("Wyoming Trigger Ban") became effective, banning all abortions subject only to certain hopelessly vague exceptions. That same day, this Court entered a TRO, and subsequently entered a preliminary injunction, enjoining enforcement of the Wyoming Trigger Ban statute. Among other things, the Court found that Plaintiffs had established a likelihood of success on the merits of three constitutional claims: the right of Wyomingites to control their own health care under article 1, section 38; equal political rights under article 1, section 3; and vagueness.

In apparent response to the Court's prior rulings, the Wyoming legislature passed a new bill banning abortion, HB 0152, on March 3, 2023. ("Wyoming Criminal Abortion Ban"). Although the Wyoming Criminal Abortion Ban attempts to cure some of the defects identified in the Court's prior rulings, it has fallen woefully short of doing so. To the contrary, the new provisions in the statute only serve to reinforce the Court's prior rulings and further make explicitly clear that the primary motivation behind the law is to impose a particular religious viewpoint – that life begins at conception – on all Wyoming citizens.

The Court should once again find that Plaintiffs are likely to prevail on the merits of their claims under article 1, sections 3 and 38 and on vagueness. In addition, the Court now should also find that the Wyoming Criminal Abortion Ban violates the prohibition on establishment of religion under the Wyoming constitution.

In addition, Plaintiffs have and will continue to demonstrate not only possible, but probable, irreparable harm necessary to justify the Preliminary Injunction, and the balance of harms and public interest weigh strongly in favor of enjoining HB 0152. For these reasons, this Court should grant a TRO enjoining Defendants from enforcing the new Criminal Abortion Ban.

STATEMENT OF FACTS

In the 2022 legislative session, the Wyoming State Legislature adopted House Bill 92, which amended the State's abortion law to prohibit abortion at any point during a woman's pregnancy. House Bill 92 provided three limited exceptions for situations in which (1) an abortion is necessary to protect a woman's life or to prevent "a serious risk of substantial and irreversible impairment of a major bodily function," (2) "the pregnancy is a result of incest as defined by W.S. § 6-4-402"; or (3) a patient's pregnancy is the result of "sexual assault as defined by W.S. § 6-2-301." HB 0092 provided penalties of 14 years in prison. Wyo. Stat. § 35-6-110.

In the 2023 legislative session, HB 00152 was adopted, repealing the Wyoming Trigger Ban and replacing it with another abortion ban. HB 0152 has somewhat different exceptions for situations in which (1) in a physician's reasonable medical judgment an abortion is necessary to protect a woman's life or to prevent "a serious and permanent impairment of a life-sustaining organ," (2) the pregnancy is a result of sexual assault or incest that are reported to a law enforcement agency, (3) a number of enumerated complications exist, including ectopic pregnancy, molar pregnancy, lethal fetal anomaly, or fetal demise, as defined by the statute. Wyo. Stat. §§ 35-6-122(a)(i) & 124.

In addition, the new statute contains provisions expressly prohibiting selective reduction in a multi-fetal pregnancy. HB 00152 also includes an express statement of its intended purposes, as well as multiple provisions purporting to establish fetal personhood from the moment of conception. Wyo. Stat. § 35-6-121. Penalties for violation of the Wyoming Criminal Abortion Ban include a fine of up to $20,000, imprisonment for up to five years, and forfeiture of a physician's medical license. *Id.* Wyo. Stat. § 35-6-125 & 126. The statute also provides civil remedies for compensatory and punitive damages against a physician who violates the act. *Id.* Wyo. Stat. § 35-6-127.

Plaintiffs are Wyoming reproductive aged women, licensed physicians, a clinic that provides reproductive health care services to pregnant patients, and a Wyoming non-profit agency that ensures impoverished women may access abortion services. Unless this Court issues a TRO, Wyoming's Criminal Abortion Ban will strip Wyoming women of their rights and their access to safe and legal abortion, forcing pregnant women to carry unwanted pregnancies to term against their will, to remain pregnant until they can travel out-of-state at great cost to themselves and their families, or to attempt to self-manage their abortions outside the medical system. In addition, their physicians and health care providers will lose the right to continue offering necessary and evidence-based health care services to their patients.

LEGAL STANDARD

Plaintiffs challenge the constitutionality of Wyo. Stat. § 35-6-123 on multiple grounds. The Wyoming Supreme Court has provided the analysis for such challenges on claims involving fundamental rights.

> "Statutes are presumed to be constitutional, and we will resolve any doubt in favor of constitutionality." In most cases, the appellant bears the burden of proving the statute is unconstitutional. Normally, this burden is heavy in that appellant must clearly and exactly show the unconstitutionality beyond any reasonable doubt. "However, '**that rule does not apply where a citizen's fundamental**

> **constitutional right**, such as free speech, **is involved.'" In that case, "[t]he strong presumptions in favor of constitutionality are inverted, the burden then is on the governmental entity to justify the validity of the [statute], and this Court has a duty to declare legislative enactments invalid if they transgress [a] constitutional provision."**

Hardison v. State, 2022 WY 45, ¶ 5, 507 P.3d 36, 39 (Wyo. 2022) (internal citations omitted) (emphasis added). "A fundamental right is a right which the constitution explicitly or implicitly guarantees." *Mills v. Reynolds*, 837 P.2d 48, 53 (Wyo. 1992).

Here, Plaintiffs raise a host of claims involving fundamental rights, including among others equal protection, establishment of religion, control of health care decisions, and unenumerated fundamental rights. Plaintiffs are thus entitled to a strict scrutiny analysis of the State's proposed statute. *See Allhusen v. State By & Through Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 885 (Wyo. 1995). Strict scrutiny requires the State to show that the proposed regulation is narrowly tailored to achieve a compelling state interest. *See Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980).

As noted, when citizens' fundamental rights are at issue, "[t]he strong presumptions in favor of constitutionality are inverted, the burden then is on the governmental entity to justify the validity of the [statute], and this Court has a duty to declare legislative enactments invalid if they transgress that constitutional provision." *Reiter v. State*, 2001 WY 116, ¶ 7, 36 P.3d 586, 589 (Wyo. 2001) (*quoting Michael v. Hertzler*, 900 P.2d 1144, 1146 (Wyo. 1995) (*quoting Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994)). The Defendants have the burden of showing that none of the constitutional rights asserted by Plaintiffs—both enumerated and unenumerated natural rights—are transgressed; and, if any one of those rights is, how such transgression for each right meets a compelling need narrowly drawn.

As demonstrated by Plaintiffs below, Plaintiffs are substantially likely to prevail on the merits of multiple constitutional claims, and Plaintiffs risk probable irreparable harm should the

statute take effect. In addition, the balance of hardships and public interest strongly support issuing a temporary restraining order.

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

If allowed to take effect, Wyoming's Criminal Abortion Ban will irreparably harm not just the Plaintiffs, but also the Wyomingites whose interests they represent who will be denied constitutional rights they have otherwise enjoyed. *See Planned Parenthood Nw. v. Members of the Med. Licensing Bd. of Indiana*, No. 53C06-2208-PL-001756, at ¶¶ oo-pp (Ind. Cir. Ct. Sept. 22, 2022) (organizations can represent the interests and irreparable harms of their clients). The medical care in jeopardy as a result of the Wyoming Criminal Abortion Ban is both time-sensitive and, as explained below, constitutionally protected, which alone justifies the requested TRO. *See infra* Part II. "Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 805 (10th Cir. 2019); *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (emphasizing "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (*quoting Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001))). This applies especially to abortion: "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

Even if a separate showing of irreparable injury were required, Plaintiffs have demonstrated that injury here. If a TRO is not entered by this Court, the Wyoming Criminal Abortion Ban will have a catastrophic impact on Plaintiffs and many other Wyomingites. The Act will force many Wyomingites seeking abortion to carry pregnancies to term against their will with all of the physical, emotional, and financial costs that entails. Ex. 3, Anthony at ¶¶ 18-31; Ex. 4,

Hinkle at ¶¶ 15-16, 26; Ex. 5, Lichtenfels at ¶¶ 21-22. Even Wyomingites who are ultimately able to obtain an abortion—either because they have been able to scrape together the resources to travel out of state or because they meet one of the law's narrow and vague exceptions—will suffer irreparable harm due to the delays and undue barriers in seeking care. Ex. 3, Anthony at ¶ 17; Ex. 4, Hinkle at ¶ 29. Critically, Drs. Anthony and Hinkle, and the Circle of Hope and their respective staffs, will suffer harms that cannot possibly be financially compensated, including the serious risk of imprisonment and loss of licensure which would bar them from practicing medicine anywhere in the country. Ex. 3, Anthony at ¶ 15; Ex. 4, Hinkle at ¶¶ 15-16; Ex. 6, Burkhart at ¶¶ 34. These harms can only be avoided through issuance of the requested TRO.

A. Plaintiffs and Wyomingites will suffer irreparable harm from forced pregnancy and parenting.

The consequences of Wyoming's Criminal Abortion Ban extend beyond the deprivation of access to time-sensitive medical care. If the Ban goes into effect, Wyomingites will be forced to remain pregnant against their will. Many will ultimately be forced to carry their pregnancies to term. These patients will suffer a range of irreparable physical, mental, and economic consequences, and there is no monetary remedy that can address the impact of forced pregnancy on health and bodily autonomy. Plaintiffs Ms. Johnson and Ms. Dow—female residents of Wyoming of child-bearing age—affirmatively resist the States imposition of the legislators' moral values into their family planning decisions, and their private consultations with their physicians and spiritual advisors. Ex. 1, Johnson at ¶¶ 11-17; Ex. 2 Dow at ¶¶ 8-10, 13-17. Plaintiffs Dr. Anthony and Dr. Hinkle are OB/GYN physicians licensed and practicing in Wyoming who will be unable to prevent these irreparable harms to Wyoming women if the Ban is in effect. And Plaintiffs Chelsea's Fund and Circle of Hope are organizations that facilitate or provide medical care to pregnant women in Wyoming that will now be unable to provide such care.

Pregnancy is a Significant Medical Condition that the Ban Forces on Wyomingites. Even in an uncomplicated pregnancy, an individual experiences a wide range of physiological challenges. Ex. 3, Anthony at ¶ 18-28; Ex. 4, Hinkle at ¶ 17-27. Individuals experience a dramatic increase in blood volume, a faster heart rate, increased production of clotting factors, breathing changes, digestive complications, substantial weight gain, and a growing uterus. Ex. 3, Anthony at ¶¶ 18-19; Ex. 4, Hinkle at ¶¶ 17-18. These and other changes put pregnant patients at greater risk of blood clots, nausea, hypertensive disorders, and anemia (among other complications). Ex. 3, Anthony at ¶¶ 18-19; Ex. 4, Hinkle at ¶¶ 17-18. Pregnancy can also aggravate preexisting health conditions, including hypertension and other cardiac diseases, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary diseases. Ex. 3, Anthony at ¶ 19; Ex. 4, Hinkle at ¶ 18. Pregnancy may also lead to the development of new and serious health conditions as well, such as hyperemesis gravidarum, preeclampsia, deep-vein thrombosis, and gestational diabetes. Ex. 3, Anthony at ¶ 19; Ex. 4, Hinkle at ¶ 18. Pregnancy can also induce or exacerbate mental health conditions. Ex. 3, Anthony at ¶ 20; Ex. 4, Hinkle at ¶ 19. Some people with a history of mental illness experience a recurrence of their illness during pregnancy. Ex. 3, Anthony at ¶ 20; Ex. 4, Hinkle at ¶ 19.

Mental-health risks can be higher for patients with unintended pregnancies, which make up 31.2% of the pregnancies in Wyoming (a percentage that is higher among racial minorities). Ex. 3, Anthony at ¶ 20; Ex. 4, Hinkle at ¶ 19. These individuals face physical and emotional changes and risks that they did not choose to take on. Ex. 3, Anthony at ¶ 20; Ex. 4, Hinkle at ¶ 19. There is no exception in the Wyoming Criminal Abortion Ban that permits an abortion to preserve the mental health of the mother, or the physical wellbeing of the mother unless there is a "substantial risk of death" or "serious and permanent impairment of a life-sustaining organ." Wyo. Stat. § 35-6-124(a)(i).

A number of pregnant patients also face an increased risk of intimate partner violence. Ex. 3, Anthony at ¶ 21; Ex. 4, Hinkle at ¶ 20. Indeed, homicide—most frequently caused by an intimate partner—has been identified as a leading cause of maternal mortality. Ex. 3, Anthony at ¶ 21; Ex. 4, Hinkle at ¶ 20. Wyomingites who face domestic violence have no avenue to terminate an unintended pregnancy unless they meet the Ban's extremely narrowly carved exceptions, none of which allow a woman to choose abortion to protect herself from this trauma and violence. Ex. 1, Johnson at ¶ 20; Ex. 2, Dow at ¶ 11.

Labor and childbirth are also significant medical events with many risks. Ex. 3, Anthony at ¶ 22; Ex. 4, Hinkle at ¶ 21. The risk of mortality from pregnancy and childbirth is over 12 times greater than for legal pre-viability abortion. Ex. 3, Anthony at ¶ 22; Ex. 4, Hinkle at ¶ 21. Complications during labor occur at a rate of over 500 per 1,000 hospital stays and the vast majority of childbirth delivery stays have a complicating condition. Ex. 3, Anthony at ¶ 23; Ex. 4, Hinkle at ¶ 22. Even a normal pregnancy with no comorbidities or complications can suddenly become life-threatening during labor and delivery. Ex. 3, Anthony at ¶ 24; Ex. 4, Hinkle at ¶ 23. Other unexpected adverse events include transfusion, ruptured uterus or liver, stroke, unexpected hysterectomy (the surgical removal of the uterus), and perineal laceration (the tearing of the tissue around the vagina and rectum), the most severe of which can result in long-term urinary and fecal incontinence and sexual dysfunction. Ex. 3, Anthony at ¶¶ 24-25; Ex. 4, Hinkle at ¶¶ 23-24. Any anesthesia or epidural administered during labor can also lead to additional risks, including severe headaches caused by the leakage of spinal fluid, infection, and nerve damage around the injection site. Ex. 3, Anthony at ¶ 26; Ex. 4, Hinkle at ¶ 25. In Wyoming, more than one in five deliveries occur by cesarean section ("C-section"), rather than vaginally, requiring an open abdominal surgery which carries significant risks of hemorrhage, infection, blood clots, and injury to internal organs. Ex. 3, Anthony at ¶ 27; Ex. 4, Hinkle at ¶ 26.

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

Pregnancy Often Presents Medical Complications that Threaten the Mother's (and Fetus's) Long Term Wellbeing. As shown by Plaintiff Dr. Hinkle, approximately twenty percent (20%) of her existing pre-natal patients are high-risk, and if the Criminal Abortion Ban goes into effect, she will not be able to provide the evidence-based care needed *when* her patients develop significant complications. Ex. 4, Hinkle at ¶ 10. This is because the Ban specifically limits the ability of a physician, like Drs. Anthony and Hinkle and the staff at Circle of Hope, to intervene and provide evidence-based medical care until the patient is at "substantial risk of death" or of "the serious and permanent impairment of a life-sustaining organ of a pregnant woman." Wyo. Stat. § 35-6-124(a)(i). This is not only incredibly narrow, but the provider must also "make all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of an unborn baby in a manner consistent with reasonable medical judgment." *Id.* These words "substantial risk" and "serious" impairment—are not commonly used in the medical community, and they do not provide physicians enough guidance to know when they can legally perform an abortion (or other medical care) to preserve an individual's long term physical wellbeing. Ex. 7, Moayedi at ¶¶ 8-9. Under the Ban, Wyomingites like Plaintiffs Ms. Johnson and Dow have no ability to choose abortion in Wyoming to preserve their own physical well-being, unless a hospital determines that the vague and narrowly carved exceptions are present.

Early medical intervention in potentially fatal situations is a hallmark of ethical and effective medical care. Forcing Wyoming physicians to withhold medical care until the last possible moment impermissibly interferes with ethical physician conduct and the physician-patient relationship. Moreover, requiring patients to delay treatment until their life is in danger deprives them of the ability to participate in their own medical decision-making—and the problem is worse

in Wyoming than elsewhere because Wyoming lacks many of the emergency medical resources that would improve the odds for pregnant patients in life-threatening situations. Ex. 7, Moayedi at ¶ 13.

Additionally, some of Drs. Anthony's and Hinkle's patients develop fetal anomalies. Ex. 3, Anthony at ¶¶ 12, 40; Ex. 4, Hinkle at ¶¶ 32-33. Fetal abnormalities have varied outcomes and it is often impossible to say with any certainty that those abnormalities will result in the fetus's death within "hours" of being born, which is required to meet the Ban's very narrow exception. Ex. 1, Johnson at ¶16; Ex. 3, Anthony at ¶ 41. A definition of "lethal" that is measured in hours will essentially ban *all* abortions, because no physician could possibly certify the exact time a newborn will die. Ex. 7, Moayedi at ¶ 16. For instance, the lethal anomaly skeletal dysplasia is inconsistent with life, but a fetus can live days after birth. Ex. 4, Hinkle ¶ 31. As a result, patients who experience these fetal defects will also be denied the evidence-based care these physicians are required to provide.

The Ban Forces Irreparable Costs on Pregnant Women in Addition to the Health Risks. In addition to these physical and mental injuries, Wyoming's Criminal Abortion Ban also threatens irreparable harm on Plaintiffs and Plaintiffs' patients by impacting one of the most personal and consequential decisions a person will make in a lifetime: whether to become or remain pregnant. In this way, Wyoming's Criminal Abortion Ban will have an impact on the composition of a person's existing family that cannot be compensated by future monetary damages. Ex. 3, Anthony at ¶¶ 29-35; Ex. 4, Hinkle at ¶¶ 28-30.

Patients have a range of views on the morality of abortion, which depend not only on their unique circumstances, but also on varying religious and spiritual views about when life begins. Ex. 3, Anthony at ¶ 13; Ex. 2, Dow at ¶¶ 8-10. For instance, Plaintiff Ms. Dow is a member of the Jewish faith and believes, in accordance with Jewish doctrine, that life does <u>not</u> begin at

conception, but rather that life begins at first breath, and that the life and well-being of the mother takes precedence over those of the unborn fetus. Ex. 2, Dow at ¶¶ 8-10. If the Ban goes into effect, it has the immediate and irreparable result of Ms. Dow living and being ruled by a law premised on Christian religious doctrine. This deprivation of her constitutional right to practice her own religion could not be remedied. *Reed v. Bryant*, 719 F. App'x 771, 780 (10th Cir. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Given the severity of the infringement on her liberties, Ms. Dow and her fiancé will seriously reevaluate their residency in Wyoming, potentially moving out of the state if the Ban is effective. Ex. 2, Dow at ¶ 16.

Women who seek but are denied an abortion are, when compared to those who are able to access abortion, more likely to lower their future goals, and less likely to be able to exit abusive relationships. Ex. 3, Anthony at ¶ 35. Their existing children are also more likely to suffer measurable reductions in achievement of child developmental milestones and an increased chance of living in poverty. *Id.* As compared to women who received an abortion, women denied an abortion are also less likely to be employed full-time and more likely to raise children alone, to receive public assistance, and to lack the financial resources to meet their basic living needs. *Id.*

The unquantifiable economic impact of forced pregnancy, childbirth, and parenting will also have dramatic, negative effects on Wyoming families' financial stability. Ex. 3, Anthony at ¶¶ 29-35. Some side effects of pregnancy render patients unable to work, or unable to work the same number of hours as they otherwise would. Ex. 3, Anthony at ¶ 29; Ex. 4, Hinkle at ¶ 28. Pregnancy-related discrimination can also result in lower earnings for women both during pregnancy and over time. *Id.* Further, Wyoming does not require employers to provide paid family leave, meaning that for many pregnant Wyomingites, time away from work to recover from pregnancy and childbirth or to care for a newborn is unpaid. *Id.*

Pregnancy-related health care and childbirth are also some of the costliest hospital-based health services, particularly for complicated or at-risk pregnancies, and result in significant out-of-pocket expenses. Ex. 3, Anthony at ¶ 30; Ex. 4, Hinkle at ¶ 29. These costs will impact a patient's existing children. Ex. 3, Anthony at ¶ 31; Ex. 4, Hinkle at ¶ 30.

Pregnancy and parenting are hugely consequential events in Wyomingites' lives, and being denied an abortion has long-term, negative effects on an individual's physical and mental health, economic stability, and the wellbeing of their family, including existing children. This results in an irreparable harm to women in Wyoming generally—the interests of whom Plaintiffs Chelsea's Fund and Circle Hope represent—and to Plaintiffs Ms. Johnson and Ms. Dow specifically, who are women of child-bearing age living in Wyoming. Allowing the Ban to go into effect and creating forced pregnancy in Wyoming denies them of their fundamental rights.

B. The Wyoming Criminal Abortion Ban will irreparably harm those patients forced to meet the exceptions for an abortion.

Patients who might qualify for one of Wyoming's Criminal Abortion Ban's limited exceptions will suffer irreparable harm in accessing (or attempting to access) care.

First, under the Act's Death and Permanent Injury Exception, pregnant persons with rapidly worsening medical conditions—who, prior, could have obtained an abortion without explanation—will be forced to wait for care until their conditions become deadly or threaten permanent impairment. Ex. 3, Anthony at ¶ 39. In fact, physicians like Drs. Anthony and Hinkle, as well as the staff at Circle of Hope, have a legal duty under the Ban to protect the fetus first unless the vague exception of "substantial risk of death" applies. *Id.* This places physicians in an even more untenable decision-making position than the prior ban imposed: they must *affirmatively* provide care to attempt to save the fetus, while *withholding* necessary, evidence-based care from their patient until their medical condition has deteriorated to a point that it is severe enough to meet

the Ban's vague exception. *Id.* This will inevitably lead to Wyomingites, including Plaintiffs Johnson and Dow who intend to have pregnancies and are of child-bearing age, suffering severe impairment, pain, and suffering before they can receive medically-indicated care.

For instance, Plaintiff Ms. Johnson was pregnant at the time that HB 92 passed and was enjoined, and presently intends to have additional children in the State of Wyoming, subject to personal and private family planning decisions made by her and her family in consultation with her physician. Ex. 1, Johnson at ¶¶ 11-13. Under the Ban, Ms. Johnson has no option to terminate a pregnancy with severe complications that would diminish her quality of life or health. *Id.* at ¶¶ 16-17. Likewise, Ms. Dow intends to become pregnant in Wyoming after her upcoming wedding and will seriously consider leaving the state if her healthcare decisions during pregnancy are not hers to make. Ex. 2, Dow at ¶¶ 15-16.

Second, some patients facing devastating fetal diagnoses will be forced to wait for medical providers (and more likely hospital lawyers) to decide that the diagnosis qualifies for abortion. Ex. 3, Anthony at ¶¶ 40-41; Ex. 4, Hinkle at ¶¶ 29-30. Under the Ban, a lethal fetal abnormality can only serve as the basis for an abortion if the fetus would die within "hours" of being born—a standard the limits of which are undefined and unworkable. Wyo. Stat. § 35-6-122(a)(vi) (defining "lethal fetal anomaly"); Ex. 1, Johnson at ¶¶ 16; Ex. 3, Anthony at ¶ 41; Ex. 4, Hinkle at ¶ 4. Fetal abnormalities have a range of outcomes and predicting with certainty whether one will result in fetal life for a few hours, days, or weeks is typically impossible. Ex. 1, Johnson at ¶ 16; Ex. 7, Moayedi at ¶ 17.

Third, sexual assault survivors seeking abortion in Wyoming will be forced to choose between accessing services and maintaining their privacy in deciding whether to report the assault to law enforcement. Ex. 3, Anthony at ¶ 42. This choice is forced on no other autonomous patient in Wyoming's health care system.

C. The Criminal Abortion Ban will irreparably harm Drs. Anthony and Hinkle, Circle of Hope and their patients, and their respective staffs

Plaintiffs Dr. Anthony, Dr. Hinkle, and Circle of Hope will also be irreparably injured by Wyoming's Criminal Abortion Ban, which will eliminate their ability to offer abortion services or provide evidence-based medical care which may result in the termination of a pregnancy. Critically, as this Court previously observed, Dr. Anthony and Dr. Hinkle face "felony prosecution, loss of professional licensure, and . . . imprisonment for providing evidence-based health care to [their] Wyoming patients." Order Granting Prelim. Inj. at ¶ 17 (Aug. 10, 2022). This risk is particularly high where, as here, "the limited exceptions . . . are vague and provide no guidance to the doctors" who may inadvertently overstep and "face felony prosecution, loss of their licensure, and imprisonment." *Id.* In addition to the imprisonment, a felony conviction under the Ban would result not only in Plaintiff's loss of licensure in Wyoming but *everywhere* in the United States. Ex. 4, Hinkle at ¶ 16.

With the Wyoming Criminal Abortion Ban, like HB 92, the exceptions are unworkable, vague, and not based on medical terminology. Ex. 7, Moayedi at ¶¶ 8-12, 14; Ex. 3, Anthony at ¶ 41; Ex. 4, Hinkle at ¶¶ 15, 32. This presents Dr. Anthony, Dr. Hinkle, and the staff at Circle of Hope with a Hobson's choice: provide the evidence-based medical care that will result in termination of a pregnancy and face criminal prosecution, or deny that care to their patient and lose goodwill and customers while also violating their ethical oaths at physicians. *See* Order Granting Prelim. Inj. at ¶ 20 (Aug. 10, 2022); *see also* Ex. 6, Burkhart at ¶¶ 33-34. Each of these eventualities constitute irreparable injury. *Int'l Snowmobile Mfrs. Ass'n. v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004).

D. Plaintiffs, Their Patients, and Wyomingites forced to receive abortion services outside of Wyoming will be irreparably harmed by the Wyoming's Criminal Abortion Ban.

Although some of those forced to remain pregnant may eventually be able to obtain abortions out of state, they will also suffer irreparable injury from the Criminal Abortion Ban. First, they will be forced to remain pregnant against their will until they can obtain care, with all of the physical, emotional, and financial implications that entails, *see supra* Part I.A. Women will likely get abortion care later in pregnancy than if they had otherwise had access to abortion in Wyoming. Ex. 3, Anthony at ¶ 38. Second, these Wyomingites will suffer additional costs and burdens of substantial travel.[1] At this time, the nearest clinics providing abortion outside of Wyoming are hundreds of miles away. Ex. 3, Anthony at ¶ 37. Third, some Wyomingites may also be forced to compromise the confidentiality of their decision to have an abortion in order to obtain transportation, leave from work, or childcare. *Id.* Finally, all of these patients will lose the availability of "medical treatment from the qualified providers of their choice." *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018). Each of these harms is irreparable. As the U.S. Court of Appeals for the Ninth Circuit has recognized, a "disruption or denial" of a patient's "health care cannot be undone after a trial on the merits." *Id.* (citation omitted); *accord Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004).

Accordingly, Plaintiffs have demonstrated that they and the Wyomingites whose interests they represent will be irreparably harmed by the Ban if an injunction is not ordered.

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[1] Wyomingites' options to seek an abortion out-of-state grow more attenuated by the day as surrounding states consider and/or implement similar provisions to Wyoming's Criminal Abortion Ban.]Thus, women who reside in Western Wyoming will have to travel even further for abortion access.

II. PLAINTIFFS CAN SHOW A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS[2]

Wyoming's Criminal Abortion Ban runs afoul of numerous rights guaranteed by the Wyoming Constitution. While Plaintiffs' complaint alleges numerous constitutional claims, for purposes of this motion we focus on four: 1) the constitutional prohibition on vague criminal statutes that do not provide sufficient notice to regulated parties of what conduct is prohibited; 2) the constitutional right of Wyoming citizens to control their own health care free from undue government interference; 3) the constitutional prohibition on establishment of religion; and 4) the constitutional right to equal protection. Notably, this Court has already found that these same Plaintiffs had demonstrated a likelihood of success on the merits of three of these claims for purposes of a TRO and preliminary injunction enjoining enforcement of the Wyoming Trigger Law.

While the Wyoming Criminal Abortion Ban has modified some of the relevant provisions of the Wyoming Trigger Law, it has done nothing to cure the deficiencies that formed the basis for the Court's prior findings. Moreover, certain new provisions in the Wyoming Criminal Abortion Ban remove any doubt that the law is intended to promote a specific religious viewpoint and to coerce Wyoming citizens to conform their conduct to these religious views, even where those citizens have very different religious beliefs. The Court should once again preliminarily enjoin enforcement of the Wyoming Criminal Abortion Ban.

Although this motion focuses on the four (4) constitutional rights and prohibitions referenced above, it is important to understand that they all fall within the overarching and

[2] As stated above and given the invocation of numerous fundamental rights by Plaintiff, the State bears the burden to demonstrate the statute's validity. Plaintiffs have no burden to demonstrate the statute's invalidity. *See Hardison*, 507 P.3d. at 39.

fundamental right under the Wyoming Constitution for citizens of the state to be left alone by the government absent a narrowly-tailored law that advances a compelling state interest.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, *the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.*

Emp. Sec. Comm'n of Wyoming v. W. Gas Processors, Ltd., 786 P.2d 866, 873 n.10, n.11 (Wyo. 1990) (emphasis in original) (citations omitted) (discussing both a federal and a Wyoming Constitutional right to privacy, *citing Beardsley v. Wierdsma*, 650 P.2d 288, 295 (Wyo. 1982); Wyo. Const. art. 1, § 36 (Reserved Rights Clause)).

More than 60 years ago, Justice Blume provided an instructive history lesson on this topic. He explained that even though the Constitution did not contain certain precise words, the "inalienable" rights appellant urged as protected existed: Even without "exact wording" establishing the right to protect property, that "inherent and inalienable right" was not "nullified thereby." *Cross v. State*, 370 P.2d 371, 376 (Wyo. 1962) (citing *State v. Langley*, 84 P.2d 767, 769-770 (Wyo. 1938); *Wilkinson v. Leland*, 27 U.S. 627, 657, 7 L. Ed. 542 (1829). "The doctrine of natural and inherent rights to life, liberty and property," the court explained, is as old as the Renaissance and is "recognized by our constitution" and "part of the positive law of the land." *Cross*, 370 P.2d at 376 (citing *Langley*, 84 P.2d at 770). The Wyoming Supreme Court has long recognized natural rights and placed powerful limits on the state's ability to curtail them: "Nearly every law abridges individual freedom or action to a more or less extent," but "[c]ourts must be, and are" the "ultimate arbiters" of whether the legislature—which may only expand the state's power in ways that are "reasonable and not arbitrary"—has gone too far. *Langley*, 84 P.2d at 771.

The right to privacy includes "the right to be let alone." *Howard v. Aspen Way Enterprises, Inc.*, 2017 WY 152, ¶ 22, 406 P.3d 1271, 1277 (Wyo. 2017). It also includes the right to privacy in the composition of one's family. "Analysis of the Wyoming Constitution and case law also leads to the conclusion that the right to associate with one's family is a fundamental liberty." *DS v. Dep't of Pub. Assistance & Soc. Servs.*, 607 P.2d 911, 918 (Wyo. 1980) (citing art. 1, sections 2, 6, 7 and 36, Wyoming Constitution; *Washakie Cnty. Sch. Dist. No. One v. Herschler, Wyo.*, 606 P.2d 310 (1980); *Matter of Adoption of Voss, Wyo.*, 550 P.2d 481 (1976); *In re Adoption of Strauser*, 65 Wyo. 98, 196 P.2d 862 (1948).

The decision to have a child (or not) is an intimate and life-altering decision. Pregnancy is physically, emotionally, and financially demanding. The choice is different for everyone and there are countless factors that go into deciding whether and when to become a parent. For decades, these were decisions that Wyoming women[3] made on their own, often in consultation with their loved ones and other trusted individuals, including health care providers and religious and spiritual advisors.

A. Wyoming's Criminal Abortion Ban violates Wyo. Const. art. 1, sec. 38 – health care.

The Wyoming Constitution provides:

Const. art. 1, section 38: Right of health care access.

> (a) **Each competent adult shall have the right to make his or her own health care decisions.** The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
> ***
> (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare

[3] References to "woman" or "women" are meant as shorthand for people who are or may become pregnant. However, people with other gender identities, including transgender men, agender, and gender-diverse individuals, may also become pregnant and seek abortion services.

> of the people or to accomplish the other purposes set forth in the Wyoming Constitution.
> (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

The formulation of art. 1, sec. 38 is a stark example of Plaintiffs' oft-cited "right to be left alone" absent a compelling need narrowly tailored. This section explicitly protects and holds fundamental every adult's right to "make his or her own health care decisions."

In interpreting constitutional provisions, a reviewing court undertakes the same analysis as that it uses to interpret statutes. *Powers v. State*, 2014 WY 15, ¶ 9, 318 P.3d 300, 304 (Wyo. 2014). To determine the intent of a provision, the Court should look first to the plain and ordinary meaning of the words and phrases used in the law. *Id.*

The Court undertook just such an analysis in enjoining the Wyoming Trigger Ban and found that the plain meaning of "health care" includes abortion. *See* Order Granting Prelim. Inj. at ¶ 30 (August 10, 2022). ("PI Order") In reaching this decision the Court relied on the common definition of health care as "the services provided, usually by medical professionals, to maintain and restore health." *Id.* Plainly, abortion falls within this definition. In its prior ruling, the Court further noted that the Wyoming Legislature elsewhere has defined "health care" broadly to include "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." PI Order at ¶ 30.

Moreover, under Wyoming law, abortions must be performed by physicians. Pursuant to specific provisions in that title, abortions (in Wyoming) can only be accomplished by physicians employing "acceptable medical procedures." Wyo. Stat. §§ 35-6-111 & 112. Consistent with these provisions, physicians are practicing medicine when they perform abortion services.

> (xi) "Practicing medicine" means any person who in any manner
> ***
> (B) Offers or undertakes to prevent, diagnose, correct or treat, in any manner, by any means, method or device, any human disease, illness, pain, wound,

> fracture, infirmity, defect or abnormal physical or mental condition, injury, deformity or ailment, including the management of pregnancy and parturition; or
> ***
> (E) Offers or undertakes to prescribe, order, give or administer drugs which can only be obtained by prescription according to law; ...

Wyo. Stat. § 33-26-102.

The medical community unambiguously considers abortion to fall within the ambit of essential health care:

> The fact is, abortion is an essential component of women's health care. The American College of Obstetricians and Gynecologists (ACOG), with over 57,000 members, maintains the highest standards of clinical practice and continuing education for the nation's women's health physicians. Abortion care is included in medical training, clinical practice, and continuing medical education.[4]

Government agencies agree. According to HHS, "[r]eproductive health care, including access to birth control and safe and legal abortion care, is an essential part of your health and well-being" and "[m]edication abortion has been approved by the FDA since 2000 as a safe and effective option."[5] According to Amnesty International, abortion is a "basic healthcare need for millions of women, girls and others who can become pregnant."[6] And according to the WHO, "comprehensive abortion care services" entail "simple and common health-care procedure[s]" that are "evidence-based" and "fundamental" to "good health."[7]

In adopting the Wyoming Criminal Abortion Ban, the legislature attempted to usurp the Court's role in interpreting the Wyoming Constitution by specifying that "[r]egarding article 1, section 38 of the Wyoming constitution, abortion as defined in this act is not health care."

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[4] American College of Obstetricians and Gynecologists, Facts Are Important: Abortion Is Healthcare, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last accessed Mar. 9, 2023).
[5] Dep't of Health and Human Servs., *Know Your Rights: Reproductive Health Care*, https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html (last accessed Mar. 9, 2023).
[6] Amnesty International, *Key Facts on Abortion*, https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/ (last accessed Mar. 9, 2023).
[7] World Health Organization, *Abortion*, https://www.who.int/health-topics/abortion#tab=tab_1 (last accessed Mar. 9, 2023)

Wyo. Stat. § 35-6-121(a)(iv). But in our constitutional system, legislation is subordinate to the constitution, not the other way around. The legislature can no more amend the constitution through a statute than it can adopt a statute that is contrary to the constitution. *Witzenburger v. State ex rel Wyoming Community Dev. Auth.*, 575 P.2d 1100, 1124 (Wyo. 1978) (the "[S]tate constitution is not a grant but a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State.") And in matters of interpretation of the constitution, the courts have the last word, not the legislature. *V-1 Oil Co. v. State*, 934 P.2d 740, 743 (Wyo. 1997) ("Whether a statute is contrary to a constitutional prohibition or restriction is to be determined by the judiciary."). While courts undoubtedly may consider the legislature's views on interpretation of the constitution, such views should be accorded no weight where, as here, they directly contradict with the unambiguous language of the constitution.

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

Abortion – unambiguously – is health care under article 1, section 38 of the constitution. As a result, the legislature may only 1) "determine reasonable and necessary restrictions" that 2) do not result in "undue governmental infringement" of the right of Wyomingites to control their abortion-related health care. On its face, the Wyoming Criminal Abortion Ban does not satisfy either of these constitutional requirements.

As an initial matter, strict scrutiny should apply to the Court's review of the statute's constitutionality, because this matter involves a fundamental, enumerated right under the

constitution. *Ailport v. Ailport*, 2022 WY 43, ¶ 7, 507 P.3d 427, 433 (Wyo. 2022).[8] The state therefore must show that the statute furthers a compelling state interest in the least intrusive means available. *Id.* But even if the Court applies the rational-basis test, the Wyoming Criminal Abortion Ban fails that test because it is "beyond a reasonable doubt, not related to a legitimate government interest." *Hardison v. State,* 2022 WY 45, ¶ 10, 507 P.3d 36, 40 (Wyo. 2022).

The statute itself attempts to articulate the specific interests that it purportedly furthers:

> Wyoming's "legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (internal citations omitted).

Wyo. Stat. § 35-6-121(a)(vi).

The statute quotes these purported state interests from the section of the majority opinion in *Dobbs* finding that Mississippi's asserted state interests were legitimate under the ***United States*** constitution and within the context of a ban on abortion after 15 weeks of gestation.[9] The state's reliance on *Dobbs* is unavailing given the obvious distinguishing factors—here, the state is asserting the above-referenced interests under the ***Wyoming*** constitution in the context of a ban on abortion from conception.[10] In any event, the language of the statute and the undisputed facts

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[8] As the Kansas Supreme Court remarked in applying strict scrutiny to an abortion ban: "At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions about medical treatment and family formation, including whether to bear or beget a child. For women, these decisions can include whether to continue a pregnancy. Imposing a lower standard than strict scrutiny, especially mere reasonableness, or the dissent's 'rational basis with a bite'—when the factual circumstances implicate these rights because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 497-98 (Kan. 2019).

[9] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 & 2284 (2022).

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

establish that the Wyoming Criminal Abortion Ban does not further any of the state's asserted interests and, in fact, affirmatively undermines most of them.

As the Court previously found, the preservation of potential life is undoubtedly both a legitimate and compelling governmental interest. As this Court noted, the Trigger Ban's failure to include any exception for fatal fetal abnormalities undercut the state's claim that the statute was intended to protect potential life. PI Order ¶ 37. In apparent response, the legislature includes in the Wyoming Criminal Abortion Ban an exception for "Lethal fetal anomal[ies]." Wyo. Stat. § 35-6-124(a)(iv).

But this exception does not apply to all fatal fetal abnormalities—it only applies to those that have a "substantial likelihood" of resulting in death within "hours" of birth, and not to those that are likely to result in death within days or weeks of birth. As Dr. Ghazaleh Moayedi explains, it is impossible for a physician to determine whether a fetal abnormality would result in death within hours, as opposed to within days, of birth. Ex. 7, Moayedi at ¶ 17. Because it will not be possible (or ethically or professionally sound) for physicians to determine whether a lethal fetal abnormality falls within the statutory definition, no fatal fetal abnormalities that could result in death after birth will qualify for this exception as a practical matter. As a result, the purported exception for lethal fetal abnormalities is illusory, and the statute continues to effectively ban abortion for multiple fetal abnormalities incompatible with life. *Id.* The Wyoming Criminal Abortion Ban's purported exception for "Lethal fetal anomal[ies]" therefore does not in any way cure the disconnect between the stated purpose of preserving potential life and the terms of the statute.

Other provisions of the Wyoming Criminal Abortion Ban are also inconsistent with preserving potential life. For example, the statute expressly includes within the definition of "abortion" (and therefore bans) the practice of multi-fetal reduction. Wyo. Stat. § 35-6-122(a)(i).

Multi-fetal reduction is a procedure to remove one or more fetuses in a multi-fetal pregnancy (i.e., a pregnancy involving three or more fetuses) in order to increase the chance that the remaining fetuses will survive. Ex. 7, Moayedi at ¶ 18. Prohibition of multi-fetal reduction therefore will result in *reducing* the potential for life. *Id.*

And it must be noted that the statute does not ban ***all*** elective abortions. Abortions remain legal in cases of sexual assault and incest. Yet a fetus that results from a sexual assault or incest represents potential life that is indistinguishable from a fetus that results from consensual relations. If the state were truly concerned about protecting potential life (instead of political palatability) then it makes no sense to include these exceptions.

With respect to the health and safety of women, it is beyond credible dispute that abortion is far safer than childbirth. Ex. 7, Moayedi at ¶ 19. The risk of death associated with childbirth is fourteen (14) times higher than the risk associated with abortions. *Id.*; *see also* Ex. 3, Anthony at ¶¶ 22-24; Ex. 4, Hinkle at ¶ 23. In fact, the risk of death from abortions is ten (10) times lower than the odds of being struck by lightning. Ex. 7, Moayedi at ¶ 19. Banning abortion and forcing women to give birth—as the Ban does—therefore will lead to greater maternal mortality and other complications. *Id.* at ¶ 13. Moreover, as described by Dr. Moayedi and discussed in greater detail below, the vagueness of the exceptions in abortion bans similar to the Wyoming Criminal Abortion Ban is resulting in delay and/or denial of necessary health care to women on a daily basis. *Id.* at ¶¶ 9-14. This shows that the statute will harm—not further—the health and safety of women.

The Wyoming Criminal Abortion Ban likewise undermines the integrity of the medical profession. As demonstrated above, the medical profession considers abortion to be essential health care for women. As noted by ACOG, "[a]bortion bans and other restrictions violate long-established and widely accepted medical ethical principles of beneficence, nonmaleficence, and

respect for patient autonomy."[11] As a result, "[r]estrictive laws on abortion place physicians in an ethical dilemma of choosing between their obligation to provide the best available medical care and substantial legal (sometimes criminal) penalties." *Id.* These statements are consistent with Dr. Moayedi's observations in her own practice and the findings of her research, which show that similar abortion bans in other states are putting physicians in the untenable position of risking criminal liability for complying with their professional standard of care. Ex. 7, Moayedi at ¶¶ 9-14. Once again, the actual impact of the Wyoming Criminal Abortion Ban is the opposite of its stated purpose.

The state's claim that denying women control over their own health care somehow prevents discrimination on the basis of race, sex or disability is patently absurd. Precisely the opposite is true, as this Court found in its prior ruling. PI Order at ¶¶ 39-41.

Nor does the statute further any other of its stated purposes. With respect to "mitigation of fetal pain," the scientific literature is clear that a fetus does not experience pain. Ex. 7, Moayedi at ¶ 20. The claim that the statute is intended to prevent "particularly gruesome or barbaric medical procedures" is nonsensical. Medical procedures such as abortions are common and not obviously different from any number of invasive treatments. The language that the Wyoming Criminal Abortion Ban quotes from the *Dobbs* opinion referencing "gruesome" and "barbaric" procedures related to a specific type of abortion procedure that is only used in later term abortions after 15 weeks.[12] By contrast, the Wyoming Criminal Abortion Ban prohibits abortions from conception and therefore applies principally to other types of abortion procedures. And once again, the statute does not ban all abortions, only some. The same supposedly gruesome and barbaric procedure is

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[11] American College of Obstetricians and Gynecologists, *Abortion Access Fact Sheet*, https://www.acog.org/advocacy/abortion-is-essential/come-prepared/abortion-access-fact-sheet (last accessed Mar. 9, 2023)

[12] *Dobbs*, 142 S. Ct. at 2242.

used in legal abortions as would be used in prohibited abortions. If the state really is claiming that abortion is gruesome or barbaric, then it makes no sense to ban only some.[13]

Finally, and perhaps most importantly, the evidence shows that the Wyoming Criminal Abortion Ban will result in undue governmental infringement of the right of Wyoming women to control their own health care, in violation of Wyoming Const. art. 1, sec. 38(d). Although the statute is directed to some—but not all—elective abortions, it sweeps within its prohibition necessary, appropriate, and ethical medical care that does not involve elective abortions. This is because medical procedures and medications used for elective abortions are also used in numerous other circumstances.

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

Although the Wyoming Criminal Abortion Ban attempts to address some—but far from all—pregnancy complications, even those efforts fall far short. For example, the definitions for ectopic and molar pregnancies do not include all of those conditions, with the result that some

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[13] Moreover, most abortions today are accomplished with medication, not procedures. Guttmacher Institute, *Medication Abortion Now Accounts for More Than Half of All US Abortions* (Feb. 24, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions (last accessed Mar. 7, 2023). The assertion that taking a series of pills is "gruesome" strains credulity.

ectopic and molar pregnancies are not included in the exception to the ban. Ex. 7, Moayedi at ¶¶ 15-16. Delaying treatment for such conditions until a woman is at imminent risk of serious injury or death increases maternal morbidity and mortality, yet that is exactly what the Wyoming Criminal Abortion Ban requires. *Id.*

One need only read the news to know that women are experiencing dangerous and traumatic delays in, or outright denial of, necessary medical care every day because of vaguely-worded abortion bans.[14] Dr. Moayedi describes such a case from her own practice in Texas, which has an abortion ban with exception language that is very similar to the Wyoming law, including use of such phrases as "serious risk of substantial impairment of a major bodily function."[15] In that case, a pregnant woman required an immediate abortion to prevent deterioration of her heart function and eventual death, but the hospital required that treatment be delayed because of concern

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[14] **"Medical Impact of Roe Reversal Goes Well Beyond Abortion, Clinics Doctors Say,"** *New York Times*, Sept. 10, 2022 (https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html);
"'It's Barbaric,' says Austin Woman Denied Care As Pregnancy Unraveled," *Austin American-Statesman*, October 23, 2022 (https://www.statesman.com/story/news/columns/2022/10/23/opinion-texas-abortion-laws-force-women-to-be-near-death-for-care/69577810007/);
"Louisiana Anti-Abortion Group Calls on Doctors to Stop Denying Care Exempted by Ban," *The Guardian*, February 26, 2023 (https://www.theguardian.com/world/2023/feb/26/louisiana-abortion-ban-miscarriage-treatments)
"Texas Hospitals Are Putting Pregnant Patients at Risk by Denying Care out of Fear of Abortion Laws, Medical Group Says," *Texas Tribune*, July 15, 2022 (https://www.texastribune.org/2022/07/15/texas-hospitals-abortion-laws/)
"Confusion post-Roe spurs delays, denials for some lifesaving pregnancy care – miscarriages, ectopic pregnancies and other common complications are now scrutinized, jeopardizing maternal health." *Washington Post,* July 16, 2022 (https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/)
"Texas Woman Almost Dies Because She Couldn't Get An Abortion," *CNN*, November 16, 2022 (https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html)
"She Had 'a Baby Dying Inside' Her. Under Missouri's Abortion Ban, Doctors Could Do Nothing." USA Today, October 15, 2022 (https://www.usatoday.com/story/news/nation/2022/10/15/missouri-abortion-ban-pregnancy-complications/10496559002/)

[15] Texas House Bill 1280 prohibits all abortions, with an exception where "in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that placed the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed." Ex. 9, Texas Health & Safety Code § 170A.002(b)(2). Texas Senate Bill 8 bans abortions after detection of a fetal heartbeat, except in "medical emergenc[ies]." Ex. 10, Texas Health & Safety Code, §§ 171.204(a) & 171.205(a).

that the woman's condition was not yet severe enough to qualify for the vague exception to Texas' abortion ban. Ex. 7, Moayedi at ¶ 10.

Dr. Moayedi has also participated in research published in the New England Journal of Medicine showing how abortion bans with vague exceptions have a "chilling effect on a broad range of health care professionals, adversely affecting patient care and endangering people's lives." Ex. 7, Moayedi at ¶ 11. Clinicians interviewed in that study described situations where critical care was delayed to pregnant women because of concerns that they were not yet sick enough to fall within the law's exceptions. *Id.* These are precisely the same ill effects on women's health care that Drs. Anthony and Hinkle anticipate will result from the Wyoming Criminal Abortion Ban. Ex. 3, Anthony at ¶¶ 39-41; Ex. 4, Hinkle at ¶¶ 31-34.

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

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

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

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

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

The Wyoming Criminal Abortion Ban undermines, rather than furthers, its stated purposes and severely interferes with necessary and appropriate medical care for Wyoming women. As such, the statute is not a "reasonable and necessary restraint" on a woman's right to control her own health care ***and*** contravenes the legislature's duty to avoid undue government infringement of this right. The Wyoming Criminal Abortion Ban therefore is directly contrary to article 1, section 38 of the Wyoming Constitution.

B. Wyoming's Criminal Abortion Ban is void for vagueness.

The Wyoming Supreme Court has provided the relevant standard for review when assessing a statute for impermissible vagueness.

> A statute may be challenged for constitutional vagueness "on its face" or "as applied" to particular conduct. *Griego v. State* at 975. When challenging a statute for unconstitutional facial vagueness the party must demonstrate that the statute reaches a substantial amount of constitutionally protected conduct, or that the statute specifies no standard of conduct at all. . . . When a statute is challenged for vagueness on its face, the court examines the statute not only in light of the complainant's conduct, but also as it might be applied in other situations . . .

Giles v. State, 2004 WY 101, ¶ 15, 96 P.3d 1027, 1031-32 (Wyo. 2004).

A penal statute such as the Wyoming Criminal Abortion Ban, must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory behavior." *Griego v. State*, 761 P.2d 973 (Wyo. 1998) (citing *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 1858 (1983)).

Here, the Wyoming Criminal Abortion Ban plainly implicates protected conduct—a woman's right to control her own health care under article 1, section 38 of the Wyoming Constitution. It also specifies no meaningful standard of conduct.

In its prior order enjoining the Wyoming Trigger Ban as unconstitutionally vague, the Court pointed to the lack of guidance on how a physician would know that a pregnancy resulted from a sexual assault or incest, as well as the omission of the provision from prior law allowing a physician to rely on "appropriate medical judgment." PI Order at ¶¶ 44-45. In apparent response, the Wyoming Criminal Abortion Ban included language suggesting that a physician could rely upon a patient's police report of sexual assault or incest, and restored language allowing the physician to rely on "reasonable medical judgment" in assessing whether the exception for a woman's health applied. Wyo. Stat. § 35-6-124(a)(i).

These changes do nothing to cure the statute's impermissible vagueness. In assessing whether an abortion is permitted by the statute, the physician is called upon to determine whether it is "necessary . . . to prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman . . . ." In applying this standard, a physician must interpret the following words and phrases: "necessary," "prevent the death," "substantial risk," "serious and permanent impairment," and "life-sustaining organ." As set forth in the Declaration of Ghazaleh Moayedi, none of these is a medical term or phrase and there is no medical literature or guidance on how to apply them. Ex. 7, Moayedi at ¶ 8.

Further, other terms in the statute that may at first glance appear to be medically based are not. For example, the phrase "separation procedure" is not defined in the statute and has no medical definition. Ex. 7, Moayedi at ¶ 7. Other terms are incoherent from a medical perspective. For example, Wyo. Stat. § 36-6-124(a)(1) requires a physician, when performing a "pre-viability

separation procedure," to "make all reasonable medical efforts under the circumstances to preserve . . . the life of the unborn baby . . . ." By definition, a pre-viability fetus cannot develop into a live baby outside the womb. And the statute defines a "Lethal fetal anomaly" as a condition for which "there is a substantial likelihood of death of the child within hours of the child's birth." Wyo. Stat. § 35-6-122(a)(vi). But it is impossible for a physician to determine in advance whether a fetus with a fatal anomaly will survive minutes, hours, days, or months following birth. Ex. 7, Moayedi at ¶ 17.

Manifestly, the ability to rely on "reasonable medical judgment" is meaningless when it comes to applying terms that have no medical definition and for which there is no established medical guidance.

Nor do these terms have any discernable non-medical meaning. For example, what constitutes a "substantial risk of death"? Is a 5% chance of death substantial or must it be more than 50%? What is a "serious and permanent impairment of a life-sustaining organ"? Must the impairment be one that will lead to death? Is disability sufficient? If so, what manner of disability? Neither the statute nor common sense provides any guidance on the meaning of these terms which are of central importance to application of the statute. The statute effectively provides no standard at all, and therefore its stated "exceptions" are unworkable and nonexistent.

Physicians are left simply to guess at the meaning of these non-medical terms, at the risk of losing their license and going to jail. Predictably, physicians attempting to apply similar exceptions in other states' abortion bans have been unable to do so, with the result that woman are being deprived of necessary medical care.

As noted above, Dr. Moayedi practices in Texas, which has a similar abortion ban with similarly vague exceptions. Through her own practice and her research, she has observed that

health care providers often delay critical, necessary care because of uncertainty on the meaning and scope of these types of vague exceptions. Ex. 7, Moayedi at ¶ 9-14.

The Wyoming Criminal Abortion Ban is a textbook example of an unconstitutionally vague penal statute. Those who are regulated by the statute have no way to know what conduct is allowed and what conduct is proscribed. The only reasonable way for physicians to respond to this complete lack of standards is to stop performing abortions altogether, with the result that women will not receive the health care they need and to which they are entitled under the Wyoming Constitution, in addition to the physicians' inability to provide evidence-based health-care, or meet their ethical professional standards.

C. Wyoming's Criminal Abortion Ban violates Wyo. Const. art. 1, sec. 18, 19; art. 7 sec. 12; art. 21, sec. 25 – establishment of religion.

The obvious disconnect between the stated purposes of the Wyoming Criminal Abortion Ban and its actual provisions, along with its equally vague and unworkable language lead to one of two conclusions: either the legislature was decidedly inartful in drafting the law, or the statute has a purpose that is different from what it claims. The language of the statute itself points strongly to the latter conclusion: the actual purpose of the law is to impose on all Wyoming citizens the distinctly religious viewpoint that life begins at conception. Viewed in this light, it is simple to reconcile the seeming inconsistencies in the statute—because the purpose is to further a religious viewpoint that all abortions are murder, the deprivation of necessary medical care is a necessary side-effect of stopping all abortions, and the impossibility of applying the exceptions is a feature and not a bug. The Wyoming Criminal Abortion Ban therefore violates the prohibition on establishment of religion.

The Wyoming Supreme Court has held that the Wyoming Constitution "contains its own variation of the federal Establishment Clause," even if its guarantee does not mimic the explicit

language of the federal constitution. *In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d 728, 744 (Wyo. 2017). In particular, the Wyoming Constitution prohibits appropriations for sectarian or religious societies or institutions, and prohibits sectarianism. *Id.* (*citing* Wyo. Const. art. 1, sec. 19 & art. 7, sec. 12). The Wyoming Supreme Court has favorably cited the federal establishment clause in its decisions. *See, e.g.*, *Snyder v. Snyder*, 2021 WY 115, ¶ 24, 496 P.3d 1255, 1261 (Wyo. 2021); *Wilson v. Wilson*, 473 P.2d 595, 598-99 (Wyo. 1970). And a federal court applying the Wyoming Constitution found that "the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, ***that it effects no favoritism among sects*** or between religion and non-religion, and that it works deterrence of no religious belief. *Williams v. Eaton*, 333 F. Sup. 107, 115 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972) (emphasis added).

This formulation of the Wyoming establishment clause comports with the test enunciated by the US Supreme Court in *Larson v. Valente*, 456 U.S. 228, 255 (1982). That decision provides that if a law discriminates *among* religions, it can survive only if it is "closely fitted to the furtherance of any compelling interest asserted." *Id.* A variation on this test is found in the Supreme Court's decision in *Lemon v. Kurtzman.* To pass this test, the government conduct (1) must have a secular purpose, (2) must have a principal or primary effect that does not advance or inhibit religion, ***and*** (3) cannot foster an excessive government entanglement with religion. 403 U.S. 602 (1971). As an "offshoot" of the *Lemon* test, courts have also applied the endorsement test, under which courts must ask "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

It should be noted that the US Supreme Court recently has abandoned the *Lemon* and endorsement test. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022). That decision

adopted a new standard, holding that under the US Establishment Clause, government may not "make a religious observance ***compulsory***." *Id.* at 2429 (citation omitted) (emphasis added). For example, "[g]overnment 'may not coerce anyone to attend church, [] nor may it force citizens to engage in "a formal religious exercise"'" as "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.*

Wyoming is not bound by this change in federal law. As the Wyoming Supreme Court noted in *In re Neely*, the Wyoming Constitution "can offer broader protection than the United States Constitution." *In re Neely*, 2017 WY 25, ¶ 48. The provisions of the Wyoming Constitution closely align with the *Lemon* test. The first element of that test—that laws have a secular purpose—is consistent with the prohibition on sectarianism in art. 1, sec. 19 and art. 7, sec. 12 of the Wyoming Constitution. The second element of the *Lemon* test—that the effect of the law must neither advance nor inhibit religion—parallels the prohibition on religious preferences in art. 1, sec. 18. The third element—that government must avoid excessive entanglement with religion—closely aligns with the requirement for "perfect toleration" of religious views in art. 21, sec. 15.

Consistent with the provisions of the Wyoming Constitution, this Court should apply something akin to the *Lemon* test in considering Plaintiffs' establishment claim. Nonetheless, even if the Court applies the "coercion" test from *Kennedy v. Bremerton School District*, the Wyoming Criminal Abortion Ban fails. It is hard to imagine a starker example of coercion than forcing women to carry a pregnancy to term against their will or forcing physicians to violate their professional duties on pain of losing their license and going to jail, due only to compelling all to comply with a penal law which embraces the religious viewpoint that life begins at conception.

The religious motivation of the Wyoming Criminal Abortion Ban is evident from the very first provision, which explicitly adopts the religious viewpoint that life begins at conception: "The

legislature finds that . . . [a]s a consequence of an unborn baby being a member of the species homo sapiens from conception, the unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution." Wyo Stat. § 35-6-121(a)(i). The statute goes on to affirm that "[t]he legislature, in the exercise of its constitutional duties and power, has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception." Wyo. Stat. § 35-6-121(a)(v).

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

By basing the Wyoming Abortion Ban on the view that life begins at conception, the legislature plainly endorsed a particular religious viewpoint, which it seeks to impose on all Wyomingites. This is because the view that life begins at conception is distinct to certain religions and is not shared by many other religions, agnostic, or secular groups. As set forth in the Declaration of Gillian Frank, this viewpoint historically was associated with Catholicism, but fairly recently has become accepted doctrine among some Evangelical Christians. Ex. 8, Frank at ¶¶ 5-6, 15-18.

There is a great diversity of religious views on the question of when life begins. Long-standing Jewish doctrine holds that life begins at birth, and until that point a fetus is a "non-

person." Ex. 8, Frank at ¶¶ 10-11. Some Muslims believe that "ensoulment" of a fetus occurs at 120 days. *Id.* ¶ 11. Other religions have other views. And among Christians, there is a stark disagreement between different denominations, and even amongst them, on the question of when life begins. *Id.*

And these views on when life begins directly inform the different religious beliefs surrounding abortion. Ex. 8, Frank at ¶¶ 5-18. Because many Catholics believe life begins at conception, they often oppose abortion at any time and for any reason. Ex. 8, Frank at ¶ 5-12. By contrast, many Jews have long believed that the pregnant woman's well-being always takes precedence over the fetus and therefore approve of abortion at any time prior to birth if necessary to protect the physical or mental well-being of the woman. *Id.* ¶10.

The belief that life begins at conception is not only distinct to certain religious denominations, it is also a distinctly religious viewpoint. There is no scientific support for this doctrine. Ex. 8, Frank at ¶ 10. And until recently, the law has never recognized a fetus as a person with full legal rights. *Id.* ¶¶ 5-18. Even the majority opinion in *Dobbs* acknowledged that prior to the mid-19th century, many states did not criminalize abortions prior to "quickening" – the point at which a woman could feel a fetus moving.[16] Quickening occurs fairly late in a pregnancy – typically close to the time of viability. Ex. 8, Frank at ¶ 17. As explained in an amicus brief for the *Dobbs* case:

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

[16] *Dobbs*, 142 S. Ct. at 2236 & 2249-2252.

Brief of Americans United for Separation of Church and State, et al. as *Amici Curiae* in Support of Respondents, U.S. Supreme Court, No. 19-1392, at p. 18.

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

> Section 5 of the Kentucky Constitution protects both the free exercise of religion and prohibits the establishment of a state religion. The Six Week Ban infringes upon those rights as well, but primarily upon the prohibition on the establishment of religion. Defendants' witnesses at the July 6th hearing advocated for and agreed with what the General Assembly essentially established in these laws, independent fetal personhood. They argue that life begins at the very moment of fertilization and as such is entitled to full constitutional protection at that point. However, this is a distinctly Christian and Catholic belief. Other faiths hold a wide variety of views on when life begins and at what point a fetus should be recognized as an independent human being. While numerous faith traditions embrace the concept of "ensoulment," or the acquisition of personhood, there are myriad views on when and how this transformation occurs. The laws at issue here, adopt the view embraced by some, but not all, religious traditions, that life begins at the moment of conception.
>
> The General Assembly is not permitted to single out and endorse the doctrine of a favored faith for preferred treatment. By taking this approach, the bans fail to account for the diverse religious views of many Kentuckians whose faith leads them to take very different views of when life begins. There is nothing in our laws or history that allows for such theocratic based policymaking. Both the Trigger Ban and the Six Week Ban implicate the Establishment and Free Exercise Clauses by impermissibly establishing a distinctly Christian doctrine of the beginning of life, and by unduly interfering with the free exercise of other religions that do not share that same belief.
>
> All of these considerations together stand for the proposition that governmental intrusion into the fundamentally private sphere of self-determination as contemplated by these laws is to be prohibited.

EMC Womens Surgical Center, et al. v. Daniel Cameron, et al., No. 22-CI-3255 (Jefferson Circuit Court, Division Three, July 22, 2022) (Opinion & Order Granting Temporary Injunction at pp. 15-16) (footnotes omitted) (Ex. 12).

The sponsors of the Wyoming Criminal Abortion Ban made their religious motivation explicit in the original draft of HB 0152. Section 35-6-211(a)(vi) of that draft bill provided that

"[t]he provisions of article 1, sections 7, 18, 33, 34, and 36 and article 21, section 25 of the Wyoming constitution are also promoted and furthered by this act by recognizing that an unborn baby is a member of the human race."[17] Thus, the authors of the bill expressly tied the viewpoint that life begins at conception to the provisions of the Wyoming Constitution addressing religion.

During debate, concerns were expressed that including this provision could make the bill subject to constitutional attack, and it was removed from the final law.[18] But removal of the offending provision does nothing to diminish the admission by the bill's drafters that the motivation behind the law was primarily religious. Indeed, the Representative who expressed concerns about including the reference to religion in the bill's text readily acknowledged the religious motivation for the bill – he just objected to making that motivation explicit because it would "provide ammo" for a legal challenge.[19] While Plaintiffs do not doubt the sincerity of the legislators' religious convictions and respect their viewpoint, the constitution makes clear that they may not impose their religious views on others through the legislative process.

This Court should likewise find that Plaintiffs have established a likelihood of success on the merits of their establishment claim.

D. Wyoming's Criminal Abortion Ban violates Wyo. Const. art. 1, sec. 3 Equal Protection.

The Wyoming Criminal Abortion Ban discriminates on the basis of sex.

The Wyoming Constitution provides:

> Const. article 1, section 3. Equal political rights.
> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual

[17] *See* Ex. 11, HB 0152b, as amended Feb. 10, 2023.
[18] House Judiciary Committee Hearing, February 1, 2023, Comments of Representative Crago at 23:00 through 23:50, https://m.youtube.com/watch?v=PaizsqUDoUA&list=PLOhkcX5d91No8QiqW5_bV4cv-NmKO3DQs&index=5
[19] *Id.*

> incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Plaintiffs' privacy and liberty interests are equally enjoyed by all Wyomingites, regardless of *any factor* except individual competence. Wyo. Const. art. 1, sec. 3. As the Wyoming Supreme Court explained:

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

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

In issuing a preliminary injunction, this Court found that Plaintiffs were likely to prevail on their claim that the Wyoming Trigger Ban discriminated against women:

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

> decisions. The statute dilutes the rights available to women in making decisions regarding their health care whether or not to give birth to a child.

PI Order at ¶ 41. The same reasoning applies with equal force to the Wyoming Criminal Abortion Ban. The conclusion, then, is inescapable that Wyoming's Criminal Abortion Ban discriminates on the basis of sex.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES SUPPORT ISSUANCE OF AN INJUNCTION

Plaintiffs and their patients face far greater harm while Wyoming's Criminal Abortion Ban is in effect than Defendants will face if the Court preserves the status quo. The State has no "interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). In addition, the public has an interest in a speedy injunction to block a law that fundamentally upsets the longstanding status quo on which Wyoming women and their families have relied upon for at least five decades. "The purpose of a preliminary injunction during the pendency of litigation is '"to preserve the status quo until the merits of an action can be determined."'" *Brown v. Best Home Health & Hospice*, LLC, 2021 WY 83, ¶ 7, 491 P.3d 1021, 1026 (Wyo. 2021) (internal citations omitted). Here, the status quo is that Wyoming women can obtain a lawful abortion pursuant to Wyo. Stat. § 35-6-102(a) and have been able to do so pursuant to that statute since 1977. The balance of equities and public interest thus weigh decisively in Plaintiffs' favor, further demonstrating that a temporary restraining order is appropriate.

IV. THIS COURT SHOULD ENTER A TEMPORARY RESTRAINING ORDER WITHOUT BOND

Under Wyo. R Civ. P. 65(c) "if the district court finds no likelihood of harm to the defendant, no bond is necessary." *Operation Save Am. v. City of Jackson*, 2012 WY 51, ¶ 98, 275 P.3d 438, 466 (Wyo. 2012). At the TRO and preliminary injunction stage of proceedings on the

Wyoming Trigger Ban, the District Court found that no bond was necessary, and no Defendant requested bond.

Plaintiffs request this Court continue to use its discretion to waive the security requirement. Here, the relief sought will result in no monetary loss for Defendants and is necessary to protect the constitutional rights of Plaintiffs, their patients, and women in Wyoming.

CONCLUSION

For the foregoing reasons, Plaintiffs have clearly demonstrated that a temporary restraining order is appropriate pending a full adjudication on the merits of this matter. This dispute implicates serious Constitutional debate and the rights of every Wyomingite to privacy and health care are at risk. Plaintiffs respectfully request this Court enter a temporary restraining order enjoining and restraining Defendants and their officers, employees, servants, agents, appointees, or successors from administering or enforcing Wyoming's Criminal Abortion Ban with respect to any abortion provided while such injunction is in effect, including in any future enforcement actions for conduct that occurred during the pendency of this injunction, or during the interim between the Criminal Abortion Ban's effective date and the issuance of any injunction, and that such an injunction issue without posting of security.

WHEREFORE Plaintiffs request an entry of temporary restraining order enjoining Defendants from enforcement of the Wyoming Criminal Abortion Ban pending trial in this matter.

RESPECTFULLY SUBMITTED this 17th day of March, 2023.

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CERTIFICATE OF SERVICE

This is to certify that this 17th day of March 2023, a true and correct copy of the foregoing was served as follows:

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