IN THE SUPREME COURT, THE STATE OF WYOMING

STATE OF WYOMING; MARK GORDON, Governor of Wyoming; and BRIDGET HILL, Attorney General for the State of Wyoming; Appellants (Defendants), v. 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, Appellees (Plaintiffs).	S-24-0326

BRIEF OF APPELLEES/PLAINTIFFS

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STATEMENT OF JURISDICTION

Plaintiffs/Appellees concur in the Appellant's Statement of Jurisdiction, including that 1) the District Court's November 18, 2024, summary judgment ruling constitutes a final judgment; 2) the State filed a timely notice of appeal four days later; and 3) this Court has jurisdiction to hear and adjudicate this matter under Article 5, Section 2 of the Wyoming Constitution.

INTRODUCTION

The Wyoming legislature's efforts to ban abortion and abortion medication mark a radical departure from Wyoming's long-standing protection of women's fundamental rights to equality, to control their bodies, families and lives, and to free exercise of their religious beliefs. Contrary to the State's assertions, these rights are deeply rooted in Wyoming's history, which from its earliest territorial days has afforded women greater rights than the rest of the country, including greater rights to abortion. While the State claims it is necessary to violate these fundamental rights to protect women, prenatal life and the medical profession, these claims do not survive any level of scrutiny. They are instead a thinly veiled pretense for the legislature's attempt to impose a sectarian religious viewpoint on all Wyoming citizens. This Court should reject the State's effort to deprive Wyoming women of their fundamental constitutional rights and affirm the District Court's permanent injunction against the abortion bans.

BACKGROUND

A. Wyoming's History and Tradition of Equality and Individual Liberty.

Wyoming has long recognized expansive individual liberties in the form of natural rights. As this Court repeatedly has affirmed, "natural rights are recognized by our

constitution" and are "part of the positive law of the land." *Cross v. State*, 370 P.2d 371, 376 (Wyo. 1962) (quoting *State v. Langley*, 84 P.2d 767, 769–70 (Wyo. 1938)). Natural rights include the right to control one's own body and family composition. *See Ailport v. Ailport*, 2022 WY 43, ¶ 8, 507 P.3d 427, 433 (Wyo. 2022) ("liberty interest 'denotes not merely freedom from bodily restraint' but also the right of any individual to establish a home and bring up children") (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

Equally strong is the Wyoming tradition of affording these "most valued" rights to all citizens, regardless of gender. As the District Court observed: "From its earliest territorial days and at the advent of statehood, Wyoming set itself apart by committing to the principle that its laws applied equally to both men and women. . . . As the first state in the history of the United States to give women the right to vote and hold office, it quickly became known as the 'Equality State.' In honor of this, the first official seal of Wyoming included the motto: 'Equal Rights' which was later adopted as Wyoming's official motto pursuant to Wyo. Stat. Ann. § 8-3-107." R. at TR-3894 [SJ Order ¶ 12] (citation omitted).

To secure liberty and equality, the Wyoming constitution contains robust protections for individual rights beyond the protections in the U.S. Constitution. *See, e.g.*, Wyo. Const. art. 1, §§ 2 (Equality for all), 3 (Equal political rights). "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." *Johnson v. State Hearing Exam'r's Off.*, 838 P.2d 158, 164 (Wyo. 1992) (citation and footnote omitted).

This history and tradition of equality and liberty extends to abortion rights. While still a territory, Wyoming chose to incorporate the English common law stretching back centuries. C.L. 1876, ch. 26, § 1 (codified at Wyo. Stat. Ann. § 8-1-101). There was no common law prohibition on abortion prior to "quickening"—the point at which a woman can feel "movement of the fetus in the womb" at roughly the mid-point of pregnancy. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 242 (2022); *see also State v. Cooper*, 22 N.J.L. 52, 58 (1849) ("[T]he procuring of an abortion by the mother . . . unless the mother be quick with child, is not an indictable offence at the common law."); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 265–66 (1845) (same).

Consistent with this common law, abortion was commonly practiced throughout Eighteenth Century America, with a recipe for a homemade abortifacient published by Benjamin Franklin. R. at TR-1967 [Peters ¶ 51]. Abortion before quickening was first restricted in the Nineteenth Century, and then only as part of a religious-based movement by Christian physicians. R. at TR-1967 [Peters ¶¶ 51–52]. Individual states gradually adopted legislation restricting abortion, with some states making an exception for abortions necessary to "preserve" the woman's life and some states distinguishing in severity between pre-quickening and post-quickening abortions. *See Dobbs*, 597 U.S. at App. A.

Nearly alone among the states, Wyoming took a more permissive approach. Under Wyoming's first abortion statute, adopted in 1869, a woman was permitted to undergo an abortion at <u>any</u> stage of pregnancy where, based on the "advice of a physician or surgeon," the abortion was intended "to save the life of such woman, ***or to prevent serious and permanent bodily injury to her***." Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869)

(emphasis added). No other state but Maryland adopted similar exceptions to its earliest legislation restricting abortion. *See Dobbs*, 597 U.S. at App. A.

While later nineteenth-century Wyoming statutes do not include the language referencing "bodily injury," it was added back in broader form in the twentieth century to comply with *Roe v. Wade*. Wyo. Stat. Ann. § 35-6-102 (1977) (permitting abortion after viability "when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment"). However, even after the U.S. Supreme Court opened the door to some restrictions on pre-viability abortions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Wyoming continued to allow an unrestricted right to such abortions. In the 1994 election, anti-abortion proponents succeeded in placing an abortion-limiting initiative on the state-wide ballot, which failed by a 60/40 margin.[1] In many respects, this initiative was *less* restrictive than the current abortion bans, but was still decisively rejected by the Wyoming voters. *See Wyoming National Abortion Rights Action League v. Karpan*, 881 P.2d 281, 294 (Wyo. 1994).

Against this backdrop, in 2012, Wyoming adopted an explicit constitutional right for citizens to make their own health care decisions, free from undue government interference. Wyo. Const. art. 1, § 38 ("Section 38"). At the time Wyoming voters overwhelmingly adopted Section 38 abortion was constitutionally protected until viability

[1] *See* Ballotpedia, Wyoming Initiative 1, Abortion Ban Measure (1994), https://ballotpedia.org/Wyoming_Initiative_1,_Abortion_Ban_Measure_(1994) (last visited Feb. 23, 2025).

and statutorily protected thereafter to preserve a woman's life or health. Section 38 therefore buttressed the right of Wyoming women to decide to have an abortion, as acknowledged by the Legislature. During debate, Senator Nicholas commented that a "person's right to reproductive options" were "a health care decision, and seems to me that a competent adult under [Section 38] should have that right." R. at TR-2950 (80:15–18). Section 38 therefore represents the culmination of protections for abortion rights that were grounded in centuries of jurisprudence, laws and practices, and recognizing and reaffirming these rights as liberties guaranteed in Wyoming.

B. The Abortion Bans Are Contrary To Wyoming's Tradition of Equality and Liberty.

The laws at issue in this action represent a radical departure from this history of equality and liberty. House Bill 152 criminalizes all abortions, subject to vague exceptions that are narrower than those historically permitted ("Abortion Ban"). While the 1869 statute allowed abortion to prevent "bodily injury" and the 1977 statute authorized abortions to protect women's "health," the Abortion Ban only permits abortion to prevent a "serious and permanent impairment of a ***life-sustaining organ***." Wyo. Stat. Ann. § 35-6-124(a)(i) (emphasis added). Whatever is meant by the ambiguous phrase "life-sustaining organ," it plainly is narrower than "bodily injury" or "health."

Unlike earlier statutes which allow abortion to protect the woman from a risk of death from ***any*** condition, the Abortion Ban only allows abortion to protect a woman from a risk of death caused by a "physical condition." *Id.* In other words, the current law—unlike the earlier laws—does not allow abortion to protect a woman from suicide or a drug

overdose—among the leading causes of maternal mortality. R. at TR-1895 [Moayedi ¶ 38–39, n.45]; R. at TR-2791, TR-2807 [Wyoming Maternal Mortality Report (2018–2020)].

The Abortion Ban likewise departs from the discretion historically afforded physicians to determine whether an abortion was permissible. The territorial statute allowed physicians unfettered discretion to determine when abortion was necessary to prevent bodily injury, and the 1977 law allowed physicians to exercise "appropriate medical judgment" to determine when an abortion was necessary to protect a woman's health. *See* Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869); Wyo. Stat. Ann. § 35-6-102. By contrast, the Abortion Ban restricts the physician's discretion by imposing a host of vague, non-medical qualifications to the exceptions that make it impossible for the physician to determine, as a matter of medical judgment, what is allowed under the law. *See* R. at TR-1870–73, 1880, 1893–94 [Moayedi ¶¶ 7–10, 17, 34–37].

In addition to the Abortion Ban, the legislature also enacted Senate File 0109, banning use of medication for abortions, even if the abortion is otherwise permissible (the "Medication Ban"). Wyo. Stat. Ann. § 35-6-139. While the Medication Ban uses language in its exception that is similar to the 1977 statute, unlike the 1977 statute, it expressly excludes from "imminent peril" any mental health conditions or acts of self-harm by the pregnant person—once again substantially narrowing the earlier exception. *Id.* § 35-6-139(b)(iii). The Medication Ban also potentially sweeps within its broad prohibition certain common forms of birth control—a restriction on liberty that is entirely absent from earlier abortion statutes from any century. R. at TR-1895 [Moayedi ¶ 41].

Although purporting to protect women, the Abortion Ban and Medication Ban will

lead to an increase in maternal mortality and morbidity, and it will deprive women of essential, evidence-based health care consistent with the medical standard of care. And both the Abortion Ban and the Medication Ban directly infringe on a woman's right, guaranteed under Section 38, to make her own health care decisions free from undue governmental intrusion. At no point in this proceeding has the State been able to identify any similar restrictions imposed by the State on health care decisions by men. The abortion statutes therefore represent an unprecedented departure from Wyoming's history and tradition of equality and liberty.

C. The Religious Origins of the Abortion Bans.

While the State has claimed that the abortion bans are intended to protect women, fetuses and physicians, both their express terms and the undisputed evidence show they do not. Instead, the statutes represent an attempt to impose a minority religious viewpoint on all Wyoming citizens. The Abortion Ban is expressly predicated on the legislative declaration that "the unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution," Wyo. Stat. Ann. § 35-6-121(a)(i), and therefore the Legislature has a "fundamental duty to provide equal protection for all human lives, including unborn babies from conception," *id.* § 35-6-121(a)(v). This declaration is profoundly at odds with Wyoming's legal tradition.

Under the common law, as incorporated by Wyoming since 1869, a fetus had no independent status prior to quickening. *Parker*, 50 Mass. (9 Met.) at 266 (The common law considered "the child [to have] a separate and independent existence, when the embryo had advanced to that degree of maturity designated by the terms 'quick with child[.]'");

Cooper, 22 N.J.L. at 54 ("*In contemplation of law* life commences at that moment when the embryo gives the first physical proof of life."). Throughout its entire history until the Abortion Ban, Wyoming law never departed from this common law rule. The State has never identified another statute that recognizes a single-celled zygote as an independent being with the same legal rights as a living person. Indeed, the earliest Wyoming statute criminalizing feticide was limited to unlawful killing of "an unborn ***quick*** child. . . ." 1890 Terr. Wyo. Sess. Laws, ch. 73, § 19 (Wyo. Rev. Stats. § 4955 (1899)) (emphasis added).

The absence of any history or tradition of recognizing the independent legal rights of a single-celled zygote raises the question of where such a viewpoint originated. The evidence uniformly points to religion. To understand these religious origins, it is necessary to first define what is meant by the phrase "life begins at conception." That the Wyoming Legislature has announced that a fertilized egg is "a member of the species homo sapiens from conception,", Wyo. Stat. Ann. § 35-6-121(a)(i), is neither contested nor relevant.

Rather, what underpins the abortion bans is the viewpoint that, from conception, prenatal beings are independent humans with full rights to equality and equal protection under the Wyoming Constitution. Wyo. Stat. Ann. § 35-6-121(a)(i) & (v). In this respect, the Legislature is adopting a view on the ***status*** of a zygote. Whether a fertilized egg has the same status as a living person is a question that cannot be answered by reference to science, medicine or any secular tradition. The question instead is distinctly religious, with the answer encompassing a broad range of different religious viewpoints.

As Professor Rebecca Peters explained, "[t]he idea that from the moment of fertilization, a zygote is, in every way, indistinguishable from a baby is a sectarian religious

belief shared by Roman Catholics, some evangelical Christians, Greek Orthodox, and Jehovah's Witnesses." R. at TR-1955 [Peters ¶ 17]. This is a minority Christian viewpoint that is not shared by the vast majority of religions. *Id.* Throughout much of history, Christians did not believe that a fertilized egg had the same status as a live person, but instead believed that ensoulment occurred at quickening and abortion before that point was not murder. R. at TR-1964–65, 1976–77 [Peters ¶¶ 41–46, 71]. Beginning in the nineteenth century, Catholic theology first evolved to the position that life begins at conception. R. at TR-1976–77 [Peters ¶ 71].

In contrast, for millennia Jews have believed that life begins when the baby takes its first breath during birth; before then, the baby has no independent status; and prior to birth a pregnancy may be terminated at any point to protect the wellbeing of the mother. R. at TR-1990–91, 1993–98 [Ruttenberg ¶¶ 13–18, 23–42]. Many Muslims believe that "ensoulment" occurs at 120 days of gestation, at which point the fetus gains personhood. R. at TR-1975–76 [Peters ¶ 68]. Hindus believe that a soul exists from conception, but it is not destroyed by abortion, only hindered in its journey through the life cycle. R. at TR-1980–81 [Peters ¶ 79]. Protestant denominations reflect a wide diversity of viewpoints, with some believing that life begins at conception, others believing that the fetus has a different status than a baby, and still others declining to take any position on the question, leaving it to individual conscience. R. at TR-1978–80 [Peters ¶¶ 74–78].

By declaring that a zygote has the same status as a living person, the legislature has taken sides in a centuries-long religious debate. It has done so in flagrant disregard for

other religious viewpoints and in violation of the Wyoming Constitution's prohibition on establishment of religion and guarantee of free exercise of different religious viewpoints.

D. Procedural Background.

In 2022, the Wyoming legislature adopted House Bill 92, which prohibited abortion at any point during a woman's pregnancy, effective if and when *Roe v. Wade* was overturned (the "Trigger Ban"). On July 27, 2022, the Trigger Ban became effective. That same day the District Court entered a temporary restraining order, and subsequently entered a preliminary injunction, enjoining enforcement of the statute. *See Johnson et al. v. State of Wyoming et al.*, Civil Action No. 18732 (9th Jud. Dist. Ct., Teton Cnty., Wyo., Aug. 10, 2022) (Order Granting Mot. for Prelim. Inj. ¶ 49) ("*Johnson I*").

To evade the ruling in *Johnson I*, the legislature repealed the Trigger Ban and replaced it with the Abortion Ban, which became effective on or about March 17, 2023. The Ban prohibits abortions from conception, subject to vague and narrow exceptions. Wyo. Stat. Ann. §§ 35-6-122, 35-6-124(a). Violations of the law are subject to criminal and civil penalties. *Id.* §§ 35-6-125, 35-6-126, 35-6-127. By repealing the Trigger Ban and adopting the Abortion Ban, the legislature mooted *Johnson I*, forcing plaintiffs to dismiss that case and file the present action ("*Johnson II*"). On March 22, 2023, the District Court entered a temporary restraining order against the Abortion Ban, finding Plaintiffs had demonstrated a likelihood of success on their Section 38 claim. R. at TR-744–45, 749–50.

In addition to the Abortion Ban, the legislature also enacted Senate File 109 banning use of medication for abortions ("Medication Ban"). Senate File 109 was to become

effective on July 1, 2023. On June 22, 2023, the District Court issued a temporary restraining order against the Medication Ban, finding it likely violates Section 38. R. at TR-2258–65.

The parties then filed cross-motions for summary judgment. In their motion, Plaintiffs made extensive showings that the abortion statutes violate multiple constitutional provisions. The State did not attempt to rebut any of this showing, instead taking the position that there are no relevant factual questions and this matter can be resolved as a matter of law. Because there are no factual disputes, the District Court vacated the trial date and took the summary judgment motions under submission. On November 18, 2024, the District Court granted plaintiffs' motion for summary judgment, finding that the Abortion Ban and Medication Ban violate Section 38 ("SJ Order"). R. at TR-3884.

While the summary judgment motions were pending in the District Court, the legislature attempted to make an end-run around the judicial process, adopting yet another abortion bill during the 2024 legislative session, known as House Bill 148. H.B. 148, 67th Leg., Budget Sess. (Wyo. 2024). That bill would have imposed a host of onerous requirements on women and abortion providers, intending, again, to make it difficult or impossible to obtain abortion care. Among other things, House Bill 148 included licensing and other requirements that were tailored to force closure of the Casper, Wyoming clinic operated by plaintiff Wellspring Health Access. Such "targeted restrictions on abortion providers" or "TRAP" laws have the explicit goal of preventing abortion under the guise of "public health" requirements that, in fact, have nothing to do with women's health, but rather seek to curtail it.

Plaintiffs would have been forced to file a third lawsuit, but the Governor vetoed the TRAP bill, urging the Legislature to await the outcome of this case before passing further abortion legislation. *See* Letter from Mark Gordon, Wyoming Governor, to Chuck Gray, Wyoming Sec'y of State, Re: Veto of HB0148/House Enrolled Act No. 37 Regulation of abortions (Mar. 22, 2024). Unwilling to follow the Governor's advice or to await the outcome of this litigation, during its 2025 session, the Legislature once again passed TRAP laws seeking to accomplish indirectly the abortion ban that it so far has not been able to enact directly. *See* H.B. 42, HEA 26, 67th Leg., Gen. Sess. (Wyo. 2025); H.B. 64, HEA 35, 67th Leg., Gen. Sess. (Wyo. 2025).

Plaintiffs are Wyoming reproductive-aged women, licensed physicians, a clinic that provides reproductive health care services to pregnant women, and a Wyoming non-profit agency that ensures impoverished women can access abortion services. Unless this Court affirms the District Court decision, Wyoming women will be stripped of their long-standing, fundamental rights and their access to essential reproductive health care, and they will be forced 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.

ARGUMENT

A. Legal Standard.

The District Court disposed of this matter by granting Plaintiffs' motion for

summary judgment. "Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law." *O'Donnell v. Blue Cross Blue Shield*, 2003 WY 112, ¶ 9, 76 P.3d 308, 311 (Wyo. 2003) (citation omitted). "A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense that has been asserted by the parties." *Knori v. State ex rel. Dep't of Health, Off. of Medicaid*, 2005 WY 48, ¶ 8, 109 P.3d 905, 908 (Wyo. 2005) (citation omitted). Because the State did not dispute any of the Plaintiffs' factual showings, there were no genuine issues of material fact requiring a trial.

Plaintiffs moved for summary judgment that the abortion statutes violate fundamental rights under multiple provisions the Wyoming Constitution: (1) the right to make health care decisions (Article 1, Section 38); (2) unenumerated rights (Article 1 Sections 6, 7 and 36); (3) equal protection (Article 1, Sections 2 and 3); (4) establishment of religion (Article 1, Sections 19; Article 7, Section 12); (5) free exercise of religion (Article 1, Section 18; Article 2, Section 25); and (6) the due process prohibition on vague criminal statutes (Article 1, Section 6). Plaintiffs requested declaratory relief that the statutes violate these constitutional provisions and a permanent injunction on enforcement of the laws. All claims are asserted both facially and as applied.

Plaintiffs bring their claims exclusively under the Wyoming Constitution. Such claims are available where there is an "articulable, reasonable and reasoned" basis for finding that the state constitution provides greater protection than the United States constitution. *In re Neely*, 2017 WY 25, ¶ 39, 390 P.3d 728, 741 (Wyo. 2017) (citing

Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993)). As discussed in greater detail below, each of the claims asserted here is based on provisions of the Wyoming Constitution that either have no analog in the United States Constitution or have been recognized by this Court to provide greater rights than similar protections under the federal Constitution.

While normally a plaintiff bears the burden of proving a statute violates the Constitution, that rule does not apply to cases, such as this one, that involve fundamental rights. "A fundamental right is a right which the constitution explicitly or implicitly guarantees." *Mills v. Reynolds*, 837 P.2d 48, 53 (Wyo. 1992). Fundamental rights are derived from the Wyoming Constitution applying one or more of the non-exclusive neutral criteria—sometimes referred to as the *Saldana* factors—that this Court has identified as important elements of constitutional analysis. *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 836 (Wyo. 2019) (citing *Saldana*, 846 P.2d at 633 (Golden, J., concurring)); *see also O'Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408 (Wyo. 2005). Because the abortion bans implicate multiple fundamental rights under the Wyoming Constitution, "the burden . . . is on the [State] to justify the validity of the [statutes]." *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994).

In order to satisfy this burden, the State must meet the strict scrutiny test. *See Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 885 (Wyo. 1995) (applying strict scrutiny to claims involving fundamental rights). 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). The State has never seriously attempted to demonstrate that the laws meet strict scrutiny, instead arguing almost exclusively under the rational basis test.

The State compounds this error by relying on a legal standard that does not apply to claims involving strict scrutiny. The State notes that a law is facially unconstitutional where "no set of circumstances exists under which the [challenged statutes] would be valid." State Br. at 25. Under this standard, a law is facially invalid "(1) when the statute reaches a substantial amount of constitutionally protected conduct, and (2) when the statute is shown to specify no standard of conduct at all." *Ochoa v. State*, 848 P.2d 1359, 1363 (Wyo. 1993). "The first situation refers to [the] overbreadth doctrine, under which a statute is facially void if, in addition to regulating a non-constitutionally protected area, 'it also substantially proscribes activities which involve the exercise of constitutionally protected rights.'" *Sheesley*, 2019 WY 32, ¶ 7, 437 P.3d at 834 (quoting *Ochoa*, 848 P.2d at 1363–64). The overbreadth doctrine is equivalent to the second prong of the strict scrutiny test. *Ochoa*, 848 P.2d at 1363 (equating overbreadth with "different levels of heightened scrutiny analysis in terms of 'narrowly drawn' or 'least restrictive alternatives'").[2] Because the abortion bans trigger strict scrutiny, it is not sufficient for the State to point to specific scenarios where the laws may not impinge upon constitutionally protected rights.

Moreover, the State's proffered standard does not apply to Plaintiffs' as-applied

[2] "Application of the 'overbreadth doctrine' has most frequently occurred in the First Amendment's protection of speech, but it applies equally when other constitutional protections are involved." *Ochoa*, 848 P.2d at 1363.

claims. Instead of addressing these claims, the State simply denies their existence, asserting that "Appellees have challenged the facial constitutionality of the" abortion statutes. State Br. at 2. The State is well aware that this statement is false, as it made the same claim below, and the District Court rejected it, finding that Plaintiffs had stated both facial and as applied claims. R. at TR-2840 [Order Denying Mot. To Strike ¶ 17]; R. at TR-3917–18 [SJ Order ¶¶ 74–75].[3] The State does not challenge this finding on appeal. It therefore is undisputed that Plaintiffs are entitled to judgment on their as applied claims.

B. The Court Should Resolve All Of Plaintiffs' Claims.

Because the District Court granted Plaintiffs' motion for summary judgment as to the Section 38 claim, it did not reach the other claims. R. at TR-3918 [SJ Order ¶ 75]. This Court should resolve all claims included in Plaintiffs' summary judgment motion for two reasons. First, each of these claims presents an alternative basis for affirming the District Court's judgment. *See Prancing Antelope I, LLC v. Saratoga Inn Overlook Homeowners Ass'n*, 2021 WY 3, ¶ 41, 478 P.3d 1171, 1182 (Wyo. 2021) (Supreme Court "may affirm the district court on any basis that appears in the record" (citation omitted)).

[3] Plaintiffs are not required to wait until they are prosecuted for violating the statutes to bring an "as applied" challenge. Plaintiffs "may seek declaratory relief before actual harm occurs if [they] ha[ve] a reasonable apprehension of that harm occurring." *United States v. Colo. Sup. Ct.*, 87 F.3d 1161, 1166 (10th Cir. 1996); *Isaacson v. Horne*, 716 F.3d 1213, 1230 n.15 (9th Cir. 2013) ("That the statute has not yet been applied to any of the plaintiffs does not preclude them from bringing a pre-enforcement, as-applied challenge.").

Second, even if this Court affirms the lower court's ruling on Section 38, it may still, and should, reach Plaintiffs' other claims. This Court has recognized that it may be appropriate to resolve claims of public importance even where unnecessary to the dispute before it. *See Allred v. Bebout*, 2018 WY 8, ¶¶ 37–58, 409 P.3d 260, 270–77 (Wyo. 2018) ("[T]he rule requiring existence of justiciable controversies is somewhat relaxed in matters of great public interest or importance." (citation omitted)); *Morad v. Wyo. Highway Dep't*, 203 P.2d 954, 956–67 (Wyo. 1949) (ruling on otherwise moot matters where deemed necessary to provide guidance to state agencies and to produce uniformity in the district courts).

The Legislature has made abundantly clear that it intends to continue enacting abortion restrictions regardless of the outcome of this case, which is certain to spawn future litigation. Both parties have addressed all of Plaintiffs' summary judgment claims in their opening briefs. Plaintiffs urge this Court to take advantage of the fully developed record on Plaintiffs' claims to provide much-needed guidance to the lower courts and the legislature on these issues.

C. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. Article 1, Section 38—Health Care.

Article 1, Section 38 of the Wyoming Constitution provides:

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

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

Wyo. Const. art. 1, § 38 (emphasis added).

This section explicitly protects and holds fundamental every adult's right to "make his or her own health care decisions," subject only to the State's power to enact restrictions that are reasonable and necessary to protect the public health and welfare ***and*** that do not unduly infringe on Wyomingites' rights. There is no provision of the federal Constitution that provides any analogous rights (the second *Saldana* factor). Indeed, the State takes the position that the people of Wyoming adopted Section 38 in order to secure rights that were not protected by federal law (the third *Saldana* factor). State Br. at 18–19, 53. And applying the first *Saldana* factor, the textual language of Section 38 unambiguously, explicitly identifies a fundamental individual right to make health care decisions. There is accordingly an articulable, reasonable and reasoned basis for finding that Section 38 provides greater protection than the U.S. Constitution.

1. Abortion Is Health Care Under Section 38.

Under any plausible interpretation, the term "health care" in Section 38 includes abortion. Courts interpret constitutional provisions in the same manner as contracts. *Powers v. State*, 2014 WY 15, ¶ 9, 318 P.3d 300, 303–04 (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.* ¶¶ 8–9, 318 P.3d at 304 ("[W]e look first to the plain and unambiguous language to discern [the] intent" of the framers. (citations

omitted)). The term "health care" unambiguously includes all abortion services.

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 Br. at 35. Nonetheless, the State claims that to qualify as health care, "the decision to get an abortion must be intended to maintain the physical condition of the pregnant woman or to restore her condition from physical disease or pain." *Id.* According to the State, "[i]f a pregnant woman in good health decides to get an abortion based upon [considerations of family, career or finances], then that decision cannot be a 'health care decision' because the purpose for procuring the abortion has nothing to do with her health." *Id.*

The District Court correctly rejected the State's argument, finding that both statutes plainly regulate health care. R. at TR-3902–03 [SJ Order ¶ 38]. Noting that "'[h]ealth care' is a common everyday household term," the District Court observed that "[h]ealth care involves much more than disease and sickness," and that it "unambiguously means professional services to individuals whether they are well or unwell." R. at TR-3905 [SJ Order ¶¶ 46–47]. As the court further explained: "When looking at its functions and the nature of health care and abortions, the Court finds that 'health care' includes professional services for medicated and surgical abortions whether the pregnant woman is physically well or unwell." R. at TR-3907 [SJ Order ¶ 50].

The District Court's decision is supported by the language of the statutes, which, on their face, define abortion as health care. The Medication Ban refers to abortion as "medical treatment," and the statute directly regulates the medical profession and

pharmacists, concerns the use of prescription medication, and references "medical testing," "medical guidelines" and "medical judgment." Wyo. Stat. Ann. § 35-6-139(b). The Abortion Ban likewise defines abortion using health care-related terms such as: "prescribing," "medicine," "drug," "clinically diagnosable," "prescription," "save the life," "preserve the health," "treat a woman," "ectopic pregnancy," "disease," and "medical treatment." R. at TR-3907 [SJ Order ¶ 50].

State law defines health care to go beyond physical disease, pain or illness. The Wyoming Health Care Decisions Act defines "health care" broadly as "any care, treatment, service or procedure ***to maintain, diagnose or otherwise affect an individual's physical or mental condition***." Wyo. Stat. Ann. § 35-22-402(a)(viii) (emphasis added). This definition expressly does not limit health care to only addressing physical pain or illness.

The medical community considers abortion to fall within the ambit of essential health care. The American College of Obstetricians & Gynecologists ("ACOG"), the premier professional organization for obstetricians, notes that "abortion is an essential component of women's health care. . . . Abortion care is included in medical training, clinical practice, and continuing medical education." R. at TR-1712.

Government agencies agree. According to the U.S. Department of Health and Human Services, "[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." R. at TR-1720. The World Health Organization has declared that "comprehensive abortion care services" entail "simple and common health-care procedure[s]" that are "evidence-based"

and "fundamental" to "good health." R. at TR-1730.

Even the definition of "health care" proposed by the State clearly encompasses abortion. The State defines "health care" as "efforts made to maintain or restore health," and defines "health" as "the condition of being sound in body, mind, or spirit." State Br. at 32. It is beyond credible dispute that abortion is, in every case, an "effort[] made to maintain or restore" "the condition of being sound in body, mind or spirit."

In addition to conflicting with its own proposed definition, the State's effort to limit the term "health care" to services addressing physical illness, disease and pain would lead to nonsensical results. None of the medical care provided to a pregnant woman would be considered health care, unless she were experiencing complications. For example, routine visits to an OBGYN, ultrasounds, and genetic testing would not qualify as health care, because, according to the State, pregnancy is not an illness or disease requiring health care. By the same logic, everyday health care services such as vaccinations, annual checkups, dental cleanings, and well-baby visits also would not qualify. The State's interpretation of the term "health care" is plainly absurd.

Even if health is limited to addressing only physical pain, disease or illness, termination of a pregnancy meets this definition. Pregnancy causes a multitude of conditions involving pain and illness, ranging from morning sickness to significant changes in organs and bodily functions, to a variety of serious medical conditions, to permanent disability and death. R. at TR-1697–98 [Anthony ¶¶ 28–31]; R. at TR-1809–12 [Hinkle ¶¶ 12–22]; R. at TR-1902, 1903–08 [Moayedi ¶¶ 53, 55]. As the District Court observed, "[i]t is undisputed that an abortion eliminates all of the medical risks a woman faces from

pregnancy and childbirth." R. at TR-3907 [SJ Order ¶ 50].

There also is no basis for the State's assertion that abortion does not constitute a woman's "own health care" because it impacts the fetus. As the District Court held, nothing in the language of Section 38 "prohibit[s] a person from making their own health care decision if their decision impacts any other person. . . . To adopt Defendants' argument the Court would have to rewrite" Section 38. R. at TR-3908 [SJ Order ¶ 52]. More to the point, "only a pregnant woman can make a decision to have an abortion. No other person can make that decision for a competent pregnant woman." R. at TR-3908 [SJ Order ¶ 52]. If the woman is not the patient for purposes of an abortion, then who is? Surely not the fetus, who in any event is neither in a position to make decisions nor entitled to do so under Section 38, which authorizes the woman to make health care decisions for the fetus. Under any definition, abortion is a woman's health care decision.[4]

Nor can the legislature dictate by statute the meaning of the Constitution. The Abortion Ban states that "[r]egarding article I, section 38 of the Wyoming constitution, abortion as defined in this act is not health care." Wyo. Stat. Ann. § 35-6-121(a)(iv). But

[4] Anti-abortion physicians have submitted an amicus brief—as they did in the District Court—arguing that there is a so-called "two patient paradigm" in which the fetus is a patient equivalent to the pregnant woman. Br. for Wyoming Physicians as Amicus Curiae Supporting Appellants and Reversal at 8–9. As the District Court noted, Amici "do not support their position that there is a 'two-patient' paradigm in medicine with any medical literature." R. at TR-3909 [SJ Order ¶ 53].

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. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1124 (Wyo. 1978) ("[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."). The courts should afford the legislature's views on interpretation of the Constitution no weight where, as here, they directly contradict the unambiguous language of the Constitution. R. at TR-3907 [SJ Order ¶ 50].

It was the Wyoming voters, and not the legislature, that adopted Section 38. As the District Court found in *Johnson I*, "[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." *Johnson I* (Order Granting Mot. for Prelim. Inj. ¶ 32). The Court further observed that when Section 38 was adopted, Wyoming women enjoyed unfettered statutory access to pre-viability abortion, and therefore abortion was within the scope of health care generally available at the time. *Id.*

Finally, the State incorrectly argues that the legislature may negate a woman's rights under Section 38 by banning a particular medical procedure. State Br. at 38–41. As the State puts it, "[t]he legislature still determines what medical services may be offered by

health care providers and, by extension, what medical services are available to patients." *Id.* at 39. The State's argument ignores subsections (c) and (d) of Section 38, which limit the State's power to restrict a woman's (or anyone'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, in its summary judgment brief, the State admitted that its authority to regulate what medical procedures are available was subject to the limitations in Section 38. R. at TR-2363–64 [State MSJ at 58–59].

Nonetheless, the State relies upon legislative history to argue that in developing the proposal for Section 38, "the Wyoming legislature intended for the right to make health care decisions to be limited to legally available medical services." State Br. at 40. Because this interpretation is contrary to the language of Section 38, it should be rejected without resort to legislative history. In any event the legislative history defeats the State's position. The State focuses on language in the initial version of the proposed amendment providing that it did not "[a]ffect which health care services are permitted by law." *Id.* The legislature did not discuss the meaning of this provision, which was dropped.

The State ignores several other provisions that were considered and rejected, which speak directly to the State's argument. For example, the same version of the proposed amendment upon which the State relies afforded citizens "the right to choose and provide for their own . . . ***lawful*** health care." State Br. at 15 (emphasis added). "Lawful health care" was defined as "any health-related service of treatment to the extent that the service

or treatment is permitted or not prohibited by law or regulation . . . ." TR-3657. Thus, the proposed amendment initially included express language that precisely matches the State's claim that Section 38 was intended to only apply to health care not prohibited by the legislature. But this language was dropped from the proposed amendment.

Another version of the proposed amendment (the Perkins Amendment) similarly attempted to limit its scope to health care authorized by the legislature, providing that "[t]he right to health care access ***as defined by the legislature*** is reserved to the citizens of the state of Wyoming." R. at TR-2480 [State MSJ, Ex. C at 296] (emphasis added). That version also was rejected by the legislature after Senator Perkins himself criticized his own language: "I'll tell you that I will not vote in favor of an amendment that's designed—that only grants access as the legislature determines it because I don't see that as a constitutional right at all." R. at TR-2960–61 [Senate Tr. at 90:24–91:3].

The limitation the State seeks to impose on rights conferred by Section 38 was twice considered and rejected by the legislature, making clear that the legislature did not so limit Section 38. *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. v. Wyo. Game and Fish Comm'n*, 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).

2. The Abortion Ban Violates Section 38.

Because abortion unambiguously is health care under Section 38, the legislature

may only 1) "determine reasonable and necessary restrictions . . . to protect the public health and welfare" that 2) do not result in "undue governmental infringement" of the fundamental right of Wyomingites to make their own abortion-related decisions. Wyo. Const. art. 1, § 38. The challenged statutes do not satisfy either of these constitutional requirements; nor can they survive strict scrutiny or even rational basis review.

a. The Abortion Ban Is Not Reasonable and Necessary to Protect Public Health and Welfare.

The Abortion Ban articulates the 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.*, 597 U.S. at 301 (2022) (internal citations omitted).

Wyo. Stat. Ann. § 35-6-121(a)(vi).

In its opening brief, the State has abandoned several of the statute's claimed purposes, including protecting the integrity of the medical profession, mitigating fetal pain, and elimination of allegedly barbaric and gruesome procedures. State Br. at 41–45. Plaintiffs nonetheless address all of the statute's stated purposes below.

i. The Abortion Ban Is Not Reasonable and Necessary to Protect Prenatal Life.

Protection of prenatal life is undoubtedly a legitimate basis to regulate health care, although as the District Court correctly held, it does not become compelling until after viability. R. at TR-3911 [SJ Order ¶ 60]. In any event, to withstand scrutiny under Section 38, the statute must be reasonable and necessary to protect prenatal life ***and*** must not

unduly infringe upon a woman's right to make health care decisions. The Abortion Ban is neither.

First, the Abortion Ban is over-inclusive because it prohibits abortion even where the fetus stands no chance of sustained life. Although there is an exception for "lethal fetal anomal[ies]," Wyo. Stat. Ann. § 35-6-124(a)(iv), it does not apply to all fatal fetal anomalies, or even al instances of the same fatal fetal anomoly. It only applies to those that have a "substantial likelihood" of resulting in death within "hours" of birth, and not to those that may result in death within days or weeks of birth. Wyo. Stat. Ann. § 35-6-122(a)(vi). But it is impossible for a physician to know whether a fetal anomaly will result in death within hours, as opposed to within days, of birth. R. at TR-1880 [Moayedi ¶ 17]; R. at TR-1689, 1694, 1701 [Anthony ¶¶ 4, 22, 38]; R. at TR-1808–09, 1814–15, 1816–17 [Hinkle ¶¶ 10, 27, 34]. Most important, the distinction is medically irrelevant, and impossible, when making a fatal fetal diagnosis.

Because it will not be possible for physicians to determine whether a lethal fetal anomaly falls within the statutory definition, no lethal fetal anomalies that could result in death after birth will qualify for this exception as a practical matter. The purported exception for lethal fetal abnormalities is illusory, and the statute continues to effectively ban abortion for fetal anomalies incompatible with life, which undercuts the claim that the law protects prenatal life. R. at TR-1880 [Moayedi ¶ 17]; R. at TR-1689, 1694, 1701 [Anthony ¶¶ 4, 22, 38]; R. at TR-1808-09, 1814–17 [Hinkle ¶¶ 10, 27, 34].

Other provisions of the Abortion Ban are under-inclusive in terms of preserving prenatal life. First, the statute includes within the definition of "abortion" (and therefore

bans) multi-fetal reduction. Wyo. Stat. Ann. § 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. R. at TR-1881 [Moayedi ¶ 18]. Prohibition of multi-fetal reduction will result in ***reducing*** the protection for prenatal life. R. at TR-1881 [Moayedi ¶ 18].

Second, the narrow exceptions to the Abortion Ban also defeat the claim that the statute is intended to protect all prenatal life. Under the exception for a woman's health, abortion is only allowed if there is a substantial risk to a "life-sustaining organ." Wyo. Stat. Ann. § 35-6-124(a)(i). In listing the organs that the State claims are "life sustaining," it did not include any female reproductive organs, including the uterus and ovaries—without which prenatal life is not possible at all. *See* R. at TR-2169–70 [State's Response to Interrogatory No. 7]. The statute harms prenatal life by barring abortions to preserve organs that are necessary for her to generate and maintain prenatal life. A woman can experience complications during pregnancy which threaten not only her current pregnancy but her future fertility. The TRAP law interferes with a woman's ability to make evidence-based, physician-driven decisions about her pregnancy, fertility, and overall health.

Third, the statute does not ban ***all*** so-called elective abortions. Abortions remain legal in cases of sexual assault and incest. According to the State, a fetus that results from a sexual crime does not represent prenatal life comparable to a fetus that results from consensual relations. *See* R. at TR-2184 [State's Response to RFA No. 6]. Although ordered by the Court to do so, the State failed to explain its nonsensical position—no doubt

because there is no explanation. *See* R. at TR-2178 [State's Response to Interrogatory No. 22]. While proclaiming that "all human lives, including unborn babies from conception," are entitled to equal protection, the Abortion Ban expressly "protects" only some "unborn babies," not all fetuses. If the State were truly concerned about protecting prenatal life (instead of political palatability), then it makes no sense to include these exceptions.

ii. The Abortion Ban Is Not Reasonable and Necessary to Protect Women.

With respect to the health and safety of women, it is undisputed that abortion is safe. After conducting an exhaustive study of the medical evidence, the National Academies of Sciences, Engineering & Medicine concluded that legal abortions in the United States "whether by medication, aspiration, D&E, or induction—are safe and effective. Serious complications are rare." R. at TR-1752, 1754, 1758–59 [2018 Consensus Study Report at 10, 77, 163–64]. Abortion statistics compiled by the Wyoming Department of Health show zero patient complications were reported for all abortions. R. at TR-2071 [2021 ITOP Report]; R. at TR-2078 [2022 ITOP Report]. The risk of death from abortions is ten times lower than being struck by lightning. R. at TR-1881–82 [Moayedi ¶ 19].

Risk of death from pregnancy and childbirth is an order of magnitude higher than the risk from abortions. *E.g.*, R. at TR-1881–82 [Moayedi ¶ 19]; R. at TR-1698 [Anthony ¶ 31]; R. at TR-1811 [Hinkle ¶ 17]. And it is undeniable that pregnancy carries serious risks of complication, both for pregnancy-related illnesses and for exacerbation of pre-existing illnesses. R. at TR-1697–98 [Anthony ¶¶ 28–31]; R. at TR-1811 [Hinkle ¶¶ 17–23]; R. at TR-1903–08 [Moayedi ¶ 55]; *New Mexico Right to Choose/NARAL v. Johnson*,

975 P.2d 841, 855 (N.M. 1998) ("[T]here is undisputed evidence . . . that carrying a pregnancy to term may aggravate pre-existing conditions . . . .").

In the United States, mortality from abortion is currently 0.43 per 100,000 reported legal abortions compared to mortality from pregnancy and childbirth of over 30 per 100,000 live births. R. at TR-1767, 1790 [Anthony at Attachment F, at 4 & Table 15]; R. at TR-1801 [Anthony at Attachment H at Table]. In May 2023, the Wyoming Department of Health published its first Maternal Mortality Report, covering the years 2018 to 2020. R. at TR-2787 [Wyoming Maternal Mortality Report (2018–2020)]. This report shows six pregnancy-related deaths out of 19,146 births, which translates roughly into a mortality rate of 31 per 100,000—almost exactly the same as the national figure. *Id.* at 3, 5.[5]

[5] The legislative sponsors and Right to Life Wyoming have submitted an amicus brief disputing the safety of abortion. *See* Mot. of Right to Life of Wyoming et al. to File Brief as Amicus Curiae (Feb. 14, 2025). In denying a motion to intervene by the same parties, the District Court invited them to submit "legal arguments and factual information" in an amicus brief with that Court; an invitation they did not accept at the District Court. R. at TR-1348 [Order Denying Mot. To Intervene ¶ 24]. As a result, the evidence amici submit was not before the court at the time of its summary judgment ruling and cannot be a basis for challenging factual findings on appeal. *See Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d 808, 812 (Wyo. 1986) (declining to consider documents "the district court did not have . . . before it" because they were "filed after the summary judgment hearing in the district court"); *see also, e.g., Wilcox v. Sec. State Bank*, 2023 WY 2, ¶ 26,

Banning abortions will lead to greater mortality risks for women in Wyoming. Among other things, the law only permits abortion to protect a woman from a risk of death from a "physical condition." Wyo. Stat. Ann. § 35-6-124(a)(i). The State admits that the Abortion Ban does not permit abortion to protect women against substantial risk of death from mental health conditions. *See* R. at TR-2172 [State's Response to Interrogatory Nos. 11–12]. Yet mental health conditions are the leading cause of pregnancy-related death in the United States and in Wyoming. R. at TR-1895 [Moayedi ¶¶ 38–39 & fn. 45]; R. at TR-2791, TR-2807 [Wyoming Maternal Mortality Report, pp. 3 & 19]. If the Legislature truly intended to protect women, it would not prohibit abortion when necessary to protect women from the leading cause of maternal mortality.

And the Abortion Ban does not protect a woman's health or safety in any circumstance unless there is a "substantial risk of death" or of "permanent impairment of a life-sustaining organ." The law therefore expressly prohibits abortions to protect women from a wide variety of serious health conditions. R. at TR-1910 [Moayedi Decl. ¶ 64]. On its face, the statute is dramatically under-inclusive in protecting women from health risks.

And even the limited exceptions for a woman's health are described in vague, non-medical terms. The exceptions require a physician to determine whether there is a "substantial risk of death," or a similar risk of "serious and permanent impairment of a life-sustaining organ." Wyo. Stat. Ann. § 35-6-124(a)(i). These terms have no medical

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523 P.3d 277, 284 (Wyo. 2023) ("This Court reviews the same materials . . . as the district court." (citation omitted)).

meaning, and physicians are unable to determine when a woman qualifies for an abortion under them. R. at TR-1612 [Pl. MSJ, at 15]. Because physicians cannot risk losing their license and going to jail if a prosecutor disagrees with their interpretation of these vague terms, the exceptions provide no protection to women at all.

Vague exceptions in abortion bans similar to Wyoming's are resulting in delay and denial of essential health care to women on a daily basis. R. at TR-1872–76 [Moayedi ¶¶ 9–14]. Dr. Anthony has already treated a patient who was denied necessary medical care because of the Abortion Ban and OB/GYN medical students are reluctant to practice in Wyoming because of the new abortion laws. R. at TR-1702, 1703 [Anthony ¶¶ 41, 44]. This shows that the statute harms—rather than protects—women's health and safety.

The State nonetheless took the position in the District Court that some abortions are "medically unnecessary," and therefore the State must ban nearly all of them to protect women. *See* R. at TR-2166–67 [State's Response to Interrogatory No. 2]. In its opening brief, the State slightly reframes this point to argue that some abortions are "elective." State Br. at 34–35. The State does not explain what it means by "elective" or "medically unnecessary." From a medical perspective, there is no such thing as "medically unnecessary" abortions, because the medical profession considers all abortion care to be essential health care for women. *See* R. at TR-1893 [Moayedi ¶¶ 33, 49–52]. Given that pregnancy and childbirth carry much higher risks to a woman's life and health than abortion, there is no circumstance where a woman will not obtain a medical benefit from an abortion. R. at TR-1893, 1900–02 [Moayedi ¶¶ 33, 49–52].

Even if abortions present some minimal health risks to women, (as does any medical

procedure) banning abortions is not ***reasonable and necessary*** to protect women. ***All*** medical procedures carry risk. These risks will vary based on a multitude of factors unique to each patient and her circumstances. It is the physician's role to assess and advise women on these risks, as well as the benefits of, and alternatives to, a particular medical treatment. *See* R. at TR-1898–99 [Moayedi ¶ 45]; R. at TR-1847 [Burkhart ¶ 17]. Fully informed of the risks, benefits and alternatives, it is then for a woman to decide the best course of action for herself. R. at TR-1898–99 [Moayedi ¶ 45]. This is a fundamental aspect of the physician-patient relationship and the essence of the right to make one's own health care decisions. R. at TR-1898–99 [Moayedi ¶ 45]. By dictating what medical procedures it claims pose too great a risk, the Legislature usurps both the physician's role and the woman's choice in a fashion that cannot possibly account for every woman's particular circumstances and needs. As a matter of law, the Abortion Bans are not reasonable or necessary to protect women.

iii. The Abortion Ban Is Not Reasonable and Necessary to Protect the Integrity of the Medical Profession.

The Abortion Ban likewise undermines—rather than protects—the integrity of the medical profession. Although it has abandoned this claim on appeal, in the District Court, the State asserted that the Abortion Ban will protect the medical profession by preventing "medically unnecessary" abortions. *See* R. at TR-2166–67 [State's Response to Interrogatory No. 2]. As discussed above, there is no such thing as "medically unnecessary" abortions. *See* R. at TR-1893, 1900–02 [Moayedi ¶¶ 33, 49–52]. Moreover, the Abortion Ban expressly prohibits abortions that are medically indicated. R. at TR-

1873–75, 1876–81, 1903–08 [Moayedi ¶¶ 10–12, 15–18, 55]; *see also* R. at TR-1703 [Anthony ¶ 42]. The law therefore compels physicians to violate their ethical duties and the standard of care—the precise opposite of the State's asserted interest.

The medical profession itself has rejected the State's claim. According to ACOG, "[a]bortion bans and other restrictions violate long-established and widely accepted medical ethical principles of beneficence, nonmaleficence, and respect for patient autonomy." R. at TR-1716. 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*.

Medical research shows that abortion bans in other states put physicians in the untenable position of risking criminal liability for complying with the standard of care. R. at TR-1872–76 [Moayedi ¶¶ 9–14]. Under Wyoming law, a physician is subject to discipline for "[p]racticing medicine below the applicable standard of care." Wyo. Stat. Ann. § 33-26-402(a)(xxii), (a)(xxvii)(B). The abortion statutes therefore compel medical professionals to engage in legally sanctionable conduct.

Moreover, under Wyoming law, no physician is ever required to perform an abortion. Wyo. Stat. Ann. § 35-6-130. Thus, banning abortion has no impact whatsoever on physicians who choose for personal or other reasons not to perform abortions. Its only impact is to prohibit physicians from providing abortion care consistent with the medical standard of care. *See* R. at TR-1632 [Pl. MSJ at 35].

In their amicus brief, anti-abortion physicians claim the Abortion Ban is consistent with the medical standard of care, but their brief proves the opposite when it admits that

women should have the option of an abortion "as soon as it is ***medically advisable***, thereby preventing an emergency in the first instance." Br. for Wyoming Physicians as Amicus Curiae at 15 (emphasis added). In the District Court, amici further asserted that a physician should perform an abortion that, in her reasonable medical judgment, is "necessary to protect a woman's life ***or health***." R. at TR-2699 [Amicus Br. at 12] (emphasis added).

Yet the Abortion Ban does not permit abortions merely because they are "medically advisable" or "necessary to protect a woman's life or health." Abortion is never allowed to protect a woman's mental health. And abortions to protect a woman's health are expressly prohibited, unless there is a substantial risk of death from a physical condition or a serious and permanent impairment of a life-sustaining organ. Thus, even anti-abortion physicians agree that the medical standard of care calls for offering an abortion in circumstances where it is prohibited by the Abortion Ban. R. at TR-1694 [Anthony ¶ 19].

The Abortion Ban harms physicians by forcing them to violate their ethical obligations and the medical standard of care—the opposite of the law's stated purpose.

iv. The Abortion Ban Is Not Reasonable and Necessary to Accomplish the State's Other Asserted Purposes.

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. There is absolutely no evidence that Wyoming women have used abortion as a tool of discrimination; nor has the State even described how this would be possible. If the State genuinely wished to ban abortions that were discriminatory, it presumably would have adopted legislation to prohibit such abortions, as other states have done. *See* Guttmacher

Institute, Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly (Jan. 22, 2020), https://www.guttmacher.org/node/28382/printable/print.

With respect to "mitigation of fetal pain," it is undisputed that a pre-viability fetus cannot experience pain. R. at TR-1882–83 [Moayedi ¶ 20]; *see* R. at TR-1817 [Hinkle ¶ 34]. The State offered no evidence to the contrary and has abandoned this claim on appeal. And even if such pain did exist, once again the statute does not prohibit all abortions and therefore does not mitigate all alleged fetal pain.

The claim that the statute is intended to prevent "particularly gruesome or barbaric medical procedures" is nonsensical. The language that the Abortion Ban quotes from the *Dobbs* opinion referencing "gruesome" and "barbaric" procedures is related to a specific type of procedural abortion that is only used in later-term abortions after 15 weeks. *Dobbs*, 597 U.S. at 233, 301. But virtually all abortions in Wyoming occur before 15 weeks of pregnancy through medication. R. at TR-2075, TR-2082 [2021 & 2022 ITOP Reports]. And once again, the statute does not ban all abortions, only some. If the State really is claiming that abortion is gruesome or barbaric, then it makes no sense to ban only some.

Because the Abortion Ban does not further—and actively undermines—the State's asserted interests, it is not reasonable or necessary to protect public health or welfare, as required by Section 38(c).

b. The Abortion Ban Unduly Infringes on the Constitutional Right of Women to Make Their Own Health Care Decisions.

The Abortion Ban also violates Section 38(d) by unduly infringing upon women's access to essential health care. Not only does the ban prevent women from deciding

whether or not to remain pregnant, it affirmatively bars physicians from providing women with the medical standard of care for pregnancy complications. R. at TR-1695–96 [Anthony ¶ 25]. For example, the statute itself recognizes the need for women with ectopic and molar pregnancies to access abortion, but the definitions for ectopic and molar pregnancies do not include all such pregnancies. R. at TR-1876–78 [Moayedi ¶¶ 15–16].

And the exceptions do not include many other pregnancy complications, such as pre-viability rupture of the amniotic sac. Pre-viability rupture is associated with multiple maternal morbidities, which increase in risk the longer treatment is delayed. R. at TR-1873–75 [Moayedi ¶¶ 11–12]. Of greatest concern, pre-viability membrane rupture can lead to sepsis or hemorrhage, which in turn can be deadly. R. at TR-1874 [Moayedi ¶¶ 11]. For these reasons, ACOG clinical guidance provides that women with pre-viability membrane rupture should always be offered the option of an abortion. R. at TR-2705–07 [Amicus Br. at 18–20]; Br. for Wyoming Physicians as Amicus Curiae, *supra*, at 20–22.

However, it is unclear whether pre-viability membrane rupture itself presents a "substantial risk of death" specified by the Abortion Ban exception, or instead if this risk only arises where membrane rupture leads to sepsis or hemorrhage. R. at TR-1903 [Moayedi ¶ 55]. As a result, the Abortion Ban will force physicians to delay or deny offering critical life-saving treatment until they can be certain that the exception applies. R. at TR-1695 [Anthony ¶ 15]; R. at TR-1872–73 [Moayedi ¶ 9]. This is precisely what has happened in other states with similar bans. R. at TR-1873–75 [Moayedi ¶¶ 11–12]. Research shows that women in Texas with pre-viability membrane rupture are routinely denied abortion care until they develop sepsis because of similar vagueness in the

exceptions to that state's abortion ban. R. at TR-1873–75 [Moayedi ¶¶ 11–12].

The Abortion Ban interferes with physicians' ability to properly treat other serious pregnancy complications. ACOG clinical guidance calls for offering women the option of an abortion to treat placenta accreta and certain types of heart disease in all cases without regard to the level of risks associated with these conditions. R. at TR-2705–07 [Amicus Br. at 18–20]; Br. for Wyoming Physicians as Amicus Curiae, *supra*, at 20–22. But the Abortion Ban only allows treatment for these conditions when they present a "substantial risk of death." Yet again, the Abortion Ban prevents physicians from acting in a manner consistent with the standard of care.

Research shows that 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." R. at TR-1874 [Moayedi ¶ 11]. Critical care is delayed because of concerns that they were not yet sick enough to fall within the law's exceptions. R. at TR-1874 [Moayedi ¶ 11]. Texas's abortion ban and its vague exceptions resulted in a doubling of maternal morbidity. R. at TR-1874 [Moayedi ¶ 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 have the infant die within one day of birth." R. at TR-1875 [Moayedi ¶ 12].

There is no reason to believe that the Abortion Ban would have any different impact. Wyoming health care providers are already declining to treat pregnant women for fear of potential criminal liability, exacerbating a pre-existing shortage of OB/GYN care. R. at TR-1703 [Anthony ¶¶ 41–42]. Some OB/GYN medical students are declining to return to

Wyoming to practice medicine. R. at TR-1703 [Anthony ¶ 44]. The inevitable impact of the Wyoming abortion statutes will be to delay or deny necessary care for women. R. at TR-1695–96, TR-1704–05 [Anthony ¶¶ 24–25, 47–48]; R. at TR-1808, TR-1817–18, TR-1820–23 [Hinkle ¶¶ 9, 35, 43–46, 48, 51].

The Abortion Ban also unduly infringes on the rights of survivors of sexual crimes. While the statute permits these victims to access pre-viability abortion, it requires them, or their parent or guardian, to report the crime to a law enforcement agency and provide a copy of the report to the physician. Wyo. Stat. Ann. § 35-6-124(a)(iii). This requirement imposes unreasonable, ambiguous and substantial obstacles to the exercise of this right.

First, the law does not specify what type of "report" must be made, what information the report must include, or to which specific agency it must be made. Law enforcement agencies are prohibited by law from releasing these reports, making it impossible to provide one to a physician. R. at TR-1943 [Blonigen ¶¶ 23–24]. It therefore is entirely unclear how a victim can meet the requirement for a report, and even less clear how a physician will determine whether the report is adequate.

Second, it is well established that sexual crimes are heavily underreported. R. at TR-1943 [Blonigen ¶ 25]. Nearly 80% of rapes and sexual assaults are not reported to the police. R. at TR-2088 [2021 DOJ Criminal Victimization Survey at Table 4]. And victims of these crimes are often unable or unwilling to inform their physicians of the circumstances that led to their pregnancy. R. at TR-1701–02 [Anthony ¶ 39]. Requiring a formal report is therefore unreasonable and unnecessary, and appears calculated to prevent those with a right to an abortion under the statute from accessing such care.

Third, the treatment of such victims who are minors is egregious. These victims cannot exercise their rights by filing a police report themselves. Instead, the statute requires their parent or guardian to make the report. In cases where one of the parents is the perpetrator of the crime, the statute would require them to report themselves to the police—a patently absurd requirement. See R. at TR-1944 [Blonigen ¶ 27]. There is no provision for appointment of a guardian *ad litem* in such circumstances, effectively nullifying the victim's rights. R. at TR-1945 [Blonigen ¶ 28].

The 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 restriction[]," 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 Abortion Ban violates Section 38.

3. Wyoming's Medication Ban Violates Section 38.

The Medication Ban likewise fails to further any of the government's asserted purposes, while unduly infringing on women's right to make their own health care decisions. There is no conceivable basis for the State to assert that the Medication Ban is reasonable and necessary to protect public health and safety. To the extent abortion is itself illegal, the ban on abortion medication is entirely superfluous. Indeed, the State has taken the position that the Medication Ban never applies to abortions that are legal under the Abortion Ban. R. at TR-2177 [State's Response to Interrogatory No. 20]. Thus, according to the State, in the event the Court upholds the abortion statutes, the Medication Ban will never apply to any abortions and therefore cannot be necessary for any purpose. *See id.*

Of course, the State's contention ignores the plain language of the statutes, which have materially different exceptions. Given that the Medication Ban has fewer and narrower exceptions, some abortions could be legal under the Abortion Ban but still subject to the Medication Ban. There is no legitimate government interest in forcing women to undergo a procedural abortion when a medication abortion is the preferred procedure.

The vast majority of abortions in Wyoming are through medication. R. at TR-2075, TR-2082 [Modlin at Attachment F (2021 ITOP Report) at Table 4; 2022 ITOP Report at Table 4]. Banning medication abortion therefore creates the real prospect that Wyoming women will not be able to obtain abortions that are otherwise legal. Such a result could not possibly further any governmental interest, because the legislature has already declared that some abortions should be available under the Abortion Ban.

And any assertion that the Medication Ban is necessary to protect women is nonsensical. To the extent the Medication Ban applies to abortions that are otherwise legal, it would require women to undergo more invasive procedural abortions, even where a medication abortion is the preferred course. *See* R. at TR-1705 [Anthony ¶ 49]. There are many reasons why patients prefer medication abortion to procedural abortion, including logistics, cost, comfort and convenience. R. at TR-1887 [Moayedi ¶ 26]; R. at TR-1693 [Anthony ¶ 16]; R. at TR-1847 [Burkhart ¶ 15].

Apart from patient preferences, there are also a variety of pregnancy complications for which medication abortion is necessary, because procedural abortion would be difficult or dangerous. R. at TR-1888–91 [Moayedi ¶¶ 27–30]. Examples of such situations include 1) where a patient is allergic to anesthetic medications used during procedural abortions;

2) patients with abnormalities of the uterus or cervix; 3) patients with seizure disorders; and 4) where procedural abortion could be traumatic to survivors of sexual violence. R. at TR-1888–91 [Moayedi ¶¶ 27–30]. In such cases, medication abortion is medically indicated, but the Medication Ban makes no provision for these circumstances.

Abortion medication is also used during procedural abortions to reduce risks to women. R. at TR-1819–22 [Hinkle ¶¶ 41, 45–46]. Banning medication will therefore ***increase*** health risks from procedural abortions. And as noted above, no complications have been reported from medication abortions in Wyoming. R. at TR-2075, TR-2082.

The Medication Ban expressly does not permit medication abortions that are necessary to prevent death or serious injury to women due to mental or emotional conditions, Wyo. Stat. Ann. § 35-6-139(b)(iii), despite the fact that mental health conditions are the leading cause of pregnancy-related death. R. at TR-1895 [Moayedi ¶¶ 38–39]. And the statute includes no exception for life-threatening ectopic and molar pregnancies. R. at TR-1821 [Hinkle ¶ 45]; R. at TR-1897–98 [Moayedi ¶ 43]. By its express terms, the Medication Ban does not protect women's health.

The Medication Ban will harm women in other ways. The exception for a woman's health is impossibly vague. That exception applies to "[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment . . . ." Wyo. Stat. Ann. § 35-6-139(b)(iii). The terms used in this exception have no medical definition or meaning and therefore it is impossible for health care professionals to know when the exception applies. R. at TR-1893 [Moayedi ¶ 34]; R. at TR-1822–23 [Hinkle ¶¶ 47, 51]; R. at TR-1704–06 [Anthony ¶¶ 47, 51].

The Medication Ban also applies to pharmacies that dispense or sell abortion medication. Wyo. Stat. Ann. § 35-6-139(a). Before filling a prescription for medication capable of inducing an abortion, a pharmacist must determine whether the medication is intended to be used for an abortion as opposed to some other purpose and, if an abortion, whether a statutory exception applies. A pharmacist has no way of making these determinations. As a result, pharmacists are already refusing to fill prescriptions for these medications, even when necessary for conditions not subject to the abortion statutes, causing further confusion, delay and denial of essential care. R. at TR-1891 [Moayedi ¶ 31]; R. at TR-1703–05 [Anthony ¶¶ 43, 48].

The exemptions—or lack thereof—to the Medication Ban demonstrate its arbitrary nature. There is no conceivable reason to allow medication abortion for pregnancies resulting from sexual crimes, but to prohibit medication abortion in cases of lethal fetal anomalies or ectopic and molar pregnancies, which are not exempted from the ban.

The Medication Ban also undermines medical ethics because it will force physicians to perform procedural abortions when a medication abortion is the more appropriate medical procedure. *See* R. at TR-1888–91 [Moayedi ¶¶ 27–30].

And although the law purports to exclude contraception from the ban, the terms used in that exception are so vague that it could apply to commonly used forms of contraception such as IUDs and emergency contraception. R. at TR-1896–97 [Moayedi ¶ 41]. The Medication Ban exempts contraceptives "administered before conception." Wyo. Stat. Ann. § 35-6-139(b)(i). This language could be construed to exclude contraceptives that result in the failure of a fertilized egg to implant in the uterus, which anti-abortion

advocates claim are abortifacients. R. at TR-1896–97 [Moayedi ¶ 41]; R. at TR-2116–17 [Students For Life Webpage]. Plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, made precisely this claim—*i.e.*, that IUDs and emergency contraception were equivalent to abortion because they acted after conception. 573 U.S. 682, 701–02 (2014). And anti-abortion groups claim that all oral contraceptives, emergency birth control and IUDs are "abortifacients," because they allegedly prevent a fertilized egg from implanting in the uterus. R. at TR-2117. These arguments could—and likely will—be used to claim that the Medication Ban prohibits these common types of birth control, thereby criminalizing a woman's basic family planning.

The Medication Ban violates Section 38; it is not reasonable or necessary to protect public health and welfare, and unduly infringes on the right to make health care decisions.

4. The Abortion Ban and Medication Ban Do Not Survive Strict Scrutiny Or Rational Basis Review.

Because Section 38 codifies the long-standing fundamental right to make individual health care decisions without governmental intrusion, the abortion bans must also survive strict scrutiny. The State acknowledges that the rights expressly afforded by Section 38 are fundamental and would normally trigger strict scrutiny. State Br. at 29. However, the State asserts that "Section 38(c) is a constitutional anomaly because it dictates the test a reviewing court must apply to determine whether a statute impermissibly infringes upon the individual right conferred by section 38(a)." *Id.* According to the State, "[b]y adopting section 38(c), the Wyoming legislature and the people of Wyoming impliedly abrogated both the rational basis test and the strict scrutiny test for purposes of section 38." *Id.*

Nothing in Section 38(c) suggests any such abrogation. Instead, that section limits the types of state regulations of health care decisions that are permissible—i.e., those that are reasonable and necessary to protect public health and welfare. It does not speak to the legal standard that such regulations must meet. As such, there is no tension between the terms of Section 38 and the strict scrutiny test—any statute must satisfy both.

The District Court found that the State had failed to articulate a compelling governmental interest in protecting fetuses before viability. R. at TR-3910–11 [SJ Order ¶¶ 59–61]. But even if we assume that the governmental purposes stated in the Abortion Ban are compelling, there is no credible argument that the statutes are narrowly tailored to these purposes. As described at length above, the statutes are both overbroad and underinclusive, because they prohibit conduct that would further the State's claimed interests and allow conduct that is inconsistent with those interests. *In re Neely*, 2017 WY 25, ¶ 38, 390 P.3d at 741 (finding disciplinary action was narrowly tailored to compelling state interest where it was neither "underinclusive [n]or overbroad."); *Does 1-11 v. Bd. Of Regents of Univ. of Colo.*, 100 F.4th 1251, 1273 (10th Cir. 2024) (finding state's policy was both "overbroad" and "underinclusive" and therefore not "narrowly tailored").

In its opening brief, the State devotes a total of one page to its discussion of whether the statutes survive strict scrutiny, which consists of the State stating the test and asserting that the statutes meet it. Nowhere does the State dispute either Plaintiffs' extensive showing or the District Court's detailed discussion of this issue. As a result, the State has effectively conceded that the statutes cannot satisfy the strict scrutiny test.

Instead, the State attempts to substitute the rational basis test, arguing that Section

38(c) is the "functional equivalent[]" of that test. State Br. at 30. As noted above, the strict scrutiny test is ***in addition to*** the limitations on government action in Section 38, and therefore the State's argument misses the point. In addition, the State's reading of Section 38 depends on re-writing the express terms of Section 38(c) and ignoring Section 38(d) in its entirety. 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 rational basis test does not incorporate any requirement of "necessity," nor does it prohibit undue infringement of a right—it merely requires a reasonable alignment between the statutory means and ends.

Section 38's terms closely align with the strict scrutiny test, under which the State must show that the statute "is ***necessary*** to achieve a compelling state interest," *Allhusen*, 898 P.2d at 885 (emphasis added), and that "there is no less onerous alternative by which its objective may be achieved," *Washakie Cnty. Sch. Dist. No. One*, 606 P.2d at 333. Because protection of public health and welfare is a compelling governmental interest, the first elements of both Section 38 and strict scrutiny are identical—*i.e.*, that the challenged statute must be ***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.

Even under the rational basis test, the statutes are unconstitutional. As the State

acknowledged in the District Court, rational basis review is not "toothless." R. at TR-2408 [State MSJ at 104 (citing *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 731 (Wyo. 2003))]. At a minimum, "there must be a substantial connection between the purpose in view and the actual provisions of the law." *Langley*, 84 P.2d at 771. The abortion statutes do not further any of the State's asserted interests, and in most cases affirmatively undermine them. Accordingly, the Abortion Ban and Medication Ban are not reasonably related to a legitimate government interest. *See Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988) (finding medical malpractice statute was not a "reasonable and effective means" of protecting health of Wyoming citizens).

5. The State Has Failed To Offer Any Basis For Challenging The District Court's Holding That The Abortion Bans Violation Section 38.

Both in their summary judgment briefs in the District Court and their opening brief in this Court, the State has made no effort to dispute or respond to Plaintiffs' showing, or the District Court's finding, that the abortion statutes do not further the State's asserted interests and that they unduly infringe on the rights of Wyoming women. Instead, the State argues that in considering whether the statutes violate Section 38, courts may not second-guess the legislature's judgments or consider the actual meaning or application of the laws. In support of this assertion, the State cites cases long pre-dating Section 38, none of which concern the State's authority under that constitutional provision. State Br. at 43. And the only Wyoming case cited by the State—*Doe v. Burk*, 513 P.2d 643, 645 (Wyo. 1973)—expressly held that courts determine the constitutionality of abortion legislation, thereby defeating the State's claim of the legislature's unreviewable discretion.

a. The State Has Not Provided Any Support For Its Claim That The Abortion Ban Does Not Violate Section 38.

The State devotes a total of five pages of its opening brief to arguing that the Abortion Ban and Medication Ban are consistent with Section 38. State Br. at 41–45. This brief discussion is notable for what it lacks. Nowhere does the State dispute any of the Plaintiffs' factual showing concerning the meaning (or lack of meaning) of the statutory terms, the application of these terms to pregnant women, or the impact of the statutes on women, fetuses and physicians. While the State takes the position that the Court may not consider any evidence beyond the statutory terms, it entirely fails to grapple with all the ways that these terms conflict with the State's asserted interests, including among others:

1) the harm to women from prohibiting abortions necessary to protect the life or health of the woman from mental health condition, common pregnancy complications, and any injuries that do not involve "life sustaining organs";

2) the harm to women from prohibiting the use of abortion medication for otherwise legal abortions when it is medically indicated and necessary to reduce risks;

3) the failure to protect fetuses by allowing abortions for rape or incest, by prohibiting abortions where a fetus will not survive long after birth, and by prohibiting multi-fetal reduction; and

4) the failure to protect medical integrity by prohibiting physicians from performing abortions that are medically indicated unless certain narrow, ill-defined exceptions apply.

Nor does the State dispute that the laws unduly infringe on women's right to make their own health care decisions in violation of Section 38(d). The State simply ignores the

limitation imposed by that provision, focusing its brief entirely on Section 38(c). The State likewise ignores Plaintiffs' as applied claim, effectively conceding its merit.

While the State does attempt to argue that the abortion bans are consistent with Section 38(c), it offers little beyond its claim that the legislature is free to determine this question without interference from the courts. For all the reasons demonstrated above, to which the State offers no response, the State has failed to rebut Plaintiffs' showing—and the District Court's finding—of unconstitutionality.

b. Plaintiffs' Evidence Is Relevant And Admissible.

Apparently recognizing that it cannot prevail on the record before the District Court, the State objects to all evidence offered by Plaintiffs. R. at TR-2341 [State MSJ at 37]. According to the State, this case presents purely legal issues. R. at TR-2341 [State MSJ at 37]. Plaintiffs agree that the Court need not resort to evidence to find that the abortion bans, on their face, violate Section 38. Nonetheless, the evidence offered by Plaintiffs provides additional support for finding that the bans are not reasonable or necessary and that they constitute undue infringement. This evidence is relevant and admissible for at least five independent reasons.

First, under Wyoming law, whether a law is "reasonable and necessary" or "unduly infringes" on a right are mixed questions of law and fact. Courts routinely consider evidence in applying a "reasonable and necessary" standard. *Griggs v. State*, 2016 WY 16, ¶ 58, 367 P.3d 1108, 1129 (Wyo. 2016) (conducting extensive evidentiary review to determine whether trial delay was "reasonable and necessary" under Sixth Amendment); *Estrada v. State*, 611 P.2d 850, 854 (Wyo. 1980) (considering evidentiary record to

determine whether trial delay was "reasonable and necessary" under state and federal constitutions); *Kirby Bldg. Sys. v. Min. Expls. Co.*, 704 P.2d 1266, 1269 (Wyo. 1985) (reviewing evidence to determine if damages were "reasonable and necessary"); *Carbaugh v. Nichols*, 2014 WY 2, ¶ 16, 315 P.3d 1175, 1178–79 (Wyo. 2014) (evidence required to determine whether medical expenses were "reasonable and necessary").

The question of undue infringement likewise implicates factual issues. Although research has revealed no caselaw applying the precise term "undue infringement," courts have had occasion to consider whether a statute constituted an "undue burden" on a constitutional right. For example, in *Jane L. v. Bangerter*, 102 F.3d 1112, 1115–16 (10th Cir. 1996), the Tenth Circuit applied the "undue burden" test that previously was controlling law under the U.S. Supreme Court's decision under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The "undue burden" test is similar to the "unduly infringes" language of Section 38, as both consider whether a law impermissibly infringes on an individual's right to health care (and, in *Casey*, abortion specifically). Under the *Casey* standard, a statute imposed an undue burden "if its purpose or effect [was] to place a substantial obstacle in the path of a woman seeking an abortion . . . ." 505 U.S. at 878.

In applying the undue burden test to plaintiffs' facial challenge of a Utah statute restricting abortion after 20 weeks, the Tenth Circuit found that extrinsic evidence was relevant to ***both*** the purpose and the effect of the statute. With respect to the purpose, the Court noted that "[l]egislative purpose to accomplish a constitutionally forbidden result . . . may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment." *Bangerter*, 102 F.3d at 1116 (citation omitted). Based

on such evidence, the Court found the legislature's intent in enacting the statute was to ban pre-viability abortions, which at the time were constitutionally protected. *Id.* at 1117.

With respect to the statute's impact, the Tenth Circuit noted that "[l]egislation is measured for consistency with the Constitution ***by its impact on those whose conduct it affects***." *Bangerter*, 102 F.3d at 1117 (emphasis added). The Court therefore assessed the constitutionality of the statute in light of "its impact on the women upon whom it operates." *Id.* Based on a declaration from the director of an abortion clinic discussing the impact of the Utah law on its patients, the Tenth Circuit found the Utah statute imposed an undue burden in violation of the Constitution. *Id.* at 1117–18. Courts have similarly conducted evidentiary reviews to apply an undue burden test in other contexts. *Meerscheidt v. State*, 931 P.2d 220, 229 (Wyo. 1997) (requiring evidence to substantiate that "probation condition placed an undue burden" on the claimant).

Nor does the fact that Plaintiffs have asserted facial challenges (in addition to their as applied challenges) render all evidence inadmissible. The *Bangerter* case itself conducted factual inquiries in a case involving a purely facial challenge. Numerous other Tenth Circuit cases have done the same. *See, e.g.*, *United States v. Bolton*, 68 F.3d 396, 398–99 (10th Cir. 1995) (weighing evidence "establishing that the assets of a business engaged in interstate commerce were depleted" to uphold the constitutionality of criminal statute); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1234–35 (10th Cir. 2005) (weighing and rejecting defendant's evidence that a criminal statute would "deter crime or aid . . . investigation[s]"); *United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (finding a statutory permitting system "survives a facial challenge" based on defendant's

testimonial evidence about the way the permitting system operates).

The Montana Supreme Court likewise considered a full evidentiary record in determining that a statute prohibiting physician assistants from performing abortions violated women's constitutional right to privacy under the Montana Constitution. *Armstrong v. State*, 1999 MT 261, ¶¶ 58–66, 989 P.2d 364, 384–87 (Mont. 1999). Although the state claimed that the law was intended to "protect[] women's health," the court pointed to extensive evidence that the law did not further the state's claimed purpose, finding "[t]here is simply no evidence in the record of this case that [the challenged statute was] necessary to protect the life, health or safety of women in this State. Indeed, there [was] overwhelming evidence to the contrary . . . ." *Id.* at 386–87.

Second, much of the evidence offered by Plaintiffs is independently admissible to demonstrate the medical meaning, or lack thereof, of the statutory terms. "Whether a [statutory] term has . . . a technical meaning is a question of fact to be proved." *Powder River Coal Co. v. Wyo. Dep't of Revenue*, 2006 WY 137, ¶ 16, 145 P.3d 442, 448 (Wyo. 2006).[6] Many of the terms in the abortion bans have (or lack) technical meanings such that expert testimony is necessary to understand them:

[6] Contrary to the State's assertions (State Br. at 99), the *Powder River* decision did not hold that these factual questions may only be resolved with legislative facts; nor did it find expert testimony inadmissible. It simply found that the agency's factual determination was supported with substantial evidence. *Powder River*, 2006 WY 137, ¶ 17, 145 P.3d at 448.

- Medical testimony is necessary to understand that the Abortion Ban's prohibition on "the elimination of one (1) or more unborn babies in a multifetal pregnancy" (Wyo. Stat. Ann. § 35-6-122(a)(i)) refers to multi-fetal reduction, which is performed to increase the chance that the remaining fetuses will survive. *See* R. at TR-1881 [Moayedi ¶ 18].
- Medical testimony is necessary to understand that the definitions of ectopic and molar pregnancy does not include all such pregnancies. *See* R. at TR-1876–80 [Moayedi ¶¶ 15–16].
- Medical testimony is necessary to understand that the Abortion Ban's definition of "lethal fetal anomaly" includes a standard that is not feasible to apply. *See* R. at TR-1694, TR-1701 [Anthony ¶¶ 22, 38].
- Medical testimony is necessary to understand that the language used in the exceptions for a woman's life or health have no medical meaning and are not medically feasible to apply. *See* R. at TR-1695 [Anthony ¶ 23]; R. at TR-1871, TR-1880 [Moayedi ¶¶ 8, 17].

All of this evidence goes to the actual meaning of the statutory language—meanings that are not evident on the face of the statutes. And all of this evidence has direct relevance to the key questions under Section 38—whether the laws are reasonable and necessary to protect public health and/or unduly infringe on the right to make health care decisions.

Third, it is undisputed that all of Plaintiffs' "as applied" claims raise fact issues. Courts have repeatedly explained that "as-applied challenges" are "based on a developed factual record and the application of a statute to a specific person." *Richmond Med. Ctr.*

For Women v. Herring, 570 F.3d 165, 172 (4th Cir. 2009). Inherent in an "as applied" claim is the need to review the facts of a Plaintiff's circumstances to assess whether the challenged provision's application is unconstitutional as to that Plaintiff. *See Robinson v. Lynch*, 2017 WL 1131896, at *2 (D. Utah Mar. 24, 2017) (looking to "particular facts" that "mak[e] plausible [plaintiff's] claim that [the challenged statute], as applied to the 'severable subcategory of persons' to which [the plaintiff] belongs, deprived [the plaintiff] of his constitutional rights"). Without a developed factual record, this form of constitutional review would be impossible. The District Court expressly found that Plaintiffs' evidence was relevant to showing how the statutes were unconstitutional as applied to each of the Plaintiffs—a finding the State does not dispute on appeal. R. at TR-2840 [Order Denying Mot. To Strike ¶ 17].

Fourth, strict scrutiny raises fact issues, both as to the State's compelling interest and on whether the law is narrowly tailored to this interest. "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification . . . and the legislature must have had ***a strong basis in evidence*** to support that justification before it implements the classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (emphasis added). "Several district courts have found least restrictive means to be a purely factual question. . . . The government bears the burden of building a record that proves that the statutory and regulatory scheme in question is the least restrictive means of advancing the government's compelling interests." *United States v. Hardman*, 297 F.3d 1116, 1130–31, 1130 n.20 (10th Cir. 2002).

Fifth, the State's effort to limit the evidence to "legislative facts," misses the point.

This 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). The advisory committee notes to Federal Rule of Evidence 201(a) expressly distinguish between legislative facts and adjudicative facts: "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 subdivision (a) in 1972 proposed rule).

Nothing in these descriptions suggests that evidence relevant to Plaintiffs' Section 38 claim is limited to legislative facts. Facts relevant to determining whether the abortion bans are reasonable and necessary to protect the public or unduly infringe on the right to make health care decisions 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." They are plainly "the facts of [this] particular case."

The State asserts that "[i]n a challenge to the facial constitutionality of a statute, only legislative facts may be legally relevant in assessing whether the statute is constitutional." State Br. at 4. In support of this assertion, the State cites three decisions from other states, none of which even address this issue. All three discuss the relevance of legislative facts to the claims asserted in those cases, but none hold that only legislative facts are relevant, and none hold that a court may not consider adjudicative facts on a facial constitutional claim. The State has cited no legal authority whatsoever to support its claim.

Moreover, much of the evidence the State itself offers for the Court's consideration consists of adjudicative facts rather than legislative facts. The State includes lengthy

discussion of the legislative history of the abortion statutes and Section 38. But 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)."). Legislative history therefore qualifies as adjudicative facts, not legislative facts. And the State's reference to evidence of the "contemporary circumstances surrounding the ratification" of Section 38, State Br. at 18, undeniably concerns adjudicative facts.

By the State's own reckoning, much of the evidence offered by Plaintiffs would constitute legislative facts, including the official publications of the State of Wyoming, the Centers for Disease Control, World Health Organization, Department of Health and Human Services, National Academy of Sciences and the American College of Obstetricians and Gynecologists, along with medical literature and statistics. This Court should reject the State's insistence that it blind itself to the actual meaning and impacts of the abortion bans.

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

In the District Court and in its opening brief, the State takes the position that Section 38 does not mean what it says. In addition to attempting to re-write the language of Section 38(c) to comport with the rational basis test (discussed above), the State also asks the Court to ignore the language of Sections 38(a) and 38(d). The State, however, is not at liberty to simply ignore the Constitution; if it wishes to revise the Constitution, it must do so through

the process set forth in the Constitution itself. Wyo. Const. art. 20, § 1.

First, the State asserts that despite its unambiguous language, 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 "give Wyoming citizens an alternative to the federal Affordable Care Act." State Br. at 19. Nothing in the language of Section 38 hints at such a limited scope. The only provision of Section 38 that addresses any aspect of the Affordable Care Act is paragraph b, which allows citizens to choose their own health insurance without penalties. However, paragraphs a, c and d go well beyond any concerns raised by the Affordable Care Act to broadly guarantee citizens the right to control their own health care without unreasonable and unnecessary government interference.

Instead of focusing on the language of Section 38, the State relies on "the circumstances surrounding the ratification of section 38." State Br. at 53. In particular, the State points to the voter guide published by a newspaper and other media reports. State Br. at 18–19, 53–54. Resort to such extrinsic evidence is unavailing where, as here, the constitutional language is clear. *Powers*, 2014 WY ¶ 35, 318 P.3d at 313 (citing *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004)) ("If the language is plain and unambiguous, there is no need for construction, and we presume the framers intended what was plainly expressed.").

Nor does the State explain how media reports can have any bearing on the intent of the nearly 200,000 Wyomingites who voted to adopt Section 38. The State has provided no evidence that the voters were even aware of these reports, 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 to vitiate the Affordable Care Act. R. at TR-2326–27 [State MSJ 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 legislative history that the State relied upon in the District Court actually defeats its argument. Some of the early versions of 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 . . . ." R. at TR-2479 [State MSJ, 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.

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. Senator Perkins could not have been clearer on this point: "What we're really talking about is choice and freedom of choice." R. at TR-2942 (72:16–20).

Senator Schiffer expanded on this theme of individual choice:

> 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.

TR-2914–TR-2915 (44:21–45:9).

Second, throughout its opening brief, the State simply ignores the unambiguous language in subsection (d) of Section 38, requiring the State to "preserve" the right to make health care decisions from "undue governmental infringement." By failing to even acknowledge this limitation on the Legislature's power—much less attempt to show that the abortion statutes do not violate Section 38(d)—the State has effectively conceded that it cannot meet its burden of demonstrating that the abortion laws are constitutional. In the District Court, the State took the position that Section 38(d) only protects Wyomingites from infringement by the ***federal*** government and not the state. R. at TR-2377 [State MSJ at 73]. But Section 38(d) applies to "undue governmental infringement," not to "undue federal government infringement." Wyo. Const. art. 1, § 38(d).

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." R. at TR-2479 [State MSJ, 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; *Parker Land & Cattle Co.*, 845 P.2d at 1065–66. The Court should reject the State's attempt to re-write Section 38.

Because the State makes no attempt to rebut Plaintiffs' showing—and the District Court's finding—that the Abortion Ban and Medication Ban violate the unambiguous

language of Section 38 and fail to satisfy either strict scrutiny or rational basis review, the Court should affirm the lower court's grant of summary judgment to the Plaintiffs.

D. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. Article 1, Sections 2, 3, and Article 6, Section 1—Equal Protection.

The Abortion Ban and Medication Ban discriminate on the basis of sex and therefore violate equal protection both facially and as applied to Plaintiffs Dow and Johnson. The Wyoming Constitution contains several equality provisions, highlighting the importance that the framers placed on equal treatment, particularly regarding gender. Wyo. Const. art. 1, § 2 ("In their inherent right to life, liberty, and the pursuit of happiness, all members of the human race are equal."); Wyo. Const. art. 1, § 3 ("[T]he laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency . . . ."); Wyo. Const. art. 6, § 1 ("Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges."); *see also* Wyo. Const. art. 1, § 34 (providing that "[a]ll laws of a general nature shall have a uniform operation"). These equality provisions "emphasiz[e] the fact that women in Wyoming are men's equals before the law." *State v. Yazzie*, 67 Wyo. 256, 263, 218 P.2d 482, 483 (1950).

Employing textual analysis as well as constitutional history, this Court repeatedly has held that the Wyoming Constitution provides greater equal protection guarantees than the federal Constitution:

> "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." . . . 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.

Johnson v. State Hearing Exam'r's Off., 838 P.2d at 164–65 (footnote and citation omitted); *see also In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d at 744 ("[T]he Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution.").

The State argues that the abortion statutes do not create a gender classification, because only women can be pregnant. State Br. at 90. The State misses the point. The discriminatory impact of the abortion laws is on a woman's right to make health care decisions—a right that applies to both women and men equally. Yet only women's rights to make health care decisions are curtailed; the legislature has imposed no similar restriction on men's health care decisions.

The State also argues that Article 1, Section 3 only applies to "political rights and privileges," which it claims do not include women's rights to make their own health care decisions. State Br. at 91. The State does not 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. Moreover, both Article 1, Section 3 and Article 6, Section 1 refer to "civil rights," and the State does not dispute that individual health care decisions qualify as a basic civil right.

This 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 Exam'r's Off.*, 838 P.2d at 164–65. *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.* at 166–67. If the right to drive and to possess alcohol are "political rights and privileges" then so must be the right to control one's own health care. Recognizing that this Court's decision in *Johnson* defeats its argument, the State boldly asserts that the Court "misconstrued" the Constitution. State Br. at 91. The State provides no basis for its claim.

Because the abortion bans impact fundamental rights under both Equal Protection and Section 38, strict scrutiny applies to the Court's review of the statutes' constitutionality. *Ailport*, 2022 WY 43, ¶¶ 7–8, 507 P.3d at 433 (applying "strict scrutiny" when statute "interfered with [] fundamental rights" of impacted class); *see also Mills*, 837 P.2d at 53–54 (a right is "fundamental" when "explicitly or implicitly guarantee[d]" by the Constitution). As the District Court found, and as demonstrated above, the State cannot meet this burden. *See* R. at TR-3910–17 [SJ Order ¶¶ 58, 59–73].

Even if the Court does not apply strict scrutiny, heightened scrutiny would still be required. "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). As described above, the abortion bans cannot withstand this or any level of scrutiny.

If the many multifaceted equality provisions in the Wyoming Constitution and the state's history of gender equality have any meaning, they surely afford women the same

fundamental right to make health care decisions that men enjoy. The Court should find that the abortion bans violate the right to equal protection under the Wyoming Constitution.

E. Wyoming's Abortion Ban and Medication Ban Violate Fundamental Unenumerated Rights Under Wyo. Const. Article 1, Sections 2, 7, and 36.

The abortion statutes also run afoul of several constitutional provisions protecting fundamental, unenumerated natural rights. In particular, Article 1, Section 2 recognizes the "inherent right to life, liberty and the pursuit of happiness"; Article 1, Section 6 protects substantive due process rights; Article 1, Section 7 protects Wyoming citizens from "[a]bsolute, arbitrary power over the[ir] lives, liberty and property"; and Article 1, Section 36 affirms that "[t]he enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

In its opening brief, the State indirectly acknowledges that Article 1, Section 2 protects "fundamental" rights, State Br. at 58, 70 n.7, and that Article 1, Sections 6 and 7 protect substantive due process rights, *id.* at 70. The State then goes on to argue that the substantive "liberty" language in Article 1, Section 6 should be narrowly construed, *id.* at 69–74, a position at odds with long-standing Wyoming precedent. The State also argues that Article 1, Section 7 is meaningless, because it was required by the federal government as a condition for admission, *id.* at 67, but fails to explain how this can possibly serve to render that provision a nullity. And the State disputes that Section 36 confers any positive rights, *id.* at 56–57, despite this Court's repeated pronouncements to the contrary.

After attempting to call into question whether the Wyoming Constitution confers any unenumerated rights, the State then asserts that these allegedly non-existent rights do

not encompass a woman's right to bodily autonomy and control of her family. The State's argument is not affirmatively supported by any legal authority, but instead relies upon criticizing decisions of this and other state supreme courts and ignoring Wyoming's history and tradition of protections for women's rights, including reproductive rights. The Court should reject the State's effort to deprive Wyomingites of their long-standing liberties.

More than sixty years ago, Justice Blume explained that even without "exact wording" establishing the right to protect property, "inherent and inalienable right[s]" were not "nullified thereby." *Cross*, 370 P.2d at 376; *see also Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The people ought not to be presumed to part with rights so vital to their security and well being."). Referencing Article 1, Sections 6 and 7, this Court explained that "[t]he doctrine of natural and inherent rights to life, liberty and property," is "***recognized by our constitution***" and "part of the positive law of the land." *Cross*, 370 P.2d at 376 (quoting *State v. Langley*, 84 P.2d 767, 769–70 (Wyo. 1938)) (emphasis added); *see also* Robert B. Keiter, *The Wyoming State Constitution* 48 (2d ed. 2017) (noting the Wyoming Constitution "recognizes an inherent right to 'life, liberty and the pursuit of happiness' . . . which the [Wyoming Supreme C]ourt has suggested constitutes a source of 'fundamental' or 'inalienable' rights entitled to strict judicial protection").

Since its *Cross* decision, this Court has further developed its analytical approach to substantive due process. To give meaning to the term "liberty," this Court has regularly looked to other constitutional provisions, such as the Article 1, Section 8 access to courts provision, to find a fundamental right that requires application of the strict scrutiny standard of review. *Mills*, 837 P.2d at 54; *see also Washakie Cnty. Sch. Dist. No. One*, 606

P.2d at 333 (citing Article 7, Section 1 to define a fundamental interest in education that requires strict scrutiny review). In the present case, Article 1, Section 38 plainly establishes a fundamental right to health care that includes abortion, which thus requires application of strict scrutiny review for due process purposes.

Contrary to the State's assertion, this Court has also recognized Article 1, Section 36 as a source of a fundamental right to privacy. *See Johnson v. State Hearing Exam'r's Off.*, 838 P.2d at 165. The State disparages the Court's decision in *Johnson,* because it purportedly adopted an "it-is-so-because-I-say-it-is-so" analysis and because it was a plurality opinion. State Br. at 66. But *Johnson* is binding precedent and includes a reasoned discussion of privacy rights. And while the case included two concurrences and one dissent, Justice Cardine's concurrence joined in the relevant portion of the Court's opinion, and the dissent approved of the Court's statement of general constitutional principles. 838 P.2d at 181–82. Only Justice Thomas, in a four-sentence concurrence, declined to join in the Court's discussion of these principles. *Id.* at 181. Try as it might, the State cannot simply dismiss this Court's precedent. Nor is *Johnson* the only decision of this Court to recognize a fundamental right to privacy under Article 1, Section 36 of the Wyoming Constitution. *See, e.g., Emp. Sec. Comm'n of Wyo. v. W. Gas Processors, Ltd.*, 786 P.2d 866, 872 & n.11 (Wyo. 1990).

Beyond this Court's own recognition of the Wyoming Constitution's protection of natural rights, historical review of the Wyoming Constitutional Convention further confirms that the delegates intended the Declaration of Rights to be liberally construed. "[T]he convention endorsed the principle of liberal construction of the Declaration of

Rights" such that proposals resulting in "a strict construction of these matters" were withdrawn in favor of "a liberal [construction] as intended." Keiter, *supra*, at 18. This liberal construction "is confirmed . . . by the sheer number of provisions protecting individual rights in the Wyoming Constitution, as well as the broad language used to define many of these rights." *Id.*

Natural, unenumerated rights include the right to control 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 Wyo. Const. art. 1, §§ 2, 6, 7, 36 and collecting cases); *see also Johnson v. State Hearing Exam'r's Off.*, 838 P.2d at 165 (holding that Article 1, Section 36 "protect[s] the right to associate with one's family."). The State concedes that the Wyoming Constitution protects the unenumerated right to "associate with one's family," but denies that this extends to "the right to control the composition of one's family." State Br. at 58.

To the contrary, this Court has consistently held that Wyomingites have the right to control their family composition. In *In re Adoption of Voss*, the Court found that a child could not be adopted over the objection of a non-consenting natural parent, in the absence of willful abandonment. 550 P.2d 481, 487 (Wyo. 1976). In *DS v. Department of Public Assistance & Social Services*, the Court referenced Article 1, Sections 6, 7 and 36 of the Constitution as requiring strict scrutiny of the State's attempt to terminate parental rights. 607 P.2d at 918. And in *Beardsley v. Wierdsma*, the Court recognized a cause of action for wrongful pregnancy stemming from a negligent tubal ligation. 650 P.2d 288, 293

(Wyo. 1982); *see also In re Adoption of MAJB*, 2020 WY 157, ¶ 21, 478 P.3d 196, 204 (Wyo. 2020) (recognizing "fundamental constitutional rights [of] parenthood and the right to procreate"). These cases establish the right of women to decide whether or not to have a child and include that child in the family unit.

While this Court has never applied these rights to the decision of whether or not to terminate a pregnancy, this is undoubtedly because it was never called upon do so given that these rights were guaranteed under the U.S. Constitution following *Roe v. Wade*. Now that the U.S. Supreme Court has jettisoned fifty years of jurisprudence in the *Dobbs* decision, the Court should affirm the long-standing, fundamental right of women to control their bodily integrity and family composition – as part of the positive law of the land.

Contrary to the State's position, this Court is not constrained by the *Dobbs* decision, because its reasoning cannot be reconciled with Wyoming's constitutional jurisprudence. The *Dobbs* decision defines "liberty" solely in terms of history and tradition—basically the legal status of abortion at the time of and before the Fourteenth Amendment was adopted in 1868. *Dobbs*, 597 U.S. at 235–63. This Court has never endorsed such a narrow approach to constitutional interpretation; rather, it employs an approach that includes the multi-factor *Saldana* criteria to interpret constitutional terms like "liberty" and "unenumerated rights." *Sheesley*, 2019 WY 32, ¶¶ 13–16, 437 P.3d at 836–38.

In addition, this Court has consistently acknowledged that the Wyoming Constitution is a living document to be interpreted with a view toward evolving social and economic conditions. *Chi. & Nw. Ry. Co. v. Hall*, 26 P.2d 1071, 1073 (Wyo. 1933); *Cnty. Ct. Judges Ass'n v. Sidi*, 752 P.2d 960, 967 (Wyo. 1988); *see also* Keiter, *supra*, at 32–33.

Hence, other state court abortion decisions, such as the Idaho Supreme Court's decision in *Planned Parenthood Great Northwest v. State*, 522 P.3d 1132, 1169–76 (Idaho 2023), which parrots the *Dobbs* history-based approach and is cited approvingly by the State, provides no relevant precedent in the present matter. Decisions of the Kansas and Montana Supreme Courts are more consistent with Wyoming's approach.

The Kansas Supreme Court recently considered whether a woman's right to access abortion care was protected by a provision in its state constitution guaranteeing "inalienable natural rights," including the rights to "life, liberty, and the pursuit of happiness." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 472 (Kan. 2019). After a lengthy review of the history of natural rights, including such rights under other state constitutions, the court found "that th[e] right to personal autonomy is firmly embedded within [the Kansas Constitution's] natural rights guarantee and its included concepts of liberty and the pursuit of happiness." *Id.* at 483.

Relying in part on holdings from other state supreme courts, the Kansas Supreme Court went on to find that the right to personal autonomy "includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy." *Hodes*, 440 P.3d at 502. As the court explained:

> 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.

Id. at 497–98.

The Montana Supreme Court likewise held that natural rights under that state's constitutional right to privacy include "the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government; and, more narrowly, a woman's right to seek and obtain pre-viability abortion services." *Armstrong*, 989 P.2d at 376. As that court observed, the right to control one's own medical decisions is deeply rooted in our country's legal tradition:

> Recognition of these inherent rights to make medical judgments affecting one's bodily integrity and health and the right to choose and to refuse medical treatment are certainly not creatures of recent invention, however. Rather, like America's historical legal tradition acknowledging the fundamental common law right of self-determination, acceptance of the right to make personal medical decisions as inherent in personal autonomy is a long-standing and an integral part of this country's jurisprudence. Over a century ago, the Supreme Court observed: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Eighty-five years ago, Justice Cardozo noted that, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." And, more recently, the Supreme Court has reaffirmed that the right to control fundamental 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."

Id. at 382–83 (citations omitted).

The State seeks to distinguish *Hodes* and *Armstrong* on a variety of grounds, none of which has merit. With respect to *Armstrong*, the State argues its holding is irrelevant

because Montana's constitution has an express right to privacy, while Wyoming's does not. State Br. at 59. But as demonstrated above, this Court has long recognized an implicit right to privacy in the Wyoming Constitution. The State therefore has failed to present any basis for distinguishing *Armstrong*.

With respect to the *Hodes* decision, the State mostly just disagrees with its holding, claiming that its lengthy and detailed reasoning "defies logic." State Br. at 63. The State then attempts to distinguish *Hodes* on the ground that the Kansas Supreme Court discounted early laws prohibiting abortion because women had no political rights, and therefore no say in these laws. By contrast, women in Wyoming did have political rights, and therefore the State argues that this Court should give greater weight to the history of Wyoming's abortion laws when analyzing unenumerated rights. *Id.* at 64.

The problem with the State's argument is that it ignores Wyoming's long history and tradition of providing women with greater rights to reproductive freedom than other states. The State also flatly denies the last fifty years of Wyoming's legal tradition by incorrectly asserting that, "[a]fter *Roe* was decided, abortion before viability was legal in Wyoming by virtue of federal law, not state law." State Br. at 72. To the contrary, following *Roe*, Wyoming revised its laws to no longer impose ***any*** restrictions on the right to abortion before viability, along with expansive rights to abortion after viability. Wyo. Stat. Ann. § 35-6-102. Even after the U.S. Supreme Court permitted some restrictions on pre-viability abortions, so long as they did not impose an "undue burden," *Casey*, 505 U.S. at 876, Wyoming continued to afford women an unfettered right to pre-viability abortion and decisively defeated a 1994 initiative aimed at restricting these rights. *See supra* p. 4.

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. *See* R. at TR-1691–92 [Anthony ¶¶ 13–14]. For decades, these were decisions that Wyoming women made on their own, often in consultation with their loved ones and other trusted individuals, including health care providers and religious and spiritual advisors. *See* R. at TR-1693–94 [Anthony ¶¶ 18–19]. By intruding on these most personal decisions, the legislature infringes upon the natural rights of all Wyoming women.

And because the unenumerated rights to bodily autonomy and family association are fundamental, the abortion statutes trigger strict scrutiny. *See Washakie Cnty. Sch. Dist. No. One*, 606 P.2d at 333 (finding strict scrutiny applies where a court determines that an unenumerated right concerns a "fundamental interest"); *DS*, 607 P.2d at 918 ("The right to associate with one's immediate family is a fundamental liberty protected by the state and federal constitutions."). As the Kansas Supreme Court remarked:

> Imposing a lower standard than strict scrutiny, . . . when the factual circumstances implicate the[] right[] [to personal autonomy] 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, 440 P.3d at 498.

In the end, as repeatedly noted above, the abortion statutes cannot satisfy any standard of review because the State cannot show that the laws relate to any legitimate governmental interest, much less that the laws are the least restrictive means of

accomplishing a compelling governmental interest. This Court, given its interpretation of the Wyoming Constitution's due process and unenumerated rights provisions, should affirm the District Court's declaration that the Abortion Ban and the Medication Ban are unconstitutional and permanently enjoin their enforcement.

F. Wyoming's Criminal Abortion Ban and Criminal Medication Ban violate Wyo. Const. Article 1, Sections 18 & 19; Article 7, Section 12; and Article 21, Section 25—Establishment of Religion.

The obvious disconnect between the stated purposes of the Abortion Ban and its provisions, along with its vague and unworkable language, lead to one of two conclusions: either the legislature was decidedly inartful in drafting the law or the statute has an actual, undisclosed purpose that is different from what it claims. The language of the statute itself points conclusively to the latter conclusion: the actual purpose of the law is to impose on all Wyoming citizens the sectarian religious viewpoint that from conception, a fertilized egg has the same status as a living person. The Abortion Ban therefore violates the prohibition on establishment of religion.

The Wyoming Constitution "contains its own variation of the federal [E]stablishment [C]lause," even if its guarantee does not mimic the explicit language of the federal Constitution. *In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d at 744. In particular, the Wyoming Constitution prohibits appropriations for sectarian or religious societies or institutions, and prohibits sectarianism. *Id.* (citing Wyo. Const. art. 1, § 19 & art. 7, § 12). A federal court applying the Wyoming Constitution framed the prohibition on establishment of religion as follows: "[t]he fullest realization of true religious liberty requires that government neither engage in ***nor compel religious practices***, ***that it effect***

no favoritism among sects or between religion and non-religion, and ***that it work deterrence of no religious belief***." *Williams v. Eaton*, 333 F. Supp. 107, 115 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972) (emphases added).

Previously, federal establishment claims were evaluated under the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). 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.'" *Id.* at 612–13 (citation omitted). 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) (citation omitted).

The U.S. Supreme Court recently has abandoned the *Lemon* and endorsement tests. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). That decision adopted a new standard prohibiting government from "mak[ing] a religious observance compulsory." *Id.* at 537. Under this test, "[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.* (citations omitted).

Wyoming is not bound by this change in federal law. As the Court noted in *In re Neely*, the Wyoming Constitution "can offer broader protection than the United States Constitution." 2017 WY 25, ¶ 39, 390 P.3d at 741 (citation omitted). The provisions of

the Wyoming Constitution closely align with the now-abandoned *Lemon* test. The first element of that test—that laws have a secular purpose—mirrors the prohibition on sectarianism in Article 1, Section 19 and Article 7, Section 12. 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 Article 1, Section 18. The third element—that government must avoid excessive entanglement with religion—is comparable to the requirement for "[p]erfect toleration" of religious views in Article 21, Section 25.

Because the U.S. Supreme Court narrowed the prohibition on establishment of religion in the *Kennedy v. Bremerton School District* case, and because the Wyoming Constitution incorporates provisions consistent with the broader *Lemon* test, there is a reasoned basis for finding that the Wyoming Constitution provides broader protections against establishment of religion than the U.S. Constitution. This Court therefore should recognize an independent establishment claim under the Wyoming Constitution governed by the *Lemon* and endorsement tests, which the abortion bans fail.

Given the complete disconnect between the Abortion Ban's stated purposes and its terms, the Court should look behind the legislature's statement of purpose to discern its true motivation. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'").

In evaluating the motivation behind a statute, courts routinely look to evidence of the circumstances surrounding adoption of the law. In undertaking an "Establishment

Clause analysis . . . an understanding of official objective" often "emerges from readily discoverable fact." *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005); *see also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[T]he record . . . reveals that the enactment of [the challenged statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose." (emphasis in original)).

In *Edwards v. Aguillard*, the U.S. Supreme Court applied the *Lemon* test to find Louisiana's Creationism Act, which forbade teaching the theory of evolution in public schools, "facially invalid as violative of the Establishment Clause." 482 U.S. 578, 580–81 (1987). In holding that the law had an impermissible purpose, the Court not only considered "the plain language" of the Act, but also "the legislative history and historical context of the Act, the specific sequence of events leading to the passage of the Act," as well as "correspondence [of] the Act's legislative sponsor." *Id.* at 595–97. *See also Epperson v. Arkansas*, 393 U.S. 97 (1968) (finding Arkansas law requiring teaching of creationism to violate Establishment Clause based on evidence of history and circumstances surrounding is passage).

Contrary to the State's assertions, State Br. at 82, statements of individual legislators are relevant to discerning the religious motivations behind legislation:

> [T]he [United States] Supreme Court has consistently held not only that legislative history can and must be considered in ascertaining legislative purpose under *Lemon*, but also that statements by a measure's sponsors and chief proponents are strong indicia of such purpose. . . . [A]lthough courts do not engage in "psychoanalysis of a drafter's heart of hearts," they routinely and properly look to individual legislators' public statements to determine legislative purpose. . . .

Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 746 n.20 (M.D. Pa. 2005) (citation omitted).

Just as with the anti-evolution statutes at issue in *Epperson* and *Edwards*, it is apparent from the events leading to the passage of the Abortion Ban and Medication Ban, as well as statements of the sponsors and the historical context, that the real purpose of these laws is to enshrine in state law the sectarian religious belief that, from conception, a zygote has the same status as a living person. The religious motivation of the 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. Ann. § 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. Ann. § 35-6-121(a)(v). The legislature unambiguously declared that the entire basis for the Abortion Ban was its fundamental view that a fertilized egg has the same status as a living person and therefore is entitled to the full legal rights of Wyoming citizens. This is the only stated justification for beginning the abortion ban at conception.

While the Medication Ban does not include a statement that life begins at conception, it was passed in the same session as the Abortion Ban, and also applies to any pregnancy, which is defined as beginning at conception, Wyo. Stat. Ann. § 35-6-101(a)(vi).

By basing the Abortion Ban—and, by extension, the Medication Ban—on the belief that life begins at conception, the legislature endorsed a particular religious viewpoint. The U.S. Supreme Court has recognized the religious roots of the view that life begins at conception. *See Burwell*, 573 U.S. at 700–03 (describing the Mennonite Church's belief that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it").

This belief is distinct to certain religions and is not shared by many other religious, agnostic or secular groups, including Jews, Muslims and many Christians. R. at TR-1955, 1973–82 [Peters ¶¶ 17, 65–83]. And these views on when life begins directly inform the different religious beliefs surrounding abortion. R. at TR-1973–82 [Peters ¶¶ 65–83]. Because many Catholics and Evangelicals believe life begins at conception, they often oppose abortion at any time and for any reason. R. at TR-1973–82 [Peters ¶¶ 65–83].

By contrast, Jews have long believed that the fetus only becomes a person during birth and before that time has no independent status. R. at TR-1974–75 [Peters ¶ 67]; R. at TR-1988–93 [Ruttenberg ¶¶ 8–22]. As a result, Jews believe that a 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. R. at TR-1974–75 [Peters ¶ 67]; R. at TR-1993–98 [Ruttenberg ¶¶ 23–42].

For these same reasons, a Kentucky court found a similar fetal personhood law to violate that state's establishment clause. In so holding, the court noted that the belief that "life begins at the very moment of fertilization and as such is entitled to full constitutional protection" is "a distinctly Christian and Catholic belief" and that "[o]ther 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." R. at TR-2030-2049 [*EMW Women's Surgical Center, et al. v. Daniel Cameron, et al.*, No. 22-CI-3225, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022) (Opinion & Order Granting Temporary Injunction at 15–16)].

There is no secular legal tradition to support the Abortion Ban's declaration that a fertilized egg is a fully formed human being. Historically, killing a fetus was a criminal offense distinct from homicide. *See Goodman v. State*, 601 P.2d 178, 184–85 & n.11 (Wyo. 1979). Not until 2021 did the legislature amend the homicide statutes to include killing a fetus in the definitions of first- and second-degree murder. S.F. 96, 66th Leg., Gen. Sess., Ch. 116 (Wyo. 2021) (codified at Wyo. Stat. Ann. §§ 6-2-101(d) & 6-2-104(b)).

The religious underpinnings of the law were discussed at length during legislative hearings on the Abortion Ban. 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:

- Representative Oakley objected that the bill was unconstitutional because of its references to religious provisions of the Constitution. R. at TR-3097. She further noted that the bill is "tie[d]" "to provisions that are . . . religious." R. at TR-3123;
- Representative Conrad supported the bill because "human life is a sacred gift from God," and abortion is "contrary to the will and commandments of God." R. at TR-3101;
- 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." R. at TR-3110;

- 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 . . . [W]e are being asked to choose . . . [and] impose that religious belief over others who don't share that belief." R. at TR-3111–12;
- Representative Provenza voiced concern that the bill was "unconstitutional legislation, especially in ways that attack separation of powers and separation of church and state." R. at TR-3120;
- Representative Crago noted that "if we're saying that we're passing this bill on religious grounds, [it's] unconstitutional on its face right off the bat." R. at TR-3134;
- Senator Scott asserted that "this bill crosses the line and imposes the will of one set of religions." R. at TR-3334;
- Senator Rothfuss noted that the bill's purpose was to "enshrine[e] those religious beliefs into statute." R. at TR-3337;
- Senator Hicks claimed 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." R. at TR-3349; 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." R. at TR-3360.

This religious motivation was explicit in the original draft of the Abortion Ban. R. at TR-2051–69 [Original Draft of HB 0152]. Section 35-6-121(a)(vi) of the 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." *See* R. at TR-2053 [Original Draft of HB 0152]. Two of the referenced provisions—Article 1, Section 18 and Article 21, Section 25—concern 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. R. at TR-1667–68 [Pl. MSJ at 70–71]. But removal of the offending provision does not 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 did not dispute the religious motivation for the bill—he just objected to making that motivation explicit because it would "provide ammo" for a legal challenge. R. at TR-1667–68 [Comments of Rep. Crago at 23:00 through 23:50].

The State cites the U.S. Supreme Court's decision in *Harris v. McCrae*, 448 U.S. 297 (1980) to claim that the Abortion Ban merely coincides with—rather than adopts—a religious viewpoint. State Br. at 77–78. The State misapplies the *Harris* decision. In that

case, the Supreme Court considered constitutional challenges to the Hyde Amendment, which prohibited use of federal funds for medically necessary abortions. 448 U.S. at 300–01. In deciding the Establishment Clause challenge, the *Harris* Court considered whether there was 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 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 the basis for the abortion bans, as the State conceded by describing the purpose of the abortion bans as "to define when life begins." R. at TR-2410 [State MSJ at 106]. The Hyde Amendment contained no such explicit incorporation of a specific religious viewpoint—it simply adopted a policy that was consistent with the goals of a particular religion. *Harris*, 448 U.S. at 319–20.

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. In *Webster v. Reproductive Health Services*, U.S. 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. 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 there is a secular basis for the belief that a zygote has the same status as a live baby. There is not. The U.S. Supreme Court has acknowledged the religious basis for this viewpoint. *Burwell*, 573 U.S. at 702–03. Plaintiffs proved 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. R. at TR-1955, 1973–82 [Peters ¶¶ 17, 65–83]. This testimony is buttressed by Rabbi Ruttenberg. R. at TR-1988–93 [Ruttenberg ¶¶ 8–22]. The State made no attempt to rebut this expert testimony, and instead suggested that the Court take judicial notice of it. R. at TR-1564–67.

The State's entire argument on this point consists of referencing dicta in two cases from other states claiming a scientific basis that life beings at conception. State Br. at 78 (citing *Foster v. State Farm Mut. Auto. Ins. Co.*, 843 F. Supp. 89 (W.D.N.C. 1994) and *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999)). Neither case addressed the precise issue presented here: whether a fertilized egg has the status of a fully formed person, independent from the mother. 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." R. at TR-1953 [Peters ¶ 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." R. at TR-1954 [Peters ¶ 16]. These facts are undisputed, and the cases cited by the State do not come close to refuting them.

In *Foster v. State Farm*, the court considered whether a health insurance policy covered treatment for the benefit of a fetus. 843 F. Supp at 90–91, 95–96. In discussing this issue, the court concluded that "[w]hatever else we might call a human at eighteen weeks of gestation, and whatever else the [parents] 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 eighteen-week-old fetus.

In a footnote, the *Foster* court cited to a report of a U.S. 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 to establish that "human life shall be deemed to exist from conception." S. 158, 97th Cong. (1981). The bill did not become law. The finding of a Senate subcommittee is 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); *Knight Pub. Co. v. U.S. Dep't of Justice*, 631 F. Supp. 1175, 1178 (W.D.N.C. 1986).

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. The court held 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 453

(emphasis in original). Thus, the court was not called upon to consider the status of a fetus.

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 studies describing the various stages of embryonic and fetal development. *Id.* at 453 n.69. None of this provides support for the proposition that, as a scientific matter, a single-celled zygote is a fully formed, independent human being with a status comparable to a live child.

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 similar to the Abortion Ban's "finding" 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. Ann. § 35-6-121(a)(i) & (v).

Plaintiffs in *Webster* challenged the preamble's "definition of life," but the plurality opinion declined to reach this claim on ripeness grounds. 492 U.S. at 501–02, 506–07. But in a separate opinion, Justice Stevens found that the statutory language violated the Establishment Clause because it "serve[d] no identifiable secular purpose" and represented "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths." *Id.* at 566–67 (Stevens, J., concurring in part and dissenting in part).

The Wyoming estate law referenced by the State does nothing to buttress its claim.

State Br. at 79–80. The 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 decedent." Wyo. Stat. Ann. § 2-4-103(emphasis added).

The criminal statutes that make killing a fetus a crime contradict the State's position that Wyoming has a long-standing legal tradition of treating an embryo the same as a live person. Not until 2021 did Wyoming law treat killing a fetus as murder. *See supra* p. 77. Historically, Wyoming law had separate offenses for killing a person and killing a fetus. The State itself highlights that, for a long time, Wyoming only criminalized killing a "quick" fetus. State Br. at 79. There is no tradition under Wyoming law historically of treating a fertilized egg the same as a fully formed human being.

As demonstrated above, the abortion statutes do not actually further any of the secular purposes asserted by the State, and affirmatively undermine most. There is no credible explanation for the motivation behind the laws other than the legislators' religious beliefs. This Court should find that the Abortion Ban and Medication Ban violate the prohibition on establishment of religion.

G. Wyoming's Criminal Abortion Ban and Criminal Medication Ban Violate Wyo. Const. Article 1, Section 18 and Article 21, Section 25—Free Exercise of Religion.

Plaintiff Kathleen Dow has brought claims that the abortion statutes, as applied to her, violate the right to free exercise of religion. The Wyoming Constitution contains multiple provisions guaranteeing religious liberty. Article 1, Section 18 provides:

> The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, . . . but the liberty of conscience hereby secured shall not be so construed as to

> excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Article 21, Section 25 provides: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship."

This Court has found "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." *In re Neely*, 2017 WY 25, ¶ 40, 390 P.3d at 741–42. In particular, the free exercise provisions of the Wyoming Constitution are "significantly broader than the similar provision[s] of the United States Constitution." *Id.*, 2017 WY 25, ¶¶ 40, 42, 390 P.3d at 742. The Court also observed that "[c]ourts of other states with similar constitutional language have held that their state constitutions provided stronger protection than the federal constitution." *Id.* ¶ 41, 390 P.3d at 742 (citing *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)).

The courts in those states have found more expansive free exercise protections under state constitutions based on a number of factors that apply with equal force to the Wyoming Constitution. First, on their face, the Wyoming free exercise provisions are broader than their federal counterparts. While the federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]" U.S. Const. amend. I, the Wyoming Constitution "forever guarantee[s]" "the free exercise and enjoyment of" religion and requires that "[p]erfect toleration of religious

sentiment shall be secured," Wyo. Const. art. 1, § 18; Wyo. Const. art. 21, § 25. The Minnesota and Washington Supreme Courts have found similarly broad language in their state constitutions to be "of a distinctively stronger character than the federal counterpart," *Hershberger*, 462 N.W. 2d at 397, and "significantly different and stronger than the federal constitution," *First Covenant Church*, 840 P.2d at 186.

Article 1, Section 18 of the Wyoming Constitution also protects not only religious ***beliefs***, but also "worship," "acts," and "practices." The Washington Supreme Court found that identical language in its state constitution "clearly protects both belief ***and conduct***," "as evidenced in the terms 'worship', 'acts', and 'practices.'" *First Covenant Church*, 840 P.2d at 186 (emphasis added).

And the Wyoming Constitution itself limits the types of restrictions the state may impose to regulations concerning "acts of licentiousness" and "practices inconsistent with the peace or safety of the state." Wyo. Const. art. 1, § 18. The Minnesota Supreme Court found identical language to significantly narrow the scope of permissible state action: "Rather than a blanket denial of a religious exemption whenever public safety is involved, only religious practices found to be *inconsistent* with public safety are denied an exemption." *Hershberger*, 462 N.W. 2d at 398 (emphasis in original). Based on the plain language of its free exercise provisions, the Wyoming Constitution therefore offers broader protections than the federal Constitution.

The State nonetheless argues that the Wyoming Constitution does not provide protections greater than the federal Free Exercise Clause, and that this Court was mistaken in referencing the Washington and Minnesota constitutions as similar to Wyoming's. State

Br. at 84-87. Instead, the State claims that the 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. *Id.* at 86. The only basis for this argument is that the draft North Dakota Constitution was available to the delegates to Wyoming's convention, from which the State speculates that Wyoming must have copied North Dakota's provisions. *Id.* The State neglects to note that the Washington Constitution was one of the other state constitutions that the Wyoming delegates relied upon in fashioning the Wyoming Constitution. *See* Richard K. Prien, The Background of the Wyoming Constitution 38 (Aug. 1956) (M.A. Thesis, Univ. of Wyo.) (ProQuest). The State therefore has provided no basis to question the Court's commentary in *In re Neely.*

The State attempts to bridge this gap by arguing that Article 21, Section 25 is a nullity with no effect, because it was required for Wyoming's admittance as a state. State Br. at 87–88. The State nowhere explains how this history renders Section 25 meaningless, nor can it possibly do so. *Powers*, 2014 WY 15 ¶ 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. Bebout*, 10 P.3d 514, 520 (Wyo. 2000))).

Consistent with the more expansive protections in the Wyoming Constitution, the Court should apply the more expansive free exercise protections articulated by the Minnesota and Washington Supreme Courts. The Washington court emphasized that strict scrutiny is triggered whenever a statute "burdens" free exercise, either directly or indirectly. *First Covenant Church*, 840 P.2d at 187–88. The Minnesota Supreme Court

likewise has found that the right to free exercise triggers strict scrutiny where "sincere religious beliefs were burdened by" a statute. *Hershberger*, 462 N.W. 2d at 398.

Here, there is no question that the Abortion Ban is squarely directed at religious belief. The very first provision of that law declares as official state policy the belief that, from conception, a zygote is the equivalent of a living person. Wyo. Stat. Ann. § 35-6-121(a). As demonstrated above, this is a distinctly religious viewpoint that is not shared by all religions, including by the Judaism practiced by Plaintiff Kathleen Dow. R. at TR-1974 [Peters ¶ 67]; R. at TR-1860–61 [Dow ¶¶ 7–10].

There can be no question that having an abortion because of one's religious beliefs is a religious practice. The U.S. Supreme Court found that a law requiring a company to provide health insurance coverage for certain contraceptives "'substantially burden[s]' the exercise of religion." *Burwell*, 573 U.S. at 719 (citation omitted). By the same reasoning, a law that prohibits Ms. Dow from obtaining an abortion dictated by her religious beliefs constitutes a direct and substantial burden on her religious beliefs.

Plaintiff Kathleen Dow practices conservative Judaism. Consistent with her faith, Ms. Dow believes that life begins when a baby takes its first breath during childbirth. R. at TR-1860–61 [Dow ¶¶ 7–10]. Ms. Dow's religious beliefs dictate that, until birth, a pregnancy can be—and at times must be—terminated to preserve the physical, emotional or other well-being of the woman. R. at TR-1860–61 [Dow ¶¶ 8–10]. Ms. Dow's beliefs fall squarely within the mainstream of Jewish doctrine.

As Rabbi Ruttenberg explains, "Jews do not believe life begins at conception, or that fetuses have any rights of 'personhood' at any point up until birth." R. at TR-1998

[Ruttenberg ¶ 41]. Rabbi Ruttenberg traces the roots of the Jewish belief that life begins when a baby takes its first breath during childbirth—a belief that dates back not merely centuries, but ***millennia***. R. at TR-1993–98 [Ruttenberg ¶¶ 23–42]. These beliefs hold that for the first forty days of gestation, an embryo or fetus has no technical status at all, and thereafter until birth is considered a part of the woman and not an independent being. R. at TR-1990–91 [Ruttenberg ¶¶ 13–18].

Consistent with this doctrine, long-standing Jewish belief places the well-being of the woman above that of the fetus throughout the entire course of pregnancy and up to birth. R. at TR-1993–98 [Ruttenberg ¶¶ 23–42]. As a result, abortion is always permitted—and at times mandated—to protect the well-being of the woman. Jewish doctrine authorizes abortion to protect the mental health of women, R. at TR-1997–98 [Ruttenberg ¶¶ 37–39], and calls for availability of abortion medication, R. at TR-1994, 1996 [Ruttenberg ¶¶ 26, 33–34]. By declaring that life begins at conception and prohibiting abortion under circumstances where it would be acceptable or required under Jewish doctrine, the abortion statutes plainly burden Ms. Dow's religious beliefs.

The State has not disputed that Ms. Dow's religious beliefs are sincerely held or that the abortion bans burden these beliefs and Ms. Dow's religious practices. The State therefore must demonstrate that the laws survive strict scrutiny. For the reasons described above, the State cannot demonstrate that the laws are narrowly tailored to a compelling government purpose—or even that they further a legitimate government purpose. Ms. Dow is entitled to judgment on her free-exercise claims.

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

Both the Abortion Ban and the Medication Ban are so vague and ambiguous that it is impossible to determine the conduct to which the statutes apply. The State has argued that Plaintiffs may not bring a facial vagueness challenge to the Abortion Ban and Medication Ban, because only some, but not all, of the terms of those laws are vague. R. at TR-2427–39 [State MSJ at 123–35]. The State is incorrect in two respects. First, the vague provisions are central to the statutes and therefore the laws cannot be applied without them. Second, Plaintiffs are also asserting an as-applied vagueness challenge.

1. Plaintiffs' Vagueness Claim Is Both Facial and "As Applied."

"A statute may be challenged for constitutional vagueness 'on its face' or 'as applied' to particular conduct." *Giles v. State*, 2004 WY 101, ¶ 15, 96 P.3d 1027, 1031–32 (Wyo. 2004) (citation omitted). Here, the abortion statutes are vague on their face because they reach "a substantial amount of constitutionally protected conduct" and they specify "no standard of conduct at all." *Id.*

A penal statute is unconstitutionally vague "as applied" where it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Griego v. State*, 761 P.2d 973, 975 (Wyo. 1998) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983)). Plaintiffs' challenge is also "as applied" because as physicians and abortion providers, Drs. Hinkle and Anthony and Wellspring are charged by the statute with applying the vague terms in both statutes, but it is impossible to do so because key

statutory provisions have no medical or commonsense meaning.

2. The Abortion Ban and Medication Ban Are Unconstitutionally Vague.

Application of the Abortion Ban and Medication Ban is not possible, because the following key terms have no discernable meaning:

- The exception to the Medication Ban for "[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment . . . ." Wyo. Stat. Ann. § 35-6-139(b)(iii).
- The terms "natural miscarriage" and "chemical abortion" in the Medication Ban. Wyo. Stat. Ann. § 35-6-139(b)(ii) & (d).
- The lack of guidance in the Medication Ban for how a physician or pharmacist is to determine that a pregnancy resulted from sexual assault or incest. Wyo. Stat. Ann. § 35-6-139(b)(iii).
- The exception to the Medication Ban for contraceptives "administered before conception or before pregnancy can be confirmed through conventional medical testing." Wyo. Stat. Ann. § 35-6-139(b)(i).
- The lack of guidance in the Abortion Ban and Medication Ban for how a pharmacist is to determine whether a particular prescription is for an abortion or whether the statute's exceptions apply.
- The Abortion Ban's exception for "a pre-viability separation procedure necessary in the physician's reasonable medical judgment to prevent the death of the pregnant woman, a substantial risk of death

for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman . . . ." Wyo. Stat. Ann. § 35-6-124(a)(i).

- The Abortion Ban's definition of "[l]ethal fetal anomaly" as "a fetal condition diagnosed before birth and if the pregnancy results in a live birth there is a substantial likelihood of death of the child within hours of the child's birth." Wyo. Stat. Ann. § 35-6-122(a)(vi).
- The Abortion Ban's requirement for a physician to "make[] all reasonable medical efforts under the circumstances to preserve . . . the life of the unborn baby…." Wyo. Stat. Ann. § 35-6-124(a)(i).

In assessing whether an abortion is permitted by the Abortion Ban, the physician is called upon to use "reasonable medical judgment" 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 . . . ." Wyo. Stat. Ann. § 35-6-124(a)(i). 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 unrebutted testimony from the physician Plaintiffs and their expert witness, none of these is a medical term or phrase and there is no medical literature or guidance on how to apply them. R. at TR-1870–73, 1893-94 [Moayedi ¶¶ 7–10, 34–37]; *see also* R. at TR-1695, 1704–06 [Anthony ¶¶ 23, 47, 51]; R. at TR-1808, 1815, 1817–18, 1822–23 [Hinkle ¶¶ 9, 28, 35, 47, 51].

In its discovery responses, the State offered definitions for some of these terms that did nothing to clarify their meaning. According to the State, the phrase "substantial risk of death" means "the possibility of death is real or true and not imaginary or illusory." *See* R. at TR-2168 [State's Response to Interrogatory No. 3]. This appears to come from the dictionary definition of the word "substantial" as "not imaginary or illusory; real, true." R. at TR-1651 [Pl. MSJ at 54] (citing *Substantial*, Merriam-Webster Dictionary (11th ed. 2023)). None of these terms has a medical meaning and the State admits there is no medical guidance to assist physicians in applying them. *See* R. at TR-2169, 2171 [State's Response to Interrogatory Nos. 5 & 9]; R. at TR-1902–03 [Moayedi ¶¶ 53–54].

Nor does this proffered definition do anything to clarify what level of risk is necessary to trigger the exception. Pregnancy itself carries a real risk of death. According to the Centers for Disease Control, in 2021 over 1,200 American women died from pregnancy or childbirth, for a mortality rate of over 0.03%. R. at TR-1799–1803 [CDC Maternal Mortality Rates in the United States, 2021]; R. at TR-1902 [Moayedi ¶ 53]. This 0.03% risk of death is plainly "real" and "true," especially for the women involved. Taken literally, the State's definition would apply to all pregnancies and allow abortion at any time up until birth. *See* R. at TR-1902 [Moayedi ¶ 53].

This plainly is not the intent of the Abortion Ban, as applying the State's definition would result in rendering the statute a nullity. But if 0.03% is not "substantial," what is? 0.3%? 3.0%? And most importantly, at what point is the woman's condition sufficiently dire to justify an exemption to the Abortion Ban? Must she be in need of immediate medical intervention, or is it sufficient that delay in treatment could lead to a greater risk

of death? Physicians are left to guess.

The same is true for the phrase "serious and permanent impairment of a life-sustaining organ." Neither the State's discovery responses nor its opening brief even attempt to clarify the meaning of "serious and permanent impairment." According to the State's interrogatory responses, the term "life-sustaining organ" means "vital organ," which the State defines as "an organ a person needs to survive." *See* R. at TR-2169–70 [State's Response to Interrogatory No. 7]. The State claimed only five organs are "vital": the brain, heart, lungs, kidneys and liver. Not included are multiple organs that are necessary for survival, including the pancreas, skin, esophagus, and intestines. R. at TR-1909–10 [Moayedi ¶¶ 60–63].

In its opening brief, the State abandoned this definition of "life-sustaining organ" and offered an entirely different one: "any organ in the human body that helps someone stay alive." State Br. at 95. This definition directly conflicts with its discovery responses and the position the State took in response to Plaintiffs' summary judgment motion and should not be considered on appeal. In any event, the State's new definition does nothing to clarify the term "life-sustaining organ." Because every organ in the human body "helps someone stay alive," every human organ would qualify as life sustaining. The State's definition would render the phrase "life sustaining" as meaningless surplusage.

When asked in discovery to identify conditions that satisfied the requirement for a "substantial risk of death" or a "serious and permanent impairment of a life-sustaining organ," the State could only come up with two: preeclampsia and placental abruption. *See* R. at TR-2168, 2170 [State's Response to Interrogatory Nos. 4 & 8]. The State offers the

same two examples in its opening brief, State Br. at 97, but fails to include numerous other conditions that can lead to serious injury or death of a pregnant woman, such as pre-viability membrane rupture, pulmonary hypertension, placenta previa, cardiomyopathy, placenta accrete spectrum disorder, and various forms of cancer. R. at TR-1903–08 [Moayedi ¶ 55]. Under the State's definition, physicians are left simply to guess whether these potentially fatal conditions fall within the exceptions to the Abortion Ban.

The Medication Ban requires the physician to use "appropriate medical judgment" to determine whether abortion medication is "necessary to preserve the woman from an imminent peril that substantially endangers her life or health . . . ." Wyo. Stat. Ann. § 35-6-139(b)(iii). To apply this exception, the physician must divine the meaning of the terms "necessary to preserve," "imminent peril," "substantially endangers" and "health." None of these is a medical term and there is no medical guidance on how a physician should apply them to the circumstances of a particular patient. R. at TR-1893 [Moayedi ¶ 34].

The State's efforts to explain the meaning of this language fails to clarify anything. In discovery, the State claimed that the phrase "imminent peril that substantially endangers her life or health," means "a real or true exposure to the risk of death or injury to the pregnant woman that is ready to take place." *See* R. at TR-2175 [State's Response to Interrogatory No. 15]. As with the Abortion Ban, these terms have no medical meaning and the State admits there is no medical guidance to apply them. R. at TR-1908 [Moayedi ¶ 56]; *see also* R. at TR-2176 [State's Response to Interrogatory No. 17].

Nor is there any non-medical meaning to this combination of phrases. What is a "real or true exposure to the risk of death or injury?" And what does it mean for such a

risk to be "ready to take place?" It appears that the State has simply cobbled together fragments of the Merriam-Webster definitions for "substantial" (real or true), "imminent" (ready to take place), and "peril" (exposure to the risk of being injured). R. at TR-1654 [Pl. MSJ at 57 (Merriam-Webster Dictionary (11th ed. 2023))]. Merriam-Webster does not explain what all these terms mean when combined with each other in the context of a woman's health care. By mixing and matching unrelated dictionary definitions, the State has created a Frankenstein's Monster of a definition that is even more incomprehensible than the statutory language.

And the Abortion Ban defines a "[l]ethal 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. Ann. § 35-6-122(a)(vi). But it is impossible for a physician to know in advance whether a fetus with a fatal anomaly will survive hours, days, or months following birth. R. at TR-1880 [Moayedi ¶ 17]; *see also* R. at TR-1808, 1814–17 [Hinkle ¶¶ 10, 27, 34].

In its opening brief, the State argues that the term "reasonable medical judgment" is defined in the statute and therefore not ambiguous. State Br. at 95. The State misses the point. The question is not whether physicians understand what is "reasonable medical judgment," but instead how they can possibly exercise such judgment to interpret terms that have no medical meaning. Nothing in a physician's education, knowledge, experience or training equips her to interpret the vague exceptions to the abortion statutes. R. at TR-1910 [Moayedi ¶¶ 64–65]. Pharmacists likewise have no way to know whether the statutes or their exceptions apply when patients attempt to fill prescriptions for medications that could be used to terminate a pregnancy.

Because the statutes purport to require the exercise of medical judgment, evidence of how physicians understand the terms is relevant to determining the vagueness claim. *See United States v. Richter*, 796 F.3d 1173, 1189 (10th Cir. 2015) ("[W]here a statute or regulation is aimed at a class of people with specialized knowledge, the specificity required by due process is measured by the common understanding of that group.").

Moreover, "[w]hether a [statutory] term has . . . a technical meaning is a question of fact to be proved." *Powder River*, 2006 WY 137, ¶ 16, 145 P.3d at 448. This evidence also is undeniably admissible on Plaintiffs' facial vagueness claims. *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1234 (10th Cir. 2023) ("As-applied vagueness challenges involve a factual dimension in that vagueness is determined in light of the facts of the case at hand.") (quoting *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1299 (10th Cir. 2008)).

Finally, the State argues that as to Plaintiffs' facial claims, the statutes are not impermissibly vague, because there are some circumstances where the statutes can be applied "with certainty." State Br. at 97. This argument fails for several reasons. First, the examples the State provides of such "certainty"—preeclampsia, sexual crimes and lethal fetal anomaly—are, in fact, far from certain. As described above, it is impossible for a physician to apply the definition of lethal fetal anomaly, it is unclear how to satisfy the requirement for reporting sexual crimes, and physicians cannot know at what point preeclampsia gives rise to a "substantial" risk of death.

Second, Plaintiffs have, in fact, demonstrated that the statutes are impermissibly vague in all of their applications for purposes of their facial claim. This vagueness infects all of the exceptions and many of the definitions in both abortion bans. To the extent the

State argues that these defects can be cured by severing the vague terms from the statutes, the Court should reject the argument. Severance is only available where the rest of the statute "can be given effect without the invalid provision." Wyo. Stat. Ann. § 8-1-103 (2024). "The question is whether the statute can be enforced even if the invalid portions are severed from the statute or whether 'the several parts are so interdependent that ***the main purpose of the law would fail by reason of the invalidity of a part***.'" *Air Methods/Rocky Mountain Holdings, LLC v. State ex rel. Dep't of Workforce Servs.*, 2018 WY 128, ¶ 34, 432 P.3d 476, 485 (Wyo. 2018) (emphasis added) (citation omitted).

Here, the main purpose of the Abortion Ban and Medication Ban is to specify when abortions and medication abortions are permissible and when they are not. The vague terms of both statutes are central to this purpose, in that they describe exceptions to the general bans—*i.e.*, when a physician may legally perform an abortion or use medication for an abortion. Without these terms, all abortions would be prohibited at all times, which plainly is contrary to the purpose of the statutes which, on their face, are not intended to prohibit ***all*** abortions or ***all*** use of abortion medication. Accordingly, it is not possible to sever the vague terms without drastically altering the impact of the statutes.

Third, even if severance were possible, Plaintiffs would be entitled to declaratory and injunctive relief with respect to the vague statutory terms, as applied to them individually. The requirement that the statute be unclear in all of its applications applies only to a facial claim, not to an as applied claim. *See Fraternal Ord. of Eagles Sheridan Aerie No. 186, Inc. v. State ex rel. Forwood*, 2006 WY 4, ¶ 46, 126 P.3d 847, 863–66 (Wyo. 2006) (comparing facial and as-applied challenges); *see also Griego*, 761 P.2d at 976

(describing different requirements between facial and as-applied claims). The abortion bans are directed at the conduct of physicians such as Plaintiffs Anthony, Hinkle and Wellspring. The unrebutted testimony presented by these Plaintiffs establishes they have no way to know what conduct is allowed and what conduct is proscribed by the statutes.

The Court should find that the Abortion Ban and Medication Ban are unconstitutionally vague, both on their face and as applied to the Plaintiffs.

CONCLUSION

This Court should affirm the district court's Summary Judgment decision – regardless of the level of scrutiny. This case is of the utmost public importance, and there is no entity other than this Court which can provide clarity.

And, clarity is needed – especially for the legislature. The liberties and freedoms these Plaintiffs assert (in addition to health care and equality) include personal autonomy, self-determination, privacy, and the right to be left alone by the government. These rights are basic to human dignity, and have been protected by the Wyoming Constitution since the State's inception, as part of the *positive law of the land*. As such, these natural and inherent rights have *always* been enjoyed by *all* Wyomingites – and are guarantees the legislature cannot take away.

The Abortion Ban and Medication Ban violate multiple provisions of the Wyoming constitution and are a radical departure from Wyoming's long history of affording broad rights to privacy and equality. This Court should affirm the District Court's judgment and invalidate the Abortion Ban and Medication Ban.

DATED: February 28, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that this 28th day of February 2025, a true and correct copy of the foregoing was served as follows:

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CERTIFICATION OF REDACTIONS AND EXAMINATIONS

We hereby certify that the foregoing document, as submitted in digital form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Windows Defender on February 28, 2025, and according to the program, is free of viruses. In addition, we certify that all required privacy redactions have been made, and with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Clerk.

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APPENDICES

Pursuant to Wyo. R. App. P. 7.01(k), Appellee does not have any additional documents to submit.

COSTS

Pursuant to Wyo. Rs. App. P. 7.01(k)(3) and 1.01(c)(1), Appellee has incurred the following costs in this action:

Production of Original Brief numbering 116 pages at $4.40/page: $510.40

Production of six copies of Original Brief at $.75/page: $522.20

Postage for delivery of Original Brief and copies to Supreme Court is unknown at this time and will be incorporated by later motion.