IN THE SUPREME COURT, STATE OF WYOMING

STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming, Appellants, 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,	)	S-24-0326

REPLY BRIEF OF APPELLANTS

Jay Jerde #6-2773
Special Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-5996

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND AUTHORITIES ii

NEW ISSUES AND ARGUMENTS RAISED IN APPELLEES' BRIEF 1

ARGUMENT 2

I. Article 1, section 38(d) and the strict scrutiny test do not apply in assessing whether the Life Act and the criminal abortion statute impermissibly restrict the right conferred by article 1, section 38(a) 2

II. The Life Act and the chemical abortion statute do not treat women differently than men 6

III. This Court should not apply the test from *Lemon v. Kurtzman* because the establishment of religion provisions in the Wyoming Constitution are not more protective than their federal counterpart and because the *Lemon* test is no longer good law 7

IV. This Court should not follow the endorsement of religion test in *Santa Fe Independent School District v. Doe* because that test conflicts with long-established precedent from this Court 9

V. The first Wyoming territorial legislature abrogated the common law with respect to abortion 11

VI. This Court should defer to the legislative finding that abortion is not health care 14

VII. Historically and traditionally, Wyoming has not afforded women greater rights to abortion than other states. 16

VIII. Appellees' proffered evidence is not legally relevant 19

IX. The standard for assessing the facial constitutionality of a statute applies even when the challenged statute is subject to strict scrutiny 27

CONCLUSION 30

CERTIFICATE REGARDING ELECTRONIC FILING AND SERVICE 31

TABLE OF CASES, STATUTES, AND AUTHORITIES

Cases

Aramark Facility Servs. v. Serv. Emps. Int'l Union, Loc. 1877, AFL-CIO,
530 F.3d 817 (9th Cir. 2008) 23, 24

Barrow v. Raffensperger,
842 S.E.2d 884 (Ga. 2020) 5

Bird v. Wyo. Bd. of Parole,
2016 WY 100, 382 P.3d 56 (Wyo. 2016) 6

Carbaugh v. Nichols,
2014 WY 2, 315 P.3d 1175 (Wyo. 2014) 20

Citizens Concerned About Our Child. v. Sch. Bd. of Broward Cnty., Fla.,
193 F.3d 1285 (11th Cir. 1999) 22

City of Alexandria v. Cleco Corp.,
735 F.Supp.2d 465 (W.D. La. 2010) 24

Cnty. Ct. Judges Ass'n v. Sidi,
752 P.2d 960 (Wyo. 1988) 5

Commonwealth v. Parker,
50 Mass. 263 (Mass. 1845) 11, 12

Coronado Oil Co. v. Grieves,
603 P.2d 406 (Wyo. 1979) 16

Dir. of Office of State Lands & Invs. v. Merbanco, Inc.,
2003 WY 73, 70 P.3d 241 (Wyo. 2003) 27, 28

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022) 13, 19

Doe v. City of Albuquerque,
667 F.3d 1111 (10th Cir. 2012) 28, 29

Edwards v. Aguillard,
482 U.S. 578 (1987) 10

EMW Women's Surgical Ctr. v. Cameron,
No. 22-CI-3225, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022) 9

Encon Int'l., Inc. v. Garrahan,
Case No. 11-2137-KGS, 2013 WL 12250907 (D. Kan. 2013) 26

Estrada v. State,
611 P.2d 850 (Wyo. 1980) 19

Geringer v. Bebout,
10 P.3d 514 (Wyo. 2000) 4, 16

Gingerich v. City of Elkhart Prob. Dep't,
273 F.R.D. 532 (N.D. Ind. 2011) 26

Good Neighbor Care Ctr., Inc. v. Minn. Dep't of Human Servs.,
428 N.W.2d 397 (Minn. Ct. App. 1988) 25

Gordon v. State by & Through Capitol Bldg. Rehab.,
2018 WY 32, 413 P.3d 1093 (Wyo. 2018) 28

Greenwalt v. Ram Rest. Corp. of Wyo.,
2003 WY 77, 71 P.3d 717 (Wyo. 2003) 12, 20

Griggs v. State,
2016 WY 16, 367 P.3d 1108 (Wyo. 2016) 19

Herrick v. Jackson Hole Airport Bd.,
2019 WY 118, 452 P.3d 1276 (Wyo. 2019) 24

In re Smith's Estate,
97 P.2d 677 (Wyo. 1940) 12

Kennedy Oil v. Dep't of Revenue,
2008 WY 154, 205 P.3d 999 (Wyo. 2008) 23

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022) 8

Kirby Bldg. Sys. v. Min. Expls. Co.,
704 P.2d 1266 (Wyo. 1985) 20

Kitzmiller v. Dover Area Sch. Dist.,
400 F.Supp.2d 707 (M.D. Pa. 2005) 10, 11

Lemon v. Kurtzman,
403 U.S. 602 (1971) 7, 8, 9

Lomack v. City of Newark,
463 F.3d 303 (3rd Cir. 2006) 22

Lopez v. Stages of Beauty, LLC,
307 F.Supp.3d 1058 (S.D. Cal. 2018) 23, 24

Martin v. Bd. of Cnty. Comm'rs of Laramie Cnty.,
2022 WY 21, 503 P.3d 68 (Wyo. 2022) 4

McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.,
545 U.S. 844 (2005) 10

Merrill v. Jansma,
2004 WY 26, 86 P.3d 270 (Wyo. 2004) 12

Mills v. Reynolds,
837 P.2d 48 (Wyo. 1992) 28

Mills v. State,
2023 WY 76, 533 P.3d 182 (Wyo. 2023) 7

Mont. Cannabis Indus. Ass'n v. State,
368 P.3d 1131 (Mont. 2016) 29

Moreno v. Brickner,
416 P.3d 807 (Ariz. 2018) 29

Mountain Cement Co. v. S. of Laramie Water & Sewer Dist.,
2011 WY 81, 255 P.3d 881 (Wyo. 2011) 9, 10, 11

N.H. Democratic Party v. Sec'y of State,
262 A.3d 366 (N.H. 2021) 29

Nw. Landowners Ass'n v. State,
978 N.W.2d 679 (N.D. 2022) 29

Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n,
845 P.2d 1040 (Wyo. 1993) 10

Parker v. Ritter,
Civil Action No. 08-cv-00737-MSK-KLM, 2010 WL 419398
(D. Colo. Jan. 28, 2010) 26

Planned Parenthood Great Nw. v. State,
522 P.3d 1132 (Idaho 2023) 6, 7, 25

Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State of Iowa,
975 N.W.2d 710 (Iowa 2022) 7

Polk v. Swift,
339 F.R.D. 189 (D. Wyo. 2021) 24

Power v. City of Providence,
582 A.2d 895 (R.I. 1990) 25

Powers v. State,
2014 WY 15, 318 P.3d 300 (Wyo. 2014) 28

Pub. Lands Council v. Babbitt,
167 F.3d 1287 (10th Cir. 1999) 21

Rodriguez-Williams v. Johnson,
2024 WY 16, 542 P.3d 632 (Wyo. 2024) 5

Roe v. Wade,
410 U.S. 113 (1973) 19

Sammon v. N. J. Bd. of Med. Exam'rs,
66 F.3d 639 (3rd Cir. 1995) 25

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 9

Saunders v. Hornecker,
2015 WY 34, 344 P.3d 771 (Wyo. 2015) 25

Serpico v. Laborers' Int'l Union of N. Am.,
97 F.3d 995 (7th Cir. 1996) 6

Shaw v. Hunt,
517 U.S. 899 (1996) 21, 22

Sheesley v. State,
2019 WY 32, 437 P.3d 830 (Wyo. 2019) 8, 9, 28

Solvay Chems., Inc. v. Wyo. Dep't of Revenue,
2022 WY 124, 517 P.3d 1146 (Wyo. 2022) 25, 26

State ex rel. Irvine v. Brooks,
84 P. 488 (Wyo. 1906) 16

State v. Cooper,
22 N.J.L. 52 (N.J. 1849) 11

State v. Hardesty,
214 P.3d 1004 (Ariz. 2009) 22

State v. Langley,
84 P.2d 767 (Wyo. 1938) 20

Sw. Pub. Serv. Co. v. N.M. Pub. Regul. Comm'n,
548 P.3d 97 (N.M. 2024) 21

TracFone Wireless, Inc. v. Neb. Pub. Serv. Comm'n,
778 N.W.2d 452 (Neb. 2010) 23

United States v. Comstock,
560 U.S. 126 (2010) 6

United States v. Hardman,
297 F.3d 1116 (10th Cir. 2002) 21, 22

United States v. Rivas,
605 F.3d 194 (3rd Cir. 2010) 18

United States v. Salerno,
481 U.S. 739 (1987) 28

Wallace v. Jaffree,
472 U.S. 38 (1985) 10

Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.,
575 P.2d 1100 (Wyo. 1978) 15

Constitutional Provisions

Wyo. Const. art. 1, § 38(a) ..... passim

Wyo. Const. art. 1, § 38(c) ..... passim

Wyo. Const. art. 1, § 38(d) 2, 3, 4, 19

Wyo. Const. art. 2, § 1 2

Statutes and Session Laws

1884 Terr. Wyo. Sess. Laws ch. 1, § 2 19

1890 Terr. Wyo. Sess. Laws, ch. 73, § 19 11

Gen. Laws Terr. of Wyo., ch. 3, Title 1 (1869) 13

Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869) 13, 17

Wyo. Stat. Ann. § 8-1-101 12

Wyo. Stat. Ann. § 35-6-121 ..... 14, 16

Wyo. Stat. Ann. § 35-6-122 15

Other Authorities

Black's Law Dictionary (11th ed. 2019) 15

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 2:12 (4th ed., Aug. 2023 update) 23

James C. Mohr, *Abortion in America* 4 (Oxford Univ. Press 1978) 13

John Keown, *Abortion, doctors and the law* 11 (Cambridge Univ. Press 1988) 13

NEW ISSUES AND ARGUMENTS RAISED IN APPELLEES' BRIEF

I. Appellees argue that the Life is a Human Right Act (Life Act) and the chemical abortion statute must satisfy the requirements in article 1, section 38(c) and (d) and also pass strict scrutiny. (Appellees' Br. at 18, 26-29, 36, 45, 46, 49, 54, 59).

II. Appellees argue that the Life Act and the chemical abortion statute have a discriminatory impact on the right to make health care decisions – "a right that applies to both women and men equally." (Appellees' Br. at 61).

III. Appellees argue that the establishment of religion provisions in the Wyoming Constitution are more protective than the federal Establishment Clause so this Court should apply the test from the United States Supreme Court opinion in *Lemon v. Kurtzman* in assessing whether the Life Act impermissibly imposes a sectarian viewpoint on all Wyoming citizens. (Appellees' Br. at 1, 73-78).

IV. Appellees argue that this Court also should apply the endorsement of religion test adopted by the U.S. Supreme Court in *Santa Fe Independent School District v. Doe* in assessing whether the Life Act impermissibly infringes upon the establishment of religion provisions in the Wyoming Constitution. (Appellees' br. at 73-84).

V. Appellees argue that, before the Life Act was enacted, Wyoming followed the common law view that an unborn baby has no independent status before quickening. (Appellees' Br. at 7-8).

VI. Appellees argue that this Court should not defer to the legislative finding in the Life Act that abortion is not health care for purposes of section 38. (Appellees' br. at 22-23).

VII. Appellees argue that the history and tradition show that Wyoming has afforded women greater rights to abortion than other states have afforded. (Appellees' Br. at 1, 3-4, 70).

VIII. Appellees argue that their proffered evidence is both legally relevant and admissible. (Appellees' Br. at 28-29, 31- 33, 40, 49-56, 94-96).

IX. Appellees argue that this Court's standard for assessing the facial constitutionality of a statute "does not apply to claims involving strict scrutiny" or to their as applied claims. (Appellees' Br. at 15-16).

ARGUMENT

I. Article 1, section 38(d) and the strict scrutiny test do not apply in assessing whether the Life Act and the criminal abortion statute impermissibly restrict the right conferred by article 1, section 38(a).

Appellees argue that the Life Act and the chemical abortion statute must satisfy the requirements in article 1, section 38(c) and separately must also satisfy both article 1, section 38(d) and the strict scrutiny test. (Appellees' Br. at 18, 26-27, 36, 45, 46, 54, 59). In making this argument, they: (1) impermissibly conflate section 38(c) with section 38(d) and the strict scrutiny test; and (2) advocate for this Court to act outside of its constitutionally prescribed role with respect to constitutional interpretation.

Section 38(d) dictates that "the state of Wyoming shall act to preserve" the rights conferred in section 38 "from undue government infringement." Wyo. Const. art 1, § 38(d). As a political entity, the "state of Wyoming" consists of the three departments (or branches) – the executive, the legislative, and the judicial. *See* Wyo. Const. art. 2, § 1. The phrase

"the state of Wyoming shall act to preserve" commands all departments (or branches) of Wyoming state government to take action as necessary to protect the rights conferred in section 38 from "from undue government infringement."

Because section 38(d) commands all three departments (or branches) of government to take action as necessary, the source of the undue infringement necessarily must exist outside of Wyoming state government. It makes no sense to command that the State of Wyoming take action as necessary to preserve the section 38 rights from undue infringement by the State of Wyoming. If the framers and the people had intended that result, section 38(d) would simply command that the State of Wyoming shall not unduly infringe upon the rights conferred by section 38.

The word "government" includes the federal government because the historical record confirms that the framers and the voters intended for section 38 to push back against federal government overreach in the health care arena. (*See* State's Principal Br. at 53). Section 38(d) thus directs the State to take action to preserve the rights conferred in section 38 from undue infringement by governments **other** than the State of Wyoming, including the federal government.

Appellees argue that section 38 (c) and (d) together provide the test for assessing the constitutionality of a statute that restricts health care decisions. (Appellees' Br. at 26, 40, 46). This argument ignores the fact that section 38(c) and section 38(d) serve different purposes. Section 38(c) establishes the test for assessing whether a statute that regulates medical services impermissibly infringes upon the right to make "health care decisions." Section 38(d) imposes an affirmative duty on the State of Wyoming to take action to protect

the right to make "health care decisions" from undue government infringement. To interpret section 38(d) as also limiting the Wyoming legislature's lawmaking authority would make section 38(c) meaningless and therefore would be improper as a matter of constitutional interpretation. *See Geringer v. Bebout*, 10 P.3d 514, 520 (Wyo. 2000) (explaining that the Wyoming Constitution "should not be interpreted to render any portion of it meaningless"). Appellees are therefore wrong as a matter of law when they assert that section 38(d) imposes a separate undue infringement test for assessing the constitutionality of the Life Act and the chemical abortion statute.

Appellees also are wrong as a matter of law when they insist that, even if the Life Act and the chemical abortion statute pass muster under section 38(c), those statutes also must satisfy the requirements of strict scrutiny. Section 38(c) alone establishes the test for determining whether a statute impermissibly restricts the right to make health care decisions. If this Court concludes that a statute restricting the right of individuals to make health care decisions is reasonable and necessary to protect the health and general welfare of Wyoming citizens or to accomplish some other purpose under the Wyoming Constitution, then that statute does not violate section 38 – end of story.

The strict scrutiny test demands that a statute affecting a fundamental right must be "necessary to achieve a compelling state interest" and the State must show "that it could not use a less onerous alternative to achieve its objective." *Martin v. Bd. of Cnty. Comm'rs of Laramie Cnty.*, 2022 WY 21, ¶ 14, 503 P.3d 68, 73 (Wyo. 2022) (citation omitted). Section 38(c) says nothing about a compelling interest or a least onerous alternative.

Applying the strict scrutiny test in addition to the section 38(c) test thus would effectively amend section 38(c) by creating two new requirements a statute must satisfy.

The separation of powers doctrine vests this Court with the authority and responsibility to interpret the Wyoming Constitution. *Rodriguez-Williams v. Johnson*, 2024 WY 16, ¶¶ 28-29, 542 P.3d 632, 640 (Wyo. 2024). In exercising this authority, however, this Court cannot add words or terms to a constitutional provision under the guise of interpretation or construction. *Cnty. Ct. Judges Ass'n v. Sidi*, 752 P.2d 960, 962 (Wyo. 1988); s*ee also e.g., Barrow v. Raffensperger*, 842 S.E.2d 884, 895 n.11 (Ga. 2020) (explaining that the Georgia Supreme Court had "no authority to effectively amend" the Georgia Constitution by altering requirements imposed by the constitution).

In adopting section 38(c), the people deliberately decided that the Wyoming legislature may restrict the right to make health care decisions and that any such restrictions need only be reasonable and necessary to accomplish the specific purposes identified in section 38(c). Restrictions imposed under section 38(c) are not required to be the least onerous restrictions necessary to achieve a compelling State interest. Applying the strict scrutiny test in addition to the section 38(c) test would effectively amend section 38(c) and thereby thwart the will of the people and violate the doctrine of separation of powers.

Specific to section 38(c), Appellees basically argue that the Life Act and the chemical abortion statute are not necessary to protect the health and general welfare of Wyoming citizens. (*See, e.g.*, Appellees' Br. at 25-44). They appear to believe that the term "necessary" as used in section 38(c) means "required" or some similar word. It does not. When used in a constitution, the word "necessary" means "expedient to the task at hand[.]"

Serpico v. Laborers' Int'l Union of N. Am., 97 F.3d 995, 997 (7th Cir. 1996); *see also, cf., United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (explaining that the phrase "necessary and proper" as used in the U.S. Constitution means "convenient, or useful" and not "absolutely necessary") (citations omitted).

II. The Life Act and the chemical abortion statute do not treat women differently than men.

Appellees argue that the Life Act and the chemical abortion statute impermissibly discriminate against women because, under those statutes, "only women's rights to make health care decisions are curtailed; the [Wyoming] legislature has imposed no similar restriction on men's health care decisions." (Appellees' Br. at 61). They also say that the right to make health care decisions is a civil right protected by article 6, section 1. (*Id.*). These positions are grounded in equal protection and fail as a matter of law because men and women are not similarly situated with respect to abortion.

To have a viable equal protection claim, the classifications created by a statute must be similarly situated. *Bird v. Wyo. Bd. of Parole*, 2016 WY 100, ¶ 8, 382 P.3d 56, 61 (Wyo. 2016). In an attempt to make men and women similarly situated under section 38(a), Appellees broadly characterize the classifications created by the Life Act and the chemical abortion statute as women's health care decisions and men's health care decisions. However, to the extent that the challenged statutes restrict any health care decisions, they only restrict decisions related to the procurement of an elective abortion. When it comes to abortion, men and women are not similarly situated. *See Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1198 (Idaho 2023) (holding that "men and women are not similarly

situated when it comes [to] pregnancy and abortion. Only women are capable of pregnancy; thus, only women can have an abortion"); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State of Iowa*, 975 N.W.2d 710, 743 (Iowa 2022) (concluding that men and women "undeniably" are not similarly situated with respect to pregnancy and abortion). The classifications described by Appellees are not similarly situated and therefore do not give rise to a viable equal protection claim.

With respect to article 6, section 1, Appellees have not provided this Court with a cogent legal argument supported by citation to pertinent legal authority. As a result, this Court should not consider the argument. *Mills v. State*, 2023 WY 76, ¶ 19 n.2, 533 P.3d 182, 189 n.2 (Wyo. 2023). Regardless, their assertion about article 6, section 1 is grounded in equal protection and therefore cannot succeed legally because men and women are not similarly situated when it comes to elective abortion. *See Planned Parenthood Great Nw.*, 522 P.3d at 1198; *Planned Parenthood of the Heartland*, 975 N.W.2d at 743.

III. This Court should not apply the test from *Lemon v. Kurtzman* because the establishment of religion provisions in the Wyoming Constitution are not more protective than their federal counterpart and because the *Lemon* test is no longer good law.

Appellees believe that the Wyoming legislature enacted the Life Act "to impose a sectarian religious viewpoint on all Wyoming citizens." (Appellees' Br. at 1). They suggest that the establishment of religion provisions in the Wyoming Constitution (article 1, section 19, and article 7, section 12) may provide broader protections than the federal Establishment Clause in the First Amendment to the U.S. Constitution, then urge this Court to adopt the test from *Lemon v. Kurtzman* as the test for assessing whether a statute violates

the Wyoming establishment of religion provisions. (Appellees' Br. at 73-75) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). This argument fails because it is not analytically sound.

As the party asserting that a provision in the Wyoming Constitution is more protective than an analogous federal constitutional provision, Appellees "must provide proper argument and briefing using a precise and analytically sound approach" before this Court may consider the claim. *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 837 (Wyo. 2019) (cleaned up). They have not done so here.

Appellees make several conclusory statements in an attempt to align the various religion provisions in the Wyoming Constitution with the three elements of the *Lemon* test. (Appellees Br. at 73-74). They then argue that, because the U.S. Supreme Court now employs a narrower test for determining establishment of religion, and because the *Lemon* test aligns with the various Wyoming religion provisions, the Wyoming provisions are more protective than the federal Establishment Clause. (*Id.*). This argument is not analytically sound in two respects.

First, Appellees improperly rely on the free exercise of religion provisions (article 1, section 18 and article 21, section 25) in the Wyoming Constitution to support their establishment of religion argument. (*Id.*). In the Wyoming Constitution, the free exercise provisions provide different protections that the establishment of religion provisions.

Second, the U.S. Supreme Court has abandoned the *Lemon* test because it "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022)

(cleaned up). Appellees acknowledge that the Supreme Court has abandoned the *Lemon* test, but they ask this Court to adopt the test any way. (Appellees Br. at 73-74). Appellees do not explain why this Court should willingly adopt a constitutional test that has proven to be unworkable. Their argument is neither precise nor analytically sound, so this Court should not consider it. *Sheesley*, ¶ 15, 437 P.3d at 837.

Appellees also support their establishment of religion argument with statements quoted from a Kentucky circuit court order. (Appellees' Br. at 77-78) (quoting *EMW Women's Surgical Ctr. v. Cameron*, No. 22-CI-3225, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022)). They offer these quotes without explaining why they are factually or legally relevant. Appellees have given this Court no reason to find that the Kentucky trial court order provides persuasive authority here.

IV. This Court should not follow the endorsement of religion test in *Santa Fe Independent School District v. Doe* because that test conflicts with long-established precedent from this Court.

Appellees also urge this Court to apply the endorsement of religion test from *Santa Fe Independent School District v. Doe* to assess the constitutionality of the challenged statutes. (Appellees' Br. at 73-75). Under this test, a reviewing court "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].'" (Appellees' Br. at 73) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

In essence, Appellees are asking this Court to change its long-standing precedent that statements made by individual legislators are not evidence of the legislative intent of a statute. *See, e.g., Mountain Cement Co. v. S. of Laramie Water & Sewer Dist.*, 2011 WY

81, ¶ 55 n.12, 255 P.3d 881, 902 n.12 (Wyo. 2011). To support their argument, Appellees rely on two cases for the unremarkable proposition that a reviewing court may look to legislative history to discern the intent of a statute. (Appellees' Br. at 74-75) (citing *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). This Court has long held that it may consider legislative history to confirm the plain meaning of an unambiguous statute or to discern the legislative intent of an ambiguous statute. *See, e.g., Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1043-44 (Wyo. 1993).

Appellees cite two other cases to argue that this Court may consider statements by individual legislators to discern the intent of the Life Act and the chemical abortion statute – *Edwards v. Aguillard* and *Kitzmiller v. Dover Area School District*. (Appellees' Br. at 75-76) (citations omitted). Their reliance on *Edwards* and *Kitzmiller* is misplaced, albeit for different reasons.

Appellees rely on *Edwards* for the proposition that the U.S. Supreme Court found an establishment clause violation based in part on correspondence from the legislative sponsor of the challenged statute. (Appellees' Br. at 75) (citing *Edwards v. Aguillard*, 482 U.S. 578, 595-97 (1987)). In *Edwards*, the Court referred to correspondence between the sponsor of the statute and key witnesses who testified on the statute in describing the argument in the appellees' motion for summary judgment, but did not rely on that correspondence in its analysis on the merits. *Edwards*, 482 U.S. at 595-96.

Appellees quote *Kitzmiller* to argue that federal courts "routinely and properly look to individual legislators' public statements to determine legislative purpose." (Appellees'

Br. at 75-76) (quoting *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 746 n.20 (M.D. Pa. 2005)). *Kitzmiller* does not apply here because federal case law governing the interpretation of a statute in light of the federal Establishment Clause cannot trump this Court's binding precedent cited above. Nor should it. This Court has correctly determined that the subjective intent of an individual legislator does not reflect the intent of the Wyoming legislature as a whole. *Mountain Cement Co.*, ¶ 55 n.12, 255 P.3d at 902 n.12. As a result, the statements of individual legislators are not relevant in determining the legislative intent of the Life Act or the chemical abortion statute.

V. The first Wyoming territorial legislature abrogated the common law with respect to abortion.

Appellees assert that: (1) before the Life Act was enacted, an unborn baby had "no independent status prior to quickening" under the common law; and (2) Wyoming had adopted and consistently followed this common law rule until the Life Act was enacted. (Appellees' Br. at 7-8) (citing *Commonwealth v. Parker*, 50 Mass. 263, 266 (Mass. 1845) & *State v. Cooper*, 22 N.J.L. 52, 54 (N.J. 1849)). To support this assertion, they cite the 1890 Wyoming territorial law that made it a crime to kill an unborn quick child by willfully assaulting a pregnant woman and knowing that she is pregnant. (Appellees' Br. at 8) (citing 1890 Terr. Wyo. Sess. Laws, ch. 73, § 19). The history of abortion regulation at common law and in Wyoming since 1869 refutes Appellees' assertion.

The first Wyoming territorial legislature enacted the following law to adopt the common law of England:

> The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or

> remedial acts or statutes made in aid of, or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth and ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, are the rule of decision in this state when not inconsistent with the laws thereof, and are considered as of full force until repealed by legislative authority.

(Comp. Laws of Wyo., ch. 26 (1876) (now codified at Wyo. Stat. Ann. § 8-1-101).

Section 8-1-101 adopted "the common law of England of a general nature in force in 1607 [as] the law of this state except as it has been modified by judicial decisions, and except in so far as it is inconsistent with the laws of this state." *In re Smith's Estate*, 97 P.2d 677, 681 (Wyo. 1940). Consistent with § 8-1-101, the Wyoming legislature may abrogate common law rules "in order to attain a permissible legislative object." *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 34, 71 P.3d 717, 728 (Wyo. 2003). However, "[s]tatutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated *either by express terms or by necessary implication from the language used*." *Merrill v. Jansma*, 2004 WY 26, ¶ 34, 86 P.3d 270, 285-86 (Wyo. 2004) (cleaned up) (italics in original).

In *Parker*, the New Jersey Supreme Court explained that, under ancient common law, an unborn baby "had a separate and independent existence" from the mother only when the baby had reached quickening. *Parker*, 50 Mass. at 266. Appellees leverage the "no independent status" quote from *Parker* to argue that, at common law, an unborn baby had no legally protected rights before quickening. (Appellees' Br. at 7-8).

Before the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, apparently some question existed as to whether the common law

either permitted or prohibited abortion before quickening. For example, one scholar had opined that, "[b]efore quickening, actions that had the effect of terminating what turned out to have been an early pregnancy were not considered criminal under the common law in effect in England and the United States in 1800." James C. Mohr, *Abortion in America* 4 (Oxford Univ. Press 1978). Another scholar had declared "the common law prohibited abortion and did so predominantly for the protection of fetal life." John Keown, *Abortion, doctors and the law* 11 (Cambridge Univ. Press 1988). After an exhaustive review of the common law and scholarly works about the common law, the *Dobbs* Court concluded that "abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 241 (2022).

Even if Appellees' characterization of *Parker* is accurate, the first Wyoming territorial legislature abrogated the common law regarding abortion. Eight days after the first Wyoming territorial legislature adopted the common law for Wyoming, it enacted a comprehensive criminal code for the territory. (Gen. Laws Terr. of Wyo., ch. 3, Title 1 (1869)). This criminal code included a provision that prohibited abortion generally with no exceptions. (Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869)).

The 1869 territorial abortion law abrogated and repealed any common law rules regarding abortion. The 1869 law protected the lives of unborn babies against death by abortion and did so from conception through birth. Appellees are therefore wrong when they say that Wyoming adhered to a common law rule that unborn babies have no legal

status. To the extent that such a common law rule ever existed, it was abrogated in early December 1869.

Appellees also contend that the State has not identified any Wyoming statute that criminalized feticide other than the 1890 Wyoming territorial law making it a felony to kill "an unborn quick child." (Appellees' Br. at 8). This unsupported contention ignores the fact that abortion at all stages of pregnancy was prohibited and a crime under the 1869 and 1884 territorial abortion laws and under the pre-*Roe* abortion statute. These enactments also criminalized feticide, subject to one exception from 1884 forward. The killing of an unborn quick child law closed a loophole that apparently had allowed a person to cause a miscarriage or abortion through a means not addressed in the existing abortion law.

VI. This Court should defer to the legislative finding that abortion is not health care.

In the Life Act, the Wyoming legislature specifically found that "abortion as defined in [the Life Act] is not health care." Wyo. Stat. Ann. § 35-6-121(a)(iv). Appellees characterize this finding as a legislative interpretation of section 38(a). (Appellees' Br. at 23) (citing Summ. J. order, ¶ 50). They then argue that this Court should give this interpretation "no weight" because it "directly contradict[s] the unambiguous language of the [Wyoming] Constitution." (*Id.*).

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

This finding derives from the statutory definition of abortion in the Life Act, which provides that an abortion is done with the intent to cause the death of the unborn baby. Wyo. Stat. Ann. § 35-6-122(a)(i). In turn, the Wyoming legislature defined "unborn baby" as "an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages from fertilization to full gestation and childbirth[.]" Wyo. Stat. Ann. § 35-6-122(a)(iv). Given the language in these statutory definitions, abortion at any time during the entire embryonic and fetal stages is "the intentional termination of the life of an unborn baby" and cannot be health care when the pregnant woman procures the abortion for reasons unrelated to her health.

The legislative findings and the statutory definition of "abortion" in the Life Act are consistent with the common and ordinary meaning of the word "abortion" when the statutory scheme was enacted in 2023. At that time, abortion meant "[a]n artificially induced termination of pregnancy for the purpose of destroying an embryo or fetus." *Abortion, Black's Law Dictionary* (11th ed. 2019).

In Wyoming, "legislative findings are controlling in the absence of a controversy questioning their validity." *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1131 (Wyo. 1978). The validity of the legislative finding that "abortion is the intentional termination of the life of an unborn baby" cannot reasonably be questioned because this finding is consistent with the common and ordinary meaning of the word "abortion." And it cannot be reasonably disputed that when an otherwise healthy pregnant woman gets an abortion for reasons unrelated to her own health, abortion is not "health

care." This Court, therefore has no reason to question the validity of the legislative finding that abortion is not "health care" for purposes of section 38(a).

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

VII. Historically and traditionally, Wyoming has not afforded women greater rights to abortion than other states.

Appellees contend that, since territorial times, Wyoming has afforded greater abortion rights to women than other states. (Appellees' Br. at 1, 3-4, 67, 70). The history of abortion regulation in Wyoming tells a different story.

Appellees say that the 1869 territorial abortion law allowed for an abortion to be performed to save the pregnant woman's life or to prevent serious and permanent bodily injury to her. (Appellees' Br. at 3). They then argue that only one other state had similar exceptions as of 1869. (Appellees' Br. at 4). A careful examination of the 1869 territorial abortion law reveals that the so-called exceptions actually are an affirmative defense for

the crime of manslaughter resulting from an attempted or procured abortion, but not for the crime of abortion.

The 1869 territorial abortion law appeared in section 25 of the first criminal code for the Territory of Wyoming. It provided as follows:

> Sec. 25. Any person who shall willfully and maliciously administer, or cause to be administered to, or taken by any person, any poison or other noxious or destructive substance, or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year, and not more than ten years**; and** any person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars**; and** if any woman by reason of such treatment shall die, the person or persons, administering, or causing to be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars**, unless** it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent 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 and underline added).

Section 25 addressed three distinct crimes: poisoning, abortion, and manslaughter resulting from an attempted or procured abortion. (*Id.*). In the text of section 25, each crime and the corresponding penalty for committing that crime were separated from the other crimes with a semi-colon followed immediately by the conjunction "and." (*Id.*).

The first two crimes listed in the 1869 law (poisoning and abortion) had distinct elements and distinct criminal penalties. (*Id.*). The third crime listed (manslaughter

resulting from an attempted or procured abortion) had distinct elements and distinct criminal penalties, but also provided a defense if the "miscarriage was procured or attempted by, or under the advice of a physician or surgeon, with the intent to save the life of [the pregnant woman], or to prevent serious and permanent bodily injury to her." (Id.).

By using semi-colons to separate each crime and corresponding penalty from the others, the Territorial legislature evinced an intent for section 25 to create three distinct crimes. *Cf. United States v. Rivas*, 605 F.3d 194, 209 (3rd Cir. 2010) (explaining that, "[w]hen Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes"). The fact that the life or bodily injury defense appeared only in the manslaughter subsection meant that it applied only to the crime of manslaughter – the defense did not apply to the crimes of poisoning or abortion.

In other words, the clause containing the life and bodily injury defense only related back to the semi-colon that separated the crimes of abortion and manslaughter resulting from an attempted or procured abortion. The semi-colon acted as an interpretive firewall to assure that the defense applied only to the crime of manslaughter. Accordingly, Appellees are legally incorrect when they say that the 1869 territorial abortion law had exceptions that permitted abortion when necessary to save the life of the pregnant woman or to prevent serious bodily injury to her.

Appellees are also factually incorrect when they say that Wyoming has a "long history and tradition of providing women with greater rights to reproductive freedom than other states." (Appellees' Br. at 70). As explained above, the 1869 territorial abortion law

prohibited abortion with no exceptions. In 1884, the Territorial legislature amended the law to create an exception to allow for an abortion to be performed when necessary to preserve the life of the pregnant woman. (1884 Terr. Wyo. Sess. Laws ch. 1, § 2). By the end of the 1950s, statutes in all but four states prohibited abortion except when done to save the life of the pregnant woman. *Dobbs*, 597 U.S. at 249 (citing *Roe v. Wade*, 410 U.S. 113, 139 (1973)). By the time *Roe v. Wade* was decided, thirty states still had statutes that prohibited abortion except when done to save the life of the pregnant woman. *Dobbs*, 597 U.S. at 249-50 (citing *Roe*, 410 U.S. at 118 & n.2). Thus, throughout history, the traditional approach to the regulation of abortion in Wyoming aligned with the majority of the other states in this country.

VIII. Appellees' proffered evidence is not legally relevant.

Appellees give this Court "five independent reasons" to explain why the evidence they have offered (primarily in the form of expert opinions) "provides additional support for finding that [the Life Act and the chemical abortion statute] are not reasonable or necessary and that they constitute undue infringement." (Appellees' Br. at 49-56). In its principal brief, the State addressed the argument of whether facts are admissible to address the technical meaning. (State's Principal Br. at 99-100). None of Appellees' other "independent reasons" have merit.

First, Appellees contend that the "reasonable and necessary" standard in section 38(c) and the "undue governmental infringement" standard in section 38(d) are mixed questions of law and fact. (Appellees' Br. at 49-50) (citing *Griggs v. State*, 2016 WY 16, ¶ 58, 367 P.3d 1108, 1129 (Wyo. 2016); *Estrada v. State*, 611 P.2d 850, 854 (Wyo. 1980);

Kirby Bldg. Sys. v. Min. Expls. Co., 704 P.2d 1266, 1269 (Wyo. 1985); & *Carbaugh v. Nichols*, 2014 WY 2, ¶ 16, 315 P.3d 1175, 1178–79 (Wyo. 2014). The cases cited by Appellees are distinguishable because none of them involved a question of whether a statute was reasonable and necessary to promote the health, safety, and general welfare of the people.

Regardless, the Wyoming legislature "is the department primarily constituted to determine what measures are necessary and proper to further the legitimate purposes or objects of the [police] power[.]" *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938). In enacting statutes under the police power, the "legislative choice is not subject to courtroom fact-finding and need not be based upon evidence or empirical data." *Greenwalt*, ¶ 39, 71 P.3d at 730. Thus, the question of whether the Life Act and the chemical abortion statute are reasonable and necessary cannot be a mixed question of law and fact – it is only a question of law.

Second, Appellees insist they have asserted as applied claims in this appeal. (Appellees' Br. at 13, 15-16, 49, 51, 53, 54, 60, 85, 91, 100). They argue that this Court should consider their evidence on summary judgment when it assesses their as applied claims. (Appellees' Br. at 53-54). This argument fails because the Life Act and the chemical abortion statute have not been applied to any of the specific Appellees (or to anyone else for that matter).

To pursue an as applied challenge, a specific Appellee must show that the application of the Life Act or the chemical abortion statute to her or the enforcement of the statutes against her actually infringed upon one or more of her constitutionally protected

rights. *See, e.g., Sw. Pub. Serv. Co. v. N.M. Pub. Regul. Comm'n*, 548 P.3d 97, 110 (N.M. 2024); *see also Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1302 (10th Cir. 1999) (explaining that an as applied challenge to an administrative rule was "necessarily speculative" until the rule was actually applied to the plaintiff). In such a circumstance, the facts demonstrating how the challenged statutes were applied to or enforced against the specific Appellee and the effect thereof would be relevant adjudicative facts this Court should consider. *See Sw. Pub. Serv. Co.*, 548 P.3d at 110.

Here, no such adjudicative facts exist because the Life Act and the chemical abortion statute have not been applied to any of the Appellees. As a result, they can only mount a facial challenge to the statutes. *Id.*

Third, Appellees rely on two federal cases to argue that both prongs of the strict scrutiny test present questions of fact. (Appellees' Br. at 54) (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) & *United States v. Hardman*, 297 F.3d 1116, 1130 n.20 (10th Cir. 2002)). This argument fails because the right conferred by section 38(a) is not a fundamental right, so the strict scrutiny test does not apply. (*See* State's Principal Br. at 29-30). Nevertheless, neither case cited by Appellees applies here.

The *Shaw* Court stated that the government must have a "strong basis in evidence" to establish a compelling interest for statute challenged as violating the federal Voting Rights Act, but the Court did not say that the compelling interest component of the strict scrutiny test presents a question of fact. *Shaw*, 517 U.S. at 908 n.4. The *Hardman* court said that other federal courts have found the least restrictive means requirement in the federal Religious Freedom Restoration Act to be a fact question, but that statement is dicta

because the Tenth Circuit panel expressly declined to address whether the requirement presented a question of adjudicative fact, constitutional fact, or a mixed question of law and fact. *Hardman*, 297 F.3d at 1130.

Shaw notwithstanding, many federal and state courts have concluded that the compelling interest/least restrictive means test presents a question of law. *See State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009) (en banc) (collecting cases & other authority); *see also Lomack v. City of Newark*, 463 F.3d 303, 307 (3rd Cir. 2006) (strict scrutiny); *Citizens Concerned About Our Child. v. Sch. Bd. of Broward Cnty., Fla.*, 193 F.3d 1285, 1292 (11th Cir. 1999) (same).

Fourth, Appellees contend that their proffered evidence is relevant to determining whether the Life Act and the chemical abortion statute satisfy the reasonable and necessary component of the section 38(c) test and whether the statutes unduly infringe upon the right conferred by section 38(a) because the facts conveyed by that evidence "are plainly the facts of this particular case." (Appellees' Br. at 55) (quotation marks and brackets omitted). In other words, they have argued that this Court may consider adjudicative facts in addressing the facial challenges to the Life Act and the chemical abortion statute.

This case has no relevant adjudicative facts because the Life Act and the chemical abortion statute have not been applied to any of the specific Appellees. The expert opinions offered by Appellees speculate about how the challenged statutes could be applied in a manner that might impermissibly infringe upon their constitutionally protected rights. The proffered opinions do not address how the challenged statutes were actually applied unconstitutionally to any specific Appellee and cannot do so because the statutes have not

been applied to or enforced against anyone. As a result, the expert opinions are not legally relevant in addressing the Appellees' section 38 claim because the claim can only be a facial challenge to the Life Act and the chemical abortion statute.

Appellees also note that, in the past, two courts from the Ninth Circuit took judicial notice of legislative history under Rule 201(b) of the Federal Rules of Evidence. (Appellees' Br. at 55-56) (citing *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)). They then argue that Rule 201(b) applies exclusively to adjudicative facts, so legislative history cited in the State's brief must be adjudicative facts. (Appellees' Br. at 56). They are wrong.

"Legislative history is among the most literally "legislative" of facts[.]" *TracFone Wireless, Inc. v. Neb. Pub. Serv. Comm'n*, 778 N.W.2d 452, 462 (Neb. 2010). This Court may take judicial notice of legislative history without invoking Rule 201 of the Wyoming Rules of Evidence because legislative history consists entirely of legislative facts. *See, cf.*, Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 2:12 (4th ed., Aug. 2023 update) (explaining that, when a court is interpreting a statute or constitutional provision, it may judicially notice legislative history as legislative facts without invoking Rule 201 of the Federal Rules of Evidence). In the past, this Court has taken judicial notice of legislative history without invoking Rule 201. *See, e.g., Kennedy Oil v. Dep't of Revenue*, 2008 WY 154, ¶ 22, 205 P.3d 999, 1006 (Wyo. 2008) (taking judicial notice of legislative materials submitted for the first time on appeal without invoking Rule 201). To

the extent that the federal courts in *Aramark* and *Lopez* did otherwise, those cases from the Ninth Circuit conflict with this Court's precedent and should be disregarded.

Throughout their brief, Appellees cite to interrogatory responses or a response to one request for admission, either as support for an argument they make or as support for a straw man position that they then attack. (Appellees' Br. at 28-29, 31-33, 40, 94-96). The State objected to the written discovery requests below, but the district court compelled the State to respond to them. The State's responses to the written discovery have no legal import here because: (1) written discovery was not warranted in this case; and (2) most of the interrogatories and the request for admission cited by Appellees were legally improper.

As explained above, this appeal involves only facial challenges to the Life Act and the chemical abortion statute. Written discovery is not warranted in case involving only a facial challenge to the constitutionality of a statute. Under Rule 26 of the Wyoming Rules of Civil Procedure, a party may only seek facts or information that is relevant to any party's claim or defense. *Cf. Polk v. Swift*, 339 F.R.D. 189, 194 (D. Wyo. 2021). For purposes of Rule 26, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Herrick v. Jackson Hole Airport Bd.*, 2019 WY 118, ¶ 12, 452 P.3d 1276, 1280 (Wyo. 2019) (citations omitted).

"In cases involving purely legal questions, courts have repeatedly held that discovery is not warranted, because under such circumstances, discovery cannot produce any facts upon which" a motion for summary judgment may be denied. *City of Alexandria v. Cleco Corp.*, 735 F.Supp.2d 465, 471 & n.8 (W.D. La. 2010) (collecting cases). In such

cases, if discovery cannot produce any facts that could provide the basis for denying summary judgment, then any facts or information sought through discovery by definition cannot be relevant for purposes of Rule 26 because the facts or information sought would not tend to make the existence of any consequential fact more or less probable than it would be without the facts or information.

The claims at issue in this appeal involve only purely legal questions. At the broadest level, a challenge to the facial constitutionality of a statute presents only a question of law. *Planned Parenthood Great Nw.*, 522 P.3d at 1201. To address the facial challenges, this Court first must interpret or construe the text of the pertinent constitutional and statutory provisions. The interpretation or construction of constitutional provisions or statutes are questions of law. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (constitutional interpretation); *Solvay Chems., Inc. v. Wyo. Dep't of Revenue*, 2022 WY 124, ¶ 7, 517 P.3d 1146, 1149 (Wyo. 2022) (statutory interpretation).

This Court also must assess the constitutionality of the challenged statutes in light of the applicable constitutional test. Three constitutional tests are potentially applicable in this appeal – the rational basis test, the strict scrutiny test, and the section 38(c) test. The rational basis test and the strict scrutiny test both present questions of law for this Court. *See Good Neighbor Care Ctr., Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 404 (Minn. Ct. App. 1988) (rational basis test); *see also Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990) (same); *Sammon v. N. J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3rd Cir. 1995) (same); (*see also* Section VIII above at 22 (strict scrutiny)). Similar to the rational basis test, the section 38(c) also presents only a question of law. Accordingly,

discovery was not warranted because the claims in this case present only questions of law for this Court to decide.

The State's answers to the written discovery also are not relevant here because most of the interrogatories and the one request for admission cited by Appellees were legally improper. All but four of the interrogatories called for pure legal conclusions. Under Rule 33 of the Wyoming Rules of Civil Procedure, an interrogatory that calls for a "pure legal conclusion" is objectionable. *Gingerich v. City of Elkhart Prob. Dep't*, 273 F.R.D. 532, 537 (N.D. Ind. 2011). Also, an interrogatory is objectionable if it asks the responding party to address legal issues unrelated to the facts of the case. *Parker v. Ritter*, Civil Action No. 08-cv-00737-MSK-KLM, 2010 WL 419398, at *2 (D. Colo. Jan. 28, 2010) (unpublished). The interrogatories in question asked for an interpretation of language used in a statute. (*See* R. at 2166-78 - Interrogatory Nos. 2, 3, 4, 7, 8, 11, 12, 15, 20). Questions of statutory interpretation are questions of law. *Solvay Chems.,* ¶ 7, 517 P.3d at 1149.

The nine interrogatories required the State to interpret statutory language, which means they also sought information regarding conclusions, opinions or legal theories of counsel. "An interrogatory may be objectionable when it inquires into an attorney's mental impressions, conclusions, or legal theories because this information is usually afforded work-product protection." *Encon Int'l., Inc. v. Garrahan*, Case No. 11-2137-KGS, 2013 WL 12250907, at *2 (D. Kan. 2013) (cleaned up).

Request for Admission Number 6 was improper for the same reasons as the nine interrogatories in question. This request also was objectionable because it asked the State to admit a statement that was based upon how terms such as "potential life," "fetus," and

"embryo" are used in the Life Act. (R. at 2184 – Request for Admission No. 6). The request was denied because those terms do not appear anywhere in the Life Act. (*Id.*); (R. at 2178 – Interrogatory No. 22). Or, in other words, this request was denied because it was improperly drafted. The State's response to the request and the corresponding explanation speak for themselves and show that Appellees' self-serving characterization of State's response is wrong.

IX. The standard for assessing the facial constitutionality of a statute applies even when the challenged statute is subject to strict scrutiny.

In its principal brief, the State asserted that "[a] facial challenge is 'the most difficult challenge to mount successfully' because Appellees 'must establish that no set of circumstances exists under which the [challenged statutes] would be valid.'" (State's Principal Br. at 25) (quoting *Dir. of Office of State Lands & Invs. v. Merbanco, Inc.*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003)). To rebut this assertion, Appellees present a somewhat convoluted argument that starts with strict scrutiny, then attempts to tie strict scrutiny to the overbreadth doctrine by asserting that the second prong of the strict scrutiny test is equivalent to the overbreadth doctrine, and finally surmises that, when the strict scrutiny test applies, the no set of circumstances test does not apply. (Appellees' Br. at 15). Their argument lacks merit legally for at least two reasons.

First, the strict scrutiny test does not apply to any of the claims asserted by Appellees. They insist that strict scrutiny applies because the Life Act and the chemical abortion statute "implicate multiple fundamental rights under the Wyoming Constitution[.]" (Appellees' Br. at 14). For strict scrutiny to apply, however, a challenged

statute must do more than merely implicate a fundamental right – the statute must infringe upon that right. *Mills v. Reynolds*, 837 P.2d 48, 55 (Wyo. 1992). Therefore, to "trigger" strict scrutiny review, a plaintiff must establish that the challenged statute infringes upon one of her rights and that the right in question is a fundamental right. *Id.* Appellees have not shown that the challenged statutes infringe upon any fundamental right of any of the individual Appellees. As a result, strict scrutiny does not apply here. Because strict scrutiny does not apply, Appellees' attempt to limit the application of the no set of circumstances test by equating the least onerous means prong of the strict scrutiny test to the overbreadth doctrine fails as a matter of law. (Appellees' Br. at 15).

Second, Appellees' argument cannot be squared with this Court's precedent. This Court adopted the no set of circumstances test from United States Supreme Court precedent in 1992 and has followed it faithfully for more than two decades. *See Dir. of Office of State Lands & Invs.*, ¶ 32, 70 P.3d at 252 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Gordon v. State By & Through Capitol Bldg. Rehab*., 2018 WY 32, ¶ 12, 413 P.3d 1093, 1099 (Wyo. 2018); *Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 303 (Wyo. 2014); *Sheesley*, ¶ 7, 437 P.3d at 834.

Admittedly, not all courts apply the no set of circumstances language from *Salerno* as a test for constitutionality. For example, the Tenth Circuit Court of Appeals has explained that a facial challenge focuses on the terms of the statute and not on hypothetical applications. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012). As a result, the "no set of circumstances exists" language from *Salerno*

> is accurately understood not as setting forth a *test* for facial challenges, but rather as describing the *result* of a facial challenge in which a statute fails to satisfy the appropriate constitutional standard. In other words, **where a statute fails the relevant constitutional test (such as strict scrutiny … or reasonableness review), it can no longer be constitutionally applied to anyone—and thus there is "no set of circumstances" in which the statute would be valid. The relevant constitutional test, however, remains the proper inquiry.**

Id. (italics in original) (ellipsis and emphasis added). Other courts have adopted a similar approach in addressing challenges to the facial constitutionality of a statute. *See, e.g., Nw. Landowners Ass'n v. State*, 978 N.W.2d 679, 687-88 (N.D. 2022); *N.H. Democratic Party v. Sec'y of State*, 262 A.3d 366, 375-76 (N.H. 2021).

The approach that other courts have taken means nothing here because this Court follows the no set of circumstances test to address facial challenges. This Court is not alone in continuing to apply this test when assessing the facial constitutionality of a statute. *See, e.g., Mont. Cannabis Indus. Ass'n v. State*, 368 P.3d 1131, 1138 (Mont. 2016); *Moreno v. Brickner*, 416 P.3d 807, 811 (Ariz. 2018). Appellees have not asked this Court to reconsider its precedent regarding facial challenges and this Court has no reason to do so now. The no set of circumstances test therefore applies to all of Appellees' claims in this case

[Intentionally Left Blank]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the State's principal brief, the State asks this Court to reverse the summary judgment order in its entirety, to grant summary judgment in favor of the State, to deny Appellees' motion for summary judgment in its entirety, and, in the mandate, direct the district court to enter judgment in favor of the State and to dismiss Appellees' amended complaint with prejudice.

DATED this 17th day of March 2025.

/s/Jay Jerde
Jay Jerde, #6-2773
Special Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5996
jay.jerde@wyo.gov

Attorney for Appellants

CERTIFICATE REGARDING ELECTRONIC FILING AND SERVICE

I, Jay Jerde, hereby certify that the foregoing REPLY BRIEF OF APPELLANTS was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 17th day of March 2025, on the following parties:

John H. Robinson
Marci C. Bramlet
Robinson Bramlet LLC
P.O. Box 3189
Jackson, WY 83001

John A. Masterson
159 North Wolcott, Suite 220
Casper, WY 82601

Tyler John Garrett
2515 Warrant Ave., Suite 500
Cheyenne, WY 82001

Amanda Kay Roberts
P.O. Box 5059
Sheridan, WY 82801

And by U.S. Mail to:

Peter Modlin
Gibson Dunn & Crutcher, LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Millicent Cripe
390 Madison Ave.
New York, NY 10017

Janice Mac Avoy
Antonio J. DelGrande
Laura Israel Sinrod
Alexis R. Casamassima
One New York Plaza
New York, NY 10004

Alexandra Dorothy Zaretsky
1310 L. Street, NW, Suite 200
Washington, DC 20005

Jessica Lynn Ellsworth
Danielle Desaulniers Stempel
555 Thirteenth Street, NW
Washington, DC 20004

The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Jay Jerde
Wyoming Attorney General's Office