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IN THE SUPREME COURT, STATE OF WYOMING

MEGAN DEGENFELDER, in her official capacity as Wyoming Superintendent of Public Instruction; CURTIS E. MEIER, JR., in his official capacity as Wyoming State Treasurer; and STATE OF WYOMING,

Appellants
(Defendants),

v.

WYOMING EDUCATION ASSOCIATION, a Wyoming nonprofit membership corporation; JENY GARDNER, individually and on behalf of her minor child; CHRISTINA HUTCHISON, individually and on behalf of her minor children; KATHRYNE PENNOCK III, individually and on behalf of her minor children; KATHARINE and ZACHARY SCHNEIDER, individually and on behalf of their minor children; CHAD SHARPE and KIMBERLY LUDWIG-SHARPE, individually and on behalf of their minor child; and CHRISTINA VICKERS and BRANDON VICKERS, individually and on behalf of their minor children,

Appellees
(Plaintiffs).

No. S-25-0203

APPELLANTS' BRIEF

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STATEMENT OF JURISDICTION

This appeal arises from a preliminary injunction issued in the District Court for the First Judicial District, Laramie County, Wyoming. (R. at 538-58). The district court filed the order granting the preliminary injunction on July 15, 2025. (*Id.* at 538). An order granting a preliminary injunction is a final appealable order. Wyo. R. App. P. 1.05(e). As required by Rule 2.01 of the Wyoming Rules of Appellate Procedure, the Wyoming Superintendent of Public Instruction, Wyoming Treasurer, and State of Wyoming filed their notice of appeal within thirty days of the order, July 17, 2025. (R. at 559-61). Therefore, jurisdiction is vested in this Court under article 5, section 2 of the Wyoming Constitution.

STATEMENT OF THE ISSUES

- I. Did the district court clearly err when, without evidence, it found that the plaintiffs would suffer irreparable harm without a preliminary injunction?

- II. Did the district court incorrectly determine that an appropriation to the Superintendent of Public Instruction to pay for educational services violated article 3, section 36 of the Wyoming Constitution because it was an appropriation to an entity not under the absolute control of the State?

STATEMENT OF THE CASE

I. Nature of the Case

The district court enjoined the Superintendent, Treasurer, and State of Wyoming (collectively the “State”) from implementing the Steamboat Legacy Scholarship Act. The Act implements an education savings account program, or ESA Program. Plaintiffs below, comprising the Wyoming Education Association and several parents on their own and their children’s behalf (collectively “Appellees”), seek a declaration that the ESA Program is unconstitutional and a permanent injunction to halt its operation. In addition, they sought a preliminary injunction to stop the ESA Program from continuing. Appellees offered no evidence to support their claims, either in the form of affidavits or evidence submitted in an evidentiary hearing other than one five-paragraph affidavit. The district court, relying exclusively on its interpretation of article 3, section 37 of the Wyoming Constitution and untested allegations in the complaint, issued the preliminary injunction. To decide this issue, this Court should consider cases like *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380 (Fed. Cir. 1986), where federal courts have held that a trial court must receive evidence to support preliminary injunction fact findings. This Court should also consider its cases interpreting the Wyoming Constitution, such as *Geringer v. Bebout*, to determine whether the word “appropriation” in article 3, section 36 applies only to a legislative appropriation. 10 P.3d 514, 520-22 (Wyo. 2000).

II. Facts Relevant to the Issues Presented for Review and Relevant Procedural History

In 2024, the Wyoming Legislature created the ESA Program in the Education Savings Accounts Act. 2024 Wyo. Sess. Laws 231-42. The operational portions went into effect on January 1, 2025. *Id.* at 242. The Legislature amended and renamed the program in 2025. 2025 Wyo. Sess. Laws 216, 216-20. The 2025 changes were effective immediately. 2025 Wyo. Sess. Laws 220. The formal name is now the Steamboat Legacy Scholarship Act. *Id.* at 216. The State generally refers to the program as the ESA Program.

Generally speaking, the ESA Program appropriates funds to an account within the general fund. Wyo. Stat. Ann. § 21-2-903(b); 2025 Wyo. Sess. Laws 220. The Superintendent manages the program and disbursements from that account. Wyo. Stat. Ann. § 21-2-903(b); 2025 Wyo. Sess. Laws 220. The Legislature also appropriated funding for two Department of Education employees and an outside contractor to administer the Program. 2024 Wyo. Sess. Laws 241. The Superintendent approves education service providers who are eligible to offer goods and services and receive payments under the program. Wyo. Stat. Ann. § 21-2-907(a). The Superintendent also contracts with parents of eligible children to set the terms that govern their ESA Program participation. *Id.* § 21-2-904.

The ESA program only pays for expenses of school-age children when their parents have opted them out of public schools. *Id.* § 21-2-904(b)(ii)(C). Students four years old and above may not simultaneously be enrolled in public school and participate in the ESA

program. *Id.* The ESA Program had been effective in its current form since March 4, 2025. 2025 Wyo. Sess. Laws 220.

Appellees filed suit and a motion for a preliminary injunction on June 13, 2025. (R. at 1-30; 75-110). In their complaint, Appellees alleged that the WEA was a nonprofit corporation with approximately 5,000 members. (*Id.* at 6). They claimed that members are educators and educational support personnel, taxpayers, and many are parents of public school students. (*Id.*). Appellees assert that the WEA’s purpose is to “further public education and the education profession in Wyoming.” (*Id.*).

Appellees allege facts specifically about the parent-plaintiffs and their children. They assert that their children all currently attend public schools. (*Id.* at 7-9). Appellees claim that some children, whose parents are Jeny Gardner, Christina Hutchison, Chad Sharpe and Kimberly Ludwig-Sharpe, Christina and Brandon Vickers, and Kathryne Pennock III, have disabilities and receive services either under the Individuals with Disabilities in Education Act or section 504 of the Rehabilitation Act or both. (*Id.*). Appellees also allege that one of Katharine and Zachary Schneider’s children is non-binary, Jeny Gardner’s child identifies as queer, and one of Christina and Brandon Vickers’s children is trans-female. (*Id.* at 7-8).

Appellees did not allege that the parent-plaintiffs intend to use the ESA Program themselves. They allege that the Program harms the parent-plaintiffs because private schools can refuse to admit “children with disabilities like [their] children,” and that private schools “are not required to provide special education services or comply with IEP’s [sic] [individualized education programs].” (*Id.* at 9). They claim that the ESA Program harms

their non-binary, queer, and transgender children because private schools can refuse to admit students with these characteristics. (*Id.*) For both these students and those with disabilities, Appellees assert that they “are unaware of any private school[s]” that would admit their children. (*Id.*).

Finally, Appellees assert that the ESA program harms the public schools. (*Id.* at 10).

They claim that:

As students leave the public school system using public funds provided through the [ESA] Program, the public schools will lose funding under the Average Daily Member . . . formula, thereby resulting in fewer resources available to educate and support the students remaining in public schools like [Appellees’] children.

(*Id.*) They alleged that the ESA Program is part of the public school system and lacks uniform education standards that are part of that system. (*Id.* at 15-23).

Appellees also claim that the ESA Program violates the Wyoming Constitution. (*Id.* at 24-29). They alleged specifically that it violates article 7, sections 1 and 9; article 16, section 6, and—most importantly for this appeal—article 3, section 36 of the Wyoming Constitution. (*Id.*).

After Appellees filed their complaint and motion for preliminary injunction, the State responded. (*Id.* at 351-69). About the same time, several parents moved to intervene as defendants and filed a proposed response to Appellees’ motion. (*Id.* at 167-242; 247-350). Appellees filed a reply the day before the hearing, which the district court held on June 27, 2025. (*Id.* at 143-45; Tr. at 1-124).

At that hearing, the district court heard only the parties' arguments and did not take evidence.¹ (Tr. at 1-124). The court verbally ordered that the ESA program be enjoined at the hearing and issued a "temporary" written order three days later. (*Id.* at 120-23; R. at 428-30). Neither the court's oral order nor its written order contained findings of fact or conclusions of law. (Tr. at 120-23; R. at 428-30). The court issued a more robust order granting a preliminary injunction about two weeks later, on July 15, 2025. (R. at 538-58). The State filed its notice of appeal two days later. (*Id.* at 559-62). The intervenors also appealed, and that case is docketed in this Court as No. S-25-0204.

III. Rulings Presented for Review

The district court's preliminary injunction relied on article 3, section 36 of the Wyoming Constitution as the basis for finding that Appellees would probably succeed on the merits. (*Id.* at 544-48). The court interpreted the word "appropriation" in section 36 to mean any payment for what it believed to be a prohibited purpose if the funds would end up in the hands of an entity the State does not absolutely control. (*Id.* at 545-48). It did not consider to whom the Legislature appropriated the funds. (*Id.*). It reasoned that to do

¹ The court received an affidavit from Grady Hutcherson that Appellees provided at the very end of the hearing. (Tr. at 113-15; R. at 407-10). The State objected to producing this affidavit without any notice to the other parties. (Tr. at 118-19). The court effectively, though not explicitly, overruled the objection. (*Id.* at 120). The court did not, however, rely on or otherwise cite the Hutcherson affidavit. (R. at 538-58).

otherwise would allow the Legislature to do indirectly what the court believed it was prohibited from doing directly. (*Id.* at 546-47).

The district court concluded that strict scrutiny applies to any court analysis of the ESA Program. (*Id.* at 548-51). The court declared that the ESA Program is part of the school finance system because public funds are used for educational purposes. (*Id.* at 549-50). It did not find significant the fact that parents have opted out of attending public schools. (*See id.*). The court applied strict scrutiny—though untethered from any particular constitutional provision—and determined that the ESA Program is not narrowly tailored. (*Id.* at 548-51).

The district court began its irreparable harm discussion by reciting Appellees' allegations as stated in the complaint as if they were established fact. (*Id.* at 552-53). After summarizing its perception of the parties' arguments, the court reasoned that public funds being disbursed in a manner violating the Wyoming Constitution constituted irreparable harm. (*Id.* at 552-55). It also reasoned that private schools that might receive payments as providers under the ESA Program had discriminatory admission policies. (*Id.* at 555-56). The court did not explain how supposedly improper expenditures to private schools particularly harmed Appellees in light of the lack of evidence and the parent Appellees' allegations that their children attended public schools. (*Id.* at 555).

Based on its findings of fact and conclusions of law, the district court enjoined the State from distributing any ESA funds to pay education expenses. (*Id.* at 557). The court allowed the State to continue to pay Department of Education employees' salaries and costs of a contractor administering the program. (*Id.*).

ARGUMENT

I. The district court clearly erred when it found that Appellees would suffer irreparable harm without evidence to support those findings.

The most obvious flaw in the injunction below is the district court's finding that Appellees would suffer irreparable harm based on no evidence. The court did not base its irreparable harm finding on any evidence. Instead, the court relied on unproven allegations in the complaint. To the extent that the court found that improper spending constituted irreparable injury, it did not find or have evidence that Appellees in particular would be harmed by the alleged unconstitutional spending.

A. Standard of Review

As an overall matter, this Court reviews preliminary injunction decisions for abuse of discretion. *Malave v. W. Wyo. Beverages, Inc.*, 2022 WY 14, 503 P.3d 36 (Wyo. 2022). This standard, however, consists of two parts. While its legal conclusions are subject to de novo review, its factual findings are subject to clear error review. *Brown v. Best Home Health & Hospice, LLC*, 2021 WY 83, ¶ 9, 491 P.3d 1021, 1026 (Wyo. 2021). Clear error exists when this Court is left with a firm conviction that the district court has made a mistake. *Id.* To the extent that any evidence exists on which the district court based its decision, this Court should view that evidence in the light most favorable to the moving party. *Id.*

B. The district court lacked evidence to support its findings that Appellees would suffer irreparable injury without an injunction.

The standard for preliminary injunctive relief is whether the movant has demonstrated "a clear showing of probable success on the merits of the suit and possible

irreparable injury to the plaintiff[.]” *Malave*, ¶ 8, 503 P.3d at 39 (citations and internal brackets omitted). It is not sufficient that an injury may be merely possible. An ordinary reading illustrates that the “clear showing” requirement applies to both “probable success on the merits” and “possible irreparable injury.” The two requirements are structurally parallel in that that “success” and “injury” each have their own modifier, “probable” and “possible,” respectively. The “clear showing” requirement logically applies to both items on the following list. Accordingly, a movant has an obligation to clearly show irreparable harm.

The district court’s irreparable injury finding appears to rely on its opinion that the ESA program would bring about systemic, non-particularized harms. In one of its most attenuated conclusions, the court stated that Appellees would be injured if general funds were disbursed “in violation of the constitution” and the harm is irreparable because those funds cannot be recovered. (R. at 555). All Appellees’ allegations concerning their preferences and policy interests in the ESA Program do not amount to particularized harms that have or are likely to affect these individuals.

This Court has never held that legislative spending that has no particularized effect on a litigant constitutes irreparable harm. This Court’s standing cases are instructive, however, because they focus on whether the plaintiff has shown some kind of past or reasonably certain harm sufficient to raise a justiciable case. A harm sustaining a preliminary injunction should at least meet the minimum requirements necessary to sustain standing. Standing requires a personal stake in the case, more than just a speculative or remote possibility of injury. *Weldon v. Gordon*, 2022 WY 115, ¶ 9, 517 P.3d 550, 553

(Wyo. 2022); *N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty Comm'r*, 2012 WY 158, ¶¶ 23-24, 290 P.3d 1063, 1073-74. Just like the harm that would give rise to prudential standing, any harm that a movant would suffer absent an injunction must be particular to the movant. Compare *Gaston v. Life Care Ctrs. of Am., Inc.*, 2021 WY 74, ¶ 46, 488 P.3d 929, 943 (Wyo. 2021) to *Hammel v. Speaker of House of Representatives*, 825 N.W.2d 616, 651-52 (Ct. App. Mich. 2012).

Hammel is particularly instructive. Michigan legislators brought an action against that state's House of Representatives and its leadership. *Hammel*, 825 N.W.2d at 619. The plaintiffs argued that a law violated the Michigan Constitution because the House of Representatives did not follow certain procedural requirements. *Id.* at 619-20. The trial court entered a preliminary injunction against the new law taking effect. *Id.* at 619. When it reversed the district court, the Michigan Court of Appeals noted that irreparable harm must be particularized to the party seeking the injunction. *Id.* at 622. In this case, the “[p]laintiffs’ generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized.” *Id.* at 652.

This Court already has robust caselaw concerning whether a party has or will suffer a particularized harm through its prudential standing cases. In *Miller v. Wyoming Department of Health*, for example, this Court favored the U.S. Supreme Court's articulation, which includes a harm that is ““concrete and particularized”” and ““actual or imminent, not conjectural or hypothetical.”” *Miller v. Wyo. Dep't of Health*, 2012 WY 65, ¶ 18, 275 P.3d 1257, 1261 (Wyo. 2012) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and punctuation omitted)).

Zoning and land use cases also provide an apt analogy given that some activities, such as increased traffic or dust, affect citizens as a whole. In those cases, this Court has held that standing requires harms above and beyond those sustained by the general public. *Knight v. City of Riverton*, 259 P.2d 748, 751 (Wyo. 1953). To have standing to allege nuisance, for example, individuals may not “champion[] the rights of the public[.]” *Id.* They can only maintain actions where they have “suffered some special damage[.]” *Id.* In *Tayback v. Teton County Board of County Commissioners*, this Court found that nearby landowners had a sufficient interest above that of the general public where they showed particularized injury: interference with their viewshed and suffering dust and noise nearly every day. *Tayback v. Teton Cnty. Bd. of Cnty. Comm’rs*, 2017 WY 114, ¶¶ 18-19, 402 P.3d 984, 989 (Wyo. 2017).

Appellees allege that they “believe that public funds should be used to support public schools” and other disagreements with the policy behind the ESA program. (R. at 9-10). Appellees’ allegations along these lines are no different from the separation of powers concerns raised in *Allred v. Bebout* or the policy interests raised by the lead plaintiffs in *Northern Laramie Range Foundation* and *Protect Our Water Jackson Hole*. *Allred v. Bebout*, 2018 WY 8, ¶ 44, 409 P.3d 260, 273 (Wyo. 2018); *N. Laramie Range Found.*, ¶ 35, 290 P.3d at 1076 ; *Protect Our Water Jackson Hole v. Wyo. Dep’t of Env’t Quality*, 2025 WY 36, ¶¶ 10-23, 566 P.3d 181, 184-88 (Wyo. 2025). Policy preferences are insufficient to establish standing, let alone an irreparable injury sufficient to support a preliminary injunction.

Appellees do not allege that they will actually suffer particularized harm. They allege that the parent plaintiffs “choose[] to send their children to public school.” (R. at 9). They follow with articulating some features of the public school system that led the parents to that choice. (*Id.*). They oppose the ESA “due to the harmful impact it will have on [the parents’] children.” (*Id.*). Appellees do not specifically claim that the children will be harmed, but rather allege that “students like plaintiffs’ children” will be harmed because private schools can refuse admission to children with disabilities who are “like plaintiffs’ children” and are not required to provide the same services as public schools. (*Id.*). They make the same allegations concerning children “like these plaintiffs’ children” who identify as queer, transgender, or non-binary. (*Id.*).

Aside from the fact that plaintiffs claim that other people’s children will be harmed, not their own, those allegations do not contain anything “more than a conclusory assertion that a party has a legitimate claim of entitlement to a protectable right.” *Protect Our Water Jackson Hole*, ¶ 24, 566 P.3d at 188. Appellees do not precisely allege the effect on parent-plaintiffs’ children when private schools paid with ESA Program funds are able to refuse admission to certain students. (R. at 8-9). Appellees do not assert that the parent-plaintiffs have requested enrollment at their chosen private school and been declined. In fact, they cannot allege that there are no private schools in their areas that would refuse to enroll their children, only that they are “unaware” of a school that would admit their children. (*Id.*). Moreover, private school attendance is already an option for Wyoming parents. Wyo. Stat. Ann. § 21-4-102(a). Nothing in the ESA Program changes this status quo. General and

conclusory statements aside, Appellees do not allege that the ESA program will result in any difference to their children's education, and accordingly, any irreparable harm.

Nevertheless, the district court found that they had suffered irreparable harm for injunctive purposes. (R. 552-57). It is odd that Appellees could suffer irreparable harm when they have no particularized injury sufficient to meet even standing requirements.

Even if the allegations were sufficient, if true, Appellees did not support those allegations with evidence. Courts and commentators alike have noted that a clear showing of possible irreparable injury requires evidence. "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction." 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2949 (3d ed. 2025).

For example, the U.S. Supreme Court found "serious error" when the district court issued a preliminary injunction without making findings of fact and there was no record to support the district court's injunction. *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940). In *Digital Equipment Corp.*, the district court did not engage in any fact finding before issuing an injunction. *Digital Equipment Corp.*, 805 F.2d at 382-83. While the beneficiary of the injunction argued that the Court of Appeals could review the record and uphold the injunction, the court declined. *Id.* at 383. The court vacated the injunction because of the district court's basic failure to receive evidence and base its preliminary injunction decision on that evidence. *Id.* It reasoned that a reviewing court has nothing before it to review when no evidence exists in the record. *Digital Equipment Corp.*, 805 F.2d at 383.

This Court has historically agreed with the general proposition that finding facts requires evidence to support those findings. It reverses for clear error where district courts make findings without evidence. For example, in *Vroman v. Town & Country Credit Corp.*, this Court overturned the district court's finding that the prevailing plaintiff below was not entitled to damages. *Vroman v. Town & Country Credit Corp.*, 2007 WY 82, ¶ 1, 158 P.3d 141, 143 (Wyo. 2007). This Court found that the district court had no evidentiary basis for that conclusion. *Id.*

Similarly, in *Brown v. State*, this Court found that no evidence supported the district court's finding that a law enforcement protective sweep of a home was justified under the totality of the circumstances. 738 P.2d 1092, 1095 (Wyo. 1987). The criminal defendant was arrested outside the home, and the State provided no evidence that would have caused officers to suspect any other person was inside the home. *Id.*

More recently, in *Boot Ranch, LLC v. Wagonhound Land & Livestock Company, LLC*, this Court found two of the district court's findings clearly erroneous. 2024 WY 136, ¶¶ 45, 53, 560 P.3d 887, 898, 899 (Wyo. 2025). First, it determined that no evidence supported the conclusion that boundary fence remnants were the remains of a fence of convenience. *Id.* ¶ 47, 560 P.3d at 898. Second, it held that the district court's finding that one ranch gave permission to its neighbor to use property owned by the former was clearly erroneous. *Id.* ¶ 56, 560 P.3d at 899.

The common thread in these cases is the uncontroversial proposition that a factual finding requires evidence to support it. The cited cases involve some evidence presented to the district courts, but not enough to support their findings. *Vroman*, ¶ 1, 158 P.3d at 143

(bench trial); *Brown*, 738 P.2d at 1094 (suppression hearing); *Boot Ranch*, ¶ 9, 560 P.3d at 891 (bench trial). The case for reversal is even more clear where there is no evidence at all.

The district court below held a three-hour hearing on the preliminary injunction. (R. at 539; Tr. at 2, 123). Appellees presented no witnesses or testimony at that hearing. (*Id.*). They also did not attach any affidavits or exhibits to their memorandum supporting their motion for a preliminary injunction. (R. at 80-110). The single piece of evidence that the district court received—in the last five minutes of the hearing, over the State’s objection, and without any opportunity for cross-examination—was a brief affidavit from WEA president Hutcherson. (Tr. 113-20; R. at 407-10). Hutcherson, without any significant foundation, summarily stated that he believed “[t]o the best of [his] knowledge” that generally some facts in the complaint are true. (R. at 408). It is therefore unsurprising that the district court did not rely on this affidavit, but relying on the complaint itself is no better.

Allegations in a complaint are not evidence. *State v. Mau*, 285 P. 992, 996 (Wyo. 1930); *see also Groff v. McKellar Tiedeken & Scoggin, LLC*, 2025 WY 54, ¶ 12 n.1, 568 P.3d 1164, 1167 n.1 (Wyo. 2025) (affirming grant of summary judgment despite non-movant’s allegations from the complaint). Here, the district court relied exclusively on the alleged facts in the complaint—it did not mention the Hutcherson Affidavit or any evidence that the intervenors presented in their briefing. (R. at 552-57). While the district court made findings of fact, none of those facts are supported by evidence. Without evidence to support the district court’s finding of irreparable harm, that finding is clearly erroneous.

Moreover, even accepting *arguendo* that the allegations in the complaint are true, they do not articulate any particularized harms that Appellees would suffer. The parents and students allege that they choose public schools, a choice that is unaffected by the ESA Program's existence. (R. at 7-10).

C. Appellees should not profit from their strategic delay in bringing this action.

A preliminary injunction is an equitable remedy. *Brown*, ¶ 8, 491 P.3d at 1026. Preliminary injunctions prevent future harms to the party seeking the injunction by preserving the status quo until the court can fully consider the matters before it. *In re Kite Ranch, LLC v. Powell Family of Yakima, LLC*, 2008 WY 39, ¶ 22, 181 P.3d 920, 926 (Wyo. 2008). They should be reserved for cases in which an emergency requires court action before it can consider the merits of the matter. *Brown*, ¶ 7, 491 P.3d at 1026. The risk in granting a preliminary injunction is that the enjoined party may be constrained when no wrong has been committed. *Weiss v. State ex rel. Danigan*, 434 P.2d 761, 762 (Wyo. 1967). The goal of an injunction is to preserve the status quo. *Simpson v. Petroleum, Inc.*, 548 P.2d 1, 3 (Wyo. 1976). "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." 11A Fed. Prac. & Proc. Civ. § 2948.1.

In this case, Appellees did not bring their action when the ESA program originally passed in 2024, or even when it was about to become fully effective on January 1, 2025. 2024 Wyo. Sess. Laws 242; (R. at 1). Instead, they waited while the ESA Program proceeded through implementation and was poised to begin distributing funds. (R. at 12).

Appellees and the district court apparently believed, without evidence, that the ESA program did not actually begin operating until May 2025. (Tr. at 117). Even if this were true, the ESA Program existed in law, and there was no reason to believe that the executive branch would simply ignore legislative directives.

Moreover, paying for educational expenses is merely the last step in implementing a program. The Legislature appropriated funds for both full-time positions in the Department of Education and for a contractor to help with developing the ESA Program. 2024 Wyo. Sess. Laws 241-42. The record contains nothing but arguments of Appellees' counsel on this point. (Tr. at 117). But "argument of counsel is not evidence." *Sorensen v. State*, 2019 WY 80, ¶ 27, 444 P.3d 1283, 1289 (Wyo. 2019).

While the record is sparse, it is sufficient to show that the Department of Education was working to stand up the ESA Program. This Court need only consider that the Department issued emergency rules to implement the ESA program. *Emergency Rules, Dep't of Educ., Gen. Agency, Bd. or Comm'n Rules*, ch. 48 (May 15, 2025; expired Sept. 12, 2025). Logically, the Department expended time and other resources developing those rules before adopting them.

Appellees delayed filing suit until the ESA Program was on the cusp of distributing funds, even though the Program had been effective and in development for over a year. The point of a preliminary injunction is that there is an urgent need for immediate action to protect the movant's rights. *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D. N.Y. 1959)). When a

movant sits on his hands instead of pursuing relief, that shows that there is no need for immediate action. *Id.*

Appellees apparently did not believe that the ESA Program was unconstitutional throughout 2024. By their own admission, they sat on their claims until it appeared that the ESA program was nearing the state where funds would soon be disbursed. (Tr. 117:8-117:24). If any urgency exists, it is of Appellees' own making. They should not profit from their own dilatory conduct.

II. The district incorrectly found that the ESA Program violates article 3, section 36.

The district court concluded that the ESA Program violates article 3, section 36 of the Wyoming Constitution. (R. at 547). In doing so, it expanded the word “appropriation.” (*Id.* at 544-46). Under the district court’s interpretation, if legislatively appropriated funding eventually comes into the possession of an entity not under the State’s absolute control, that appropriation is improper. (*Id.*). The district court’s interpretation is incorrect as a matter of constitutional interpretation. Its interpretation would broaden section 36’s appropriation prohibition beyond reason and remove the Legislature’s ability to tackle difficult social welfare problems.

A. Standard of Review

As articulated above, this Court reviews preliminary injunction decisions as a whole for abuse of discretion. *Malave*, ¶ 7, 503 P.3d at 39. A district court’s legal conclusions are subject to de novo review. *Brown*, ¶ 9, 491 P.3d at 1026. Consequently, this Court reviews the question below “by employing the same standards and by examining the same material

as did the district court, without a presumption of correctness as to the conclusions reached below.” *Haney v. Cribbs*, 2006 WY 158, ¶ 12, 148 P.3d 1118, 1123 (Wyo. 2006).

B. The district court’s interpretation of article 3, section 36 of the Wyoming Constitution nullifies the appropriation requirement.

The district court concluded that the Appellees were likely to succeed on the merits because The ESA Program “clearly violates the plain and unambiguous terms of Art. 3, § 36 of the Wyoming Constitution.” (R. at 547). Article 3, section 36 states:

No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

A plain reading application of section 36 would be to consider 1) whether the Legislature appropriated funding to an entity not under the absolute control of the State, and 2) whether the appropriation is for a charitable, industrial, educational, or benevolent purpose, or the object of the appropriation is a denominational or sectarian institution or institution. If the district court properly applied that analysis, it should have concluded that the appropriation was not to one of the covered entities. The appropriation was to a state fund within the treasury that the Superintendent of Public Instruction administers. Wyo. Stat. Ann. § 21-2-903(b).

The district court reasoned that “[n]o appropriation shall be made” does not only limit the Legislature’s appropriation authority. (R. at 544-48). Instead, it reasoned that when the Legislature appropriates funding that will ultimately be paid to private actors, like education service providers, the legislature has appropriated funding to those

providers. (*Id.*). In doing so, the district court ignored section 36's plain language and construed "appropriation" so broadly that it is meaningless.

This Court follows the same rules when construing the Wyoming Constitution as it applies when construing statutes. *Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006). The Constitution should not be interpreted in a way that renders any portion meaningless. *Geringer*, 10 P.3d at 520. As with statutes, this Court should give "effect to every word, clause, and sentence[.]" *State v. Juarez*, 2011 WY 110, ¶ 5, 256 P.3d 517, 519 (Wyo. 2011) (citations omitted); *id.* It should construe section 36 in a manner that avoids nullifying part of its plain text. *See Roush v. State*, 2014 WY 45, ¶ 9, 322 P.3d 34, 36 (Wyo. 2014) (holding that courts should avoid nullifying any part of statutory text).

The district court violated these fundamental principles. The plain text in section 36 places limits on the Legislature's ability to appropriate funds: 1) to entities not under the absolute control of the state; and 2) for "charitable, industrial, educational or benevolent purposes." Wyo. Const. art. 3, § 36. Article 3, section 36 has a parallel modification structure with a verb phrase ("shall be made") modified by two parallel adverbial phrases. One is to describe the purpose and is preceded by "for." The other describes the recipient and is preceded by "to." Under section 36's plain language, an appropriation to be prohibited, it must meet both purpose and recipient requirements.

An appropriation does not violate section 36 if it is for "charitable, industrial, educational or benevolent purposes" so long as it is to an entity "under the absolute control of the state." *Id.* Similarly, an appropriation would be permitted to an entity not under the

absolute control of the State under section 36 so long as it is not “for charitable, industrial, educational or benevolent purposes.” *Id.* Both circumstances must exist for the section 36 prohibition to apply.

But the district court reasoned that it did not matter to whom the appropriation was directed if funding would eventually make its way to an entity that the State does not absolutely control. (R. at 545-47). If the funding would be spent on one of the purposes listed in the statute, the district court concluded it is for an “improper use.” (*Id.* at 546). This conclusion renders the recipient language null and void. By this reasoning, it simply does not matter to whom the Legislature appropriates funds because funding will eventually land in private hands. According to the court, only the purpose for which funds are appropriated is relevant.

The district court’s reasoning renders other constitutional provisions nonsensical. For example, if providing funds “for charitable . . . or benevolent purposes” were broadly prohibited under section 36 no matter to whom the funds were appropriated, there would be no reason to provide an exception to the article 16, section 6 prohibition on donations to individuals “for necessary support of the poor.” Wyo. Const. art. 16, § 6. Assuming that “necessary support of the poor” is a “charitable . . . or benevolent purpose[],” an exception in article 16, section 6 would be unnecessary if those kinds of appropriations were banned in their entirety by section 36.

Neither the district court nor Appellees raise authority suggesting that the section 36 recipient restriction applies to the funds’ ultimate destination. The district court reasoned that the Legislature could not do indirectly what it was prohibited from doing

directly. (R. at 546-47). In doing so, the court stated that this Court had already rejected the proposition that the restrictions on appropriations in section 36 apply only to the Legislature's initial appropriation. (R. at 546). But this Court has done no such thing.

The district court relied on *Witzenburger v. State ex rel. Wyoming Community Development Authority*, 575 P.2d 1100 (Wyo. 1978). The court cited one of *Witzenburger's* core holdings: bonds were debts of the State despite a legislative pronouncement to the contrary. (R. at 546), *Witzenburger*, 575 P.2d at 1117. But that conclusion was based on article 16, sections 1 and 2 of the Wyoming Constitution, not article 3, section 36. *Witzenburger*, 575 P.2d at 1114-17. Section 36 governs both the purpose and to whom an appropriation is made. Wyo. Const. art. 3, § 36. By contrast, article 16, sections 1 and 2 prohibit the State from achieving a particular result, that is, debt exceeding certain thresholds. *Id.* art. 16, §§ 1, 2. Though *Witzenburger* mentioned section 36, this Court held that section 36 had “no application[] under the facts of this case.”² 575 P. 2d at 1133. Given that holding, the district court incorrectly stated that this Court has already decided the matter of whether appropriation under section 36 is limited to the Legislature's action.

If applied more generally, the district court's reasoning would wreak havoc on longstanding social welfare programs and misery on Wyoming residents. If the critical factor is whether the funding appropriated by the Legislature ends up in the hands of a

² The published opinion has a typographical error in that it refers to “s 3, Article III[.]” *Witzenburger*, 575 P.2d at 1133. This Court was referring instead to section 36 given that it was answering a question it rhetorically posed concerning section 36. *Id.*

person or entity that is not in the absolute control of the State, the supplemental nutrition assistance program, for example, fits the bill. This program is a public welfare benefit providing public assistance to “individuals lacking sufficient income or resources to provide themselves or their families with a reasonable subsistence compatible with decency and health.” Wyo. Stat. Ann. §§ 42-2-102(a)(iv), (vi), (vii)(H); 42-2-103(a). The Legislature appropriates funding for “Assistance & Services” to the Department of Family Services. 2024 Wyo. Sess. Laws 280. This budget line includes the supplemental nutrition assistance program, among other social welfare benefits. *See* 2024 Wyo. Sess. Laws 259-60 (incorporating “the approved budget of each agency”).³ The Department then provides the benefit directly to qualifying households. 7 C.F.R. § 274.2. Applying the district court’s rationale would render nutrition assistance unconstitutional under section 36.

Additionally, other educational benefits provided to parents who opt out of public schools would be foreclosed under the district court’s reasoning. For example, Wyoming’s eligibility for Individuals with Disabilities in Education Act (“IDEA”) funding requires it to ensure that a proportionate share of funding be used to support children with disabilities in private schools. 20 U.S.C. § 1412(a)(10)(i); 34 C.F.R. §§ 300.132, 300.133. Districts must use IDEA funding to provide services to parentally placed private school students

³ 2025-2026 Biennium Budget Request, Agency 049: Department of Family Services, at 41-43 (2024), https://drive.google.com/file/d/1wUFL1ewgyqCn4nlNa4-5gOIz-cjQ_P66/view.

based on the ratio of those students to the overall number of students with disabilities in the district. 34 C.F.R. § 300.133. The district must then develop an equitable services plan for each parentally placed private school student with a disability. 34 C.F.R. §§ 300.132, 300.134, 300.137, 300.138, 300.139.

The Legislature appropriates IDEA funds, including the portion for equitable services, to the Department of Education as part of its School Support budget. 2024 Wyo. Sess. Laws 305; *see* 2024 Wyo. Sess. Laws 259-60 (incorporating “the approved budget of each agency”); *2025-2026 Biennium Budget Request, Agency 206: Department of Education*, at 95-96, 119-21, <https://drive.google.com/file/d/1mNXEBjrlAmYZ3IgVX1YOGuQkONUWSKyL/view>. Whether provided by district employees or other service providers, funds must be paid to persons who are not under the State’s absolute control. 34 C.F.R. § 300.138(c)(1). Accordingly, if the district court correctly interpreted section 36, school districts may no longer provide equitable services to these students. Its reasoning allows for no limiting principle that would prevent these absurd consequences.

In this case, appropriated funds for the ESA Program serve an educational purpose. Wyo. Stat. Ann. § 21-2-904(b)(i). But the Legislature appropriated funds to the Steamboat Legacy Scholarship Program account, controlled by the Superintendent of Public Instruction. 2025 Wyo. Sess. Laws 220; Wyo. Stat. Ann. § 21-2-903(b). The office of the Superintendent is under the absolute control of the State. Accordingly, as a matter of law, the ESA program does not violate section 36.

C. Strict scrutiny does not apply.

The district court determined that strict scrutiny applies in this matter because it concluded that the ESA Program relates to education finance. (R. at 548-51). But the ESA Program is not part of the public school system. The Program is supported by general funds and is available only to children whose parents have opted out of the public school system. 2024 Wyo. Sess. Laws 241; 2025 Wyo. Sess. Laws 220; Wyo. Stat. Ann. § 21-2-904(b)(ii)(C).

Even if the ESA Program were part of the public school system, the district court incorrectly applied strict scrutiny without first finding that the program violated any person's individual rights. *Mills v. Reynolds* illustrates the two-step process this Court uses when scrutiny is appropriate. 837 P.2d 48 (Wyo. 1992). First, it determined that the challenged statute infringed on the right to access the courts, then it applied strict scrutiny to determine if that infringement was justified. *Id.* at 54-55. *See also Dugan v. State*, 2019 WY 112, ¶ 21, 451 P.3d 731, 738-39 (Wyo. 2019) (articulating the two-step process for determining if infringements on speech are justified). Whether a court applies strict scrutiny or the rational basis standard, that analysis occurs only after it identifies an infringement on individual constitutional rights.

In this case, the ESA Program does not violate any person's constitutional rights. As already discussed, even assuming Appellees were able to provide evidence supporting their allegations, they have not been directly harmed and are not about to be directly harmed by general funding being used for an allegedly improper purpose. Public School funding will continue in its present form and availability and parents will still be able to send their

children to public schools if they choose to. Neither Appellees nor the district court have identified any authority for the prospect that spending funds in a way prohibited by the Constitution violates a person's individual rights.

Rather than scrutinize the law in light of its section 36 holding, the district court below appears to view strict scrutiny as a free-floating judicial authority. (R. at 548-51). The court based its conclusion that the ESA Program violated article 3, section 36 on the incorrect conclusion that funding reaching private schools is impermissible under that provision. (*Id.* at 544-48). Even accepting that conclusion for this discussion, applying strict scrutiny in that context suggests that the court believes a section 36 violation may be justified by a compelling state interest and narrow tailoring. *See Vaughn v. State*, 2017 WY 29, ¶ 26, 391 P.3d 1086, 2095 (Wyo. 2017) (describing strict scrutiny in substantive due process). But its strict scrutiny discussion focused on the court's belief that the program itself was inadequate, which is not relevant to section 36. (R. at 549-51). Section 36 asks the purpose of the appropriation and to whom the appropriation is made, not whether the appropriation is sufficiently meeting its intended purpose. Wyo. Const. art. 3, § 36.

The district court's strict scrutiny discussion is policy disagreement in the guise of a constitutional analysis. Because service providers are not subject to the detailed requirements that apply to public schools, the court reasons, the education provided must be inadequate. (R. at 551). The record lacks any evidence showing that students participating in the ESA Program receive an inadequate education—the program has not been permitted to fully go into effect. The court's conclusion is another example of making

factual determinations without any evidence to support them. Strict scrutiny has no place in this preliminary injunction analysis.

Given the district court's section 36 analysis, strict scrutiny is simply not a concept that applies. There was no particularized violation of any Challenger's constitutional rights. Consequently, there was no need to apply any level of scrutiny to determine whether the violation of constitutional rights was justified. Strict scrutiny is not an independent basis to find a constitutional violation, particularly one that does not infringe on any person's individual constitutional rights.

CONCLUSION

For the foregoing reasons, Superintendent of Public Instruction Degenfelder, Treasurer Meier, and State of Wyoming respectfully request that this Court reverse the district court's order establishing a preliminary injunction.

Dated this 10th day of October, 2025.



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APPENDIX

Pursuant to Rule 7.01(k) of the Wyoming Rules of Appellate Procedure, Defendants, The State of Wyoming, Superintendent of Public Instruction and Treasurer, Appendix is as follows:

1. Wyo. R. App. P. 7.01(k)(1) – Judgment or Final Order Appealed From

- Order on Motion for Preliminary Injunction

2. Wyo. R. App. P. 7.01(k)(3) and 10.01 – Statement of Costs

Pursuant to Rule 10.01 of the Wyoming Rules of Appellate Procedure, Defendants State of Wyoming, Superintendent of Public Instruction and Treasurer certifies that it has paid the following costs:

- Defendants paid Kathy Kendrick RPR \$155.00 on August 14, 2025 for the transcript of the June 27, 2025 hearing.
- Defendants paid the Clerk of the Wyoming Supreme Court a \$140.00 filing fee on August 21, 2025.
- Defendants paid the Clerk of the District Court for the First Judicial District, Laramie County a \$100.00 filing fee on August 21, 2025.
- Petitioner paid a total of \$395.00 in costs to date for this appeal.

CERTIFICATE REGARDING ELECTRONIC FILING

I, Mackenzie Williams, hereby certify that the foregoing Appellants' Brief was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this October 10, 2025, on the following party:

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I also certify 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.



Mackenzie Williams

Deputy Attorney General

WY Laramie County District Court
1st JD
Jun 30 2025 02:10PM
2025-CV-0203366
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FILED

	<p>This order has been: Issued</p>	 <p>Judge Peter Froelicher</p>
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STATE OF WYOMING)
)
COUNTY OF LARAMIE)

**DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
OF LARAMIE COUNTY
309 WEST 20TH STREET
CHEYENNE, WY 82001**

WYOMING EDUCATION ASSOCIATION,)
a Wyoming Nonprofit Membership Corporation;)
JENY GARDNER on behalf of herself and her)
Minor child; **CHRISTINA HUTCHISON** on)
Behalf of herself and her minor children;)
KATHRYNE PENNOCK III on behalf of herself)
and her minor children; **KATHARINE AND**)
ZACHARY SCHNEIDER on behalf of)
themselves and their minor children;)
CHAD SHARPE AND KIMBERLY)
LUDWIG-SHARPE on behalf of themselves and)
their minor child; and **CHRISTINA VICKERS**)
AND BRANDON VICKERS on behalf of)
themselves and their minor children)

Plaintiffs,)

Vs.)

Case. No. 2025-CV-0203366

MEGAN DEGENFELDER, in her official)
capacity as Wyoming Superintendent of Public)
Instruction; **CURTIS E. MEIER, JR,** in his)
official capacity as Wyoming State Treasurer; and)
STATE OF WYOMING)

Defendants.)

and)

NICOLETTE AND TRAVIS LECK, and)
VICTORIA HAIGHT)

Intervening Defendants)

ORDER

THIS MATTER having come before this Court on Plaintiffs' Motion for Preliminary Injunction, and the Court having reviewed said motion and filings by the parties, having heard oral argument, and the Court being otherwise fully advised.

IT IS HEREBY ORDERED that:

1. Defendants State of Wyoming, Megan Degenfelder, and Curtis Meier, as well as any employees, agents or officials of those Defendants, are temporarily restrained from directly or indirectly transferring, expending, reimbursing, releasing or distributing state funds to or on behalf of scholarship program participants, scholarship recipients, or education service providers under the Steamboat Legacy Scholarship Act ("ESA Program"), Wyo. Stat. Ann. § 21-2-901 to 21-2-909.
2. Defendants may continue to expend funds to employees and contractors for the purpose of administering the ESA Program, provided that any distribution of funds to or on behalf of scholarship program participants, scholarship recipients, or education service providers is temporarily restrained as described in paragraph 1.
3. The State may otherwise continue the administrative functions of the ESA Program, including accepting, reviewing, and approving applications for scholarship program participants and Education Service Providers.
4. This order shall remain in effect until such time as a subsequent order is issued by this Court on the Plaintiffs' Motion for Preliminary Injunction.

DATED this 30th day of June 2025.

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2025-CV-020306
06/30/2025
By: Vern Lightfoot
Deputy Clerk
Laramie County District Court

/s/ Peter H. Froelicher
District Court Judge



This document constitutes a ruling of the court and should be treated as such.

—
/s/ Judge Peter Froelicher