IN THE SUPREME COURT, STATE OF WYOMING

RACHEL RODRIGUEZ-WILLIAMS, House District Representative; CHIP NEIMAN, House District Representative; And RIGHT TO LIFE OF WYOMING, INC.,	)	
Appellants (Proposed Intervenors),	)	
v.	)	No. S-23-0196
DANIELLE JOHNSON; KATHLEEN DOW, GIOVANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D.; CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a Wellspring Health Access,	)	
Appellees (Plaintiffs),	)	
STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming, MATTHEW CARR, Sheriff Teton County; MICHELLE WEBER, Chief of Police, Town of Jackson, Wyoming,	)	
Appellees (Defendants).	)	

BRIEF OF STATE APPELLEES (STATE DEFENDANTS)

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STATEMENT OF JURISDICTION

Appellants, State Representative Rachel Rodriguez-Williams, State Representative Chip Neiman, and Right to Life Wyoming, Inc., appeal from an order denying their motion to intervene in a civil action for declaratory and injunctive relief now pending in the Ninth Judicial District Court in Teton County, Wyoming. The district court entered the order on July 20, 2023. (R. at 001336-47). An order denying a motion to intervene is a final appealable order under Rule 1.05 of the Wyoming Rules of Appellate Procedure. *Yeager v. Forbes*, 2003 WY 134, ¶ 14, 78 P.3d 241, 246 (Wyo. 2003). As required by Rule 2.01 of the Wyoming Rules of Appellate Procedure, Appellants timely filed their notice of appeal on August 4, 2023. (R. at 001513-19). This Court has jurisdiction over this appeal under article 5, section 2 of the Wyoming Constitution.

STANDARD OF REVIEW

The district court denied Appellants' motion to intervene both of right and permissively. (R. at 001336-47). A party seeking to intervene of right must satisfy four conditions. *Hirshberg v. Coon*, 2012 WY 5, ¶ 9, 268 P.3d 258, 260 (Wyo. 2012). This Court reviews the denial of intervention of right based on the timeliness condition for an abuse of discretion. *Id.* For a denial of intervention of right based on one or more of the other three conditions, this Court will reverse the denial of the motion if the district court erroneously denied intervention. *Id.* This Court reviews the denial of a motion for permissive intervention for an abuse of discretion. *Id.*

ARGUMENT

This appeal arises from the denial of a motion to intervene filed by Appellants in a declaratory judgment action challenging the constitutionality of the Life is a Human Right Act (Wyo. Stat. Ann. § 35-6-120 through -138) and the chemical abortion statute (Wyo. Stat. Ann. § 35-6-139). (R. at 000329-65). The action was filed by Plaintiffs 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 (collectively the Appellees/Plaintiffs). (*Id.*). The State of Wyoming, Wyoming Governor Mark Gordon, and Wyoming Attorney General Bridget Hill, (collectively the State Appellees) were named as defendants in the lawsuit. (*Id.*).

In the district court, the State Appellees did not oppose the intervention of Appellants, but disagreed with their position that the district court should conduct a trial or an evidentiary hearing in the case. (R. at 000843-55). At this point, the question of whether

the district court should hold a trial or an evidentiary hearing appears to be moot, as the Appellees/Plaintiffs and the State Appellees have filed cross-motions for summary judgment and represented to the court that there are no genuine issues of material fact that require a trial. However, if this Court concludes that the question is not moot, then State Appellees continue to not oppose intervention but also continue to disagree with Appellants' belief that the district court should hold a trial or an evidentiary hearing regarding the constitutionality of the Life Act and the chemical abortion statute. Given the issues presented in this case, holding a trial or conducting an evidentiary hearing is wrong as a matter of law.

Appellants seek to intervene in this case so that they can present both non-testimonial evidence and expert testimony at a trial or an evidentiary hearing to defend the constitutionality of the Life Act and the chemical abortion statute. (Aplts.' Br. at 24-31). The district court should not hold a trial or an evidentiary hearing, however, because the Appellees/Plaintiffs have asserted only facial challenges to the constitutionality of the Life Act and the chemical abortion statute.

In the proceedings below, the Appellees/Plaintiffs alleged that the Life Act and the chemical abortion statute violate numerous provisions in the Wyoming Constitution and are unconstitutionally vague. (*See generally* R. at 000329-65). They have insisted that they are challenging the constitutionally of the statutes both facially and as applied. For example, in a motion to compel discovery responses, the Appellees/Plaintiffs argued that they have as applied claims because they are seeking declaratory and injunctive relief for themselves individually as well as other Wyomingites. (R. at 001326-27). In the order

granting the motion to compel, the district court agreed with this reasoning in concluding that the Appellees/Plaintiffs have asserted as applied claims. (R. at 001524 at ¶ 10). However, the remedies requested by the Appellees/Plaintiffs in the amended complaint can only be granted for a facial constitutional claim.

Generally speaking, "classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy" granted by the court. *Bucklew v. Precythe*, — U.S. —, —, 139 S.Ct. 1112, 1127 (2019) (cleaned up). For a facial challenge, a plaintiff must establish that no set of circumstances exist under which the challenged statute is constitutional. *Gordon v. State By & Through Capitol Bldg. Rehab.*, 2018 WY 32, ¶ 12, 413 P.3d 1093, 1099 (Wyo. 2018). In terms of remedy, "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone." Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (italics in original).

By contrast, an as applied challenge to the constitutionality of a statute "concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the *particular circumstances* of the case." *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011) (italics in original). Or, in other words, "[a]n as applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party." *People v. Thompson*, 43 N.E.3d 984, 991 (Ill. 2015). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Minn. Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013) (citation omitted).

The remedies requested by the Appellees/Plaintiffs in the amended complaint leave no doubt that they are challenging only the facial constitutionality of the Life Act and the chemical abortion statute. They ask the district court to declare that the Life Act and the chemical abortion statute are unconstitutional and "are therefore invalid and unenforceable[.]" (R. at 000364) (alteration added). They further ask the district court to issue a permanent injunction preventing the Defendants from enforcing the Life Act and the chemical abortion statute "with respect to any abortion[.]" (*Id.*) (alteration added). The Appellees/Plaintiffs seek to have the Life Act and the chemical abortion statute declared to be wholly invalid and to prevent enforcement of the statutes against everyone who falls within the reach of the statutes. The breadth of their requested remedies confirms that they are asserting only facial challenges.

"When only questions of law are presented to the court, a summary judgment is an appropriate remedy because it eliminates the necessity for a formal trial." *Peterson v. Wyo. Game & Fish Comm'n*, 989 P.2d 113, 116 (Wyo. 1999). In general, the question of whether a statute is constitutional is a question of law. *Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 303 (Wyo. 2014). More specifically, a facial challenge to a statute presents only a question of law. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1201 (Idaho 2023). Thus, a trial or an evidentiary hearing is not necessary in this case because question of whether the Life Act and the chemical abortion statute are facially constitutional is a question of law.

The legal standards the district court must apply in addressing the constitutionality of the Life Act and the chemical abortion statute show why a facial challenge is a question

of law. To address most of the facial challenges in this case, the district court must interpret or construe the text of the pertinent constitutional and statutory provisions and apply two related constitutional tests (the rational basis test and the test set forth in article 1, section 38(c)) to determine whether the Life Act and the chemical abortion statute are constitutional. Both inquiries involve only questions of law.

The interpretation of a constitutional provision or a statute is a question of law. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (constitutional interpretation); *Big Al's Towing & Recovery v. Dep't of Revenue*, 2022 WY 145, ¶ 13, 520 P.3d 97, 101 (Wyo. 2022) (statutory interpretation). To the extent that facts may be legally relevant to discerning the intent of a constitutional provision, those facts must be derived from sources that provide information about "the mischief the provision was intended to cure, the historical setting surrounding its enactment, the public policy of the state, and other surrounding facts and circumstances." *Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006). The reviewing court may also look to the debates on the Wyoming Constitution and other constitutional history to discern the intent of the provision. *Powers*, ¶ 39, 318 P.3d at 314 (citing *Rasmussen v. Baker*, 50 P. 819, 824 (Wyo. 1897)). To the extent that facts may be relevant to a statutory interpretation analysis, the court may consider information from similar sources to discern legislative intent. *See Wyodak Res. Dev. Corp. v. Wyo. Dep't of Revenue*, 2017 WY 6, ¶¶ 27, 43 n.5, 387 P.3d 725, 732, 735 n.5 (Wyo. 2017) (stating that a court may consider legislative history and the facts and circumstance surrounding the enactment of an ambiguous statute to discern legislative intent).

The facts relevant to the interpretation of a constitutional provision or a statute are known as legislative facts. Legislative facts "are the general facts which help the tribunal decide questions of law and policy and discretion." *Foster's Inc. v. City of Laramie*, 718 P.2d 868, 878 (Wyo. 1986) (Rose, J., specially concurring) (citation omitted). Legislative facts usually are established by material cited in or submitted with the briefs. *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999). A reviewing court typically takes judicial notice of legislative facts. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 2:12 (4th ed. July 2022 update); *see also, e.g., Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351, 1355 n.4 (Wyo. 1978) (the Wyoming Supreme Court took judicial notice of facts in a "yearbook" published by the State of Wyoming in addressing whether a statute violated equal protection).

Legislative facts "are facts only in the sense that they provide premises in the process of legal reasoning. They are not that type of fact for which a trial is mandated." *Atlantic Richfield Co. v. State*, 705 P.2d 418, 428 (Alaska 1985). Thus, the district court does not need to hold a trial or an evidentiary hearing to admit facts that may be relevant to the interpretation of the Life Act, the chemical abortion statute, or any of the Wyoming constitutional provisions at issue.

In addition to the interpretation analyses, the district court must assess the facial constitutionality of the Life Act and the chemical abortion statute in light of the rational basis test and the test set forth in article 1, section 38(c). Abortion is not a fundamental right, so the strict scrutiny test does not apply to any of the claims in this case. *See Dobbs v. Jackson Women's Health Org.*, — U.S. —, 142 S. Ct. 2228, 2242-43, 2253-54 (2022).

The rational basis test is a question of law. *See Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990) (stating that both parts of the rational basis test are questions of law); *Sammon v. N. J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3rd Cir. 1995) (same); *Simi Inv. Co. v. Harris Cnty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000) (same); *Mendoza v. Garrett*, No. 3:18-cv-01634—HZ, 2019 WL 2251290, at *3 (D. Or. May 16, 2019) (same) (collecting cases).

Article 1, section 38(c) effectively adopts the rational basis test as the test for assessing the constitutionality of a statute under article 1, section 38. Section 38(c) provides that the Wyoming Legislature "may determine reasonable and necessary restrictions on the rights granted" by section 38 "to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38(c) (alteration added).

The phrase "reasonable and necessary restrictions" appears to derive from past cases where this Court explained that the Wyoming Legislature "has the authority to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of [its] people." *Zancanelli v. Cent. Coal & Coke Co.*, 173 P. 981, 985 (Wyo. 1918); *see also Newport Int'l Univ. v. State, Dep't of Educ.*, 2008 WY 72, ¶ 39, 186 P.3d 382, 391 (Wyo. 2008). The phrase also aligns with this Court's explanation that, under the rational basis test, a statute "must be reasonable and not arbitrary" and that the Legislature primarily determines "what measures are necessary and proper to further the legitimate purposes or objects" of its police power. *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938)

(internal citations omitted) (emphasis added). Given the similarity between the rational basis test and the language in section 38(c), the section 38(c) test also is a question of law.

Expert witness testimony or other evidence has no role in a rational basis analysis. Under the rational basis test, the Wyoming Legislature is not constitutionally required "to articulate its reasons for enacting a statute[.]" *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003) (alteration added). Thus, the legislative choice embodied in a statute "is not subject to courtroom fact-finding and need not be based on evidence or empirical data." *Id.* In addition, "if any conceivable basis exists which will reasonably, although arguably, support the enactment" of a statute, then the reviewing court should "assume that the legislature has acted in a non-arbitrary and rational manner, and … hold the statute to be constitutional." *White v. State*, 784 P.2d 1313, 1316 (Wyo. 1989) (ellipsis added).

Given that expert witness testimony and other evidence is not relevant to the rational basis test, such evidence also is not relevant to the section 38(c) test. The district court, therefore, should apply those tests to the Life Act and the chemical abortion statute without holding a trial or an evidentiary hearing and without considering any expert witness testimony or other evidence.

A trial or an evidentiary hearing also is not needed to address whether the Life Act and the chemical abortion statute are impermissibly vague. To succeed on a facial vagueness challenge to a Wyoming statute, the plaintiff "must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications." *Alcalde v. State*,

2003 WY 99, ¶ 15, 74 P.3d 1253, 1260-61 (Wyo. 2003) (citation omitted) (cleaned up). A facial vagueness analysis focuses solely upon the proper interpretation of text of the challenged statute. *See, e.g., Alcalde*, ¶ 15, 74 P.3d at 1260-61. A facial vagueness claim therefore presents a question of law because it requires the reviewing court to perform a statutory interpretation analysis.

Appellants primarily seek to offer evidence at a trial or an evidentiary hearing to rebut evidence submitted by the Appellees/Plaintiffs. (Aplts.' Br. at 14, 23, 24, 26, 29-30). Appellants and the Appellees/Plaintiffs each want to treat the constitutional issues in this case as questions of fact that turn on the credibility of their respective expert witnesses. In essence, they seek to use the constitutional issues as a stalking horse to engage in a battle of the experts over the policies embodied in the Life Act and the chemical abortion statute. Their approach cannot be squared with this Court's precedent that constitutional issues are questions of law. *Powers*, ¶ 7, 318 P.3d at 303. And, under the doctrine of separation of powers, that policy debate must be left to the Wyoming Legislature.

The district court should assess the constitutionality of the Life Act and the chemical abortion statute based on the text of the constitutional and statutory provisions at issue here, not based on facts or evidence provided through witness testimony elicited at a trial or an evidentiary hearing or provided through affidavits and declarations submitted on summary judgment. If this the district court believes that it needs extrinsic facts or information to interpret the constitutional or statutory provisions in this case, the parties can provide the necessary information on summary judgment without written witness testimony. That information should be limited to the relevant constitutional and legislative history,

information about historical setting surrounding the adoption or enactment of the Life Act, the chemical abortion statute, and the constitutional provisions at issue, and information about the public policy of the State of Wyoming regarding the regulation of abortion.

CONCLUSION

For the foregoing reasons, the State Appellees do not oppose the intervention of Representative Rodriguez-Williams, Representative Neiman, and Right to Life Wyoming, but disagree with their position that the district court should conduct a trial or an evidentiary hearing to consider the evidence they propose to introduce.

DATED this 27th day of October 2023.

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CERTIFICATE REGARDING ELECTRONIC FILING

I, Jay Jerde, hereby certify that the foregoing BRIEF OF STATE APPELLEES/ (STATE DEFENDANTS) was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 27th day of October 2023, on the following parties:

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