IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

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TETON COUNTY WYOMING
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CLERK OF DISTRICT COURT

DANIELLE JOHNSON; KATHLEEN DOW; GIOVANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D.; CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a Wellspring Health Access; Plaintiffs,	)	
v.	)	Civil Action No. 18732
STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming; MATTHEW CARR, Sheriff Teton County, Wyoming; and MICHELLE WEBER, Chief of Police, Town of Jackson, Wyoming, Defendants.	)	

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

This matter came before the Court for a hearing on August 9, 2022 at 10:00 a.m. on the Plaintiffs' Motion for Preliminary Injunction. John H. Robinson and Marci C. Bramlet appeared for the Plaintiffs. Jay Jerde appeared for Defendants the State of Wyoming, the Governor of Wyoming, and the Wyoming Attorney General. Erin Weisman appeared for the Teton County Sheriff. Lea M. Colasuonno appeared for the Town of Jackson Chief of Police.

Plaintiffs motion is filed pursuant to Wyo. Stat. § 1-28-101, *et seq*. and W.R.C.P. 65. Plaintiffs request that this Court enter a preliminary injunction against the Defendants enjoining the enforcement of House Bill 92 (the HB 92 Amendment) that amended Wyo. Stat. § 35-6-102(a). H.B. 92, 66th Legis., Budget Sess. (Wyo. 2022).

Defendants filed a Response to Motion for Preliminary Injunction on August 5, 2022. Plaintiffs filed a Notice of Supplemental Information Concerning Irreparable Harm on August 8, 2022. The Court did not consider the Plaintiff's Notice of Supplemental Information for purposes of this Order. After reviewing the briefs of the parties, attached affidavits, and having considered counsels' arguments at the hearing, the Court hereby **GRANTS** the Plaintiffs' Motion for Preliminary Injunction for the reasons set forth in this Order.

Parties

1. Plaintiffs. Plaintiffs consist of four individuals and two non-profit groups. The Plaintiffs include: (1) Danielle Johnson, a pregnant individual and practicing nurse residing in Teton County, Wyoming; (2) Kathleen Dow, a woman of child bearing age residing in Albany County, Wyoming; (3) Giovannina Anthony, M.D., an Obstetrics and Gynecology specialist residing in Teton County, Wyoming who provides all forms of gynecologic and obstetric care, including medical abortions; (4) Rene Hinkle, M.D., an Obstetrics and Gynecology specialist residing in Laramie County, Wyoming who provides obstetric, primary gynecology and surgery services; (5) Chelsea's Fund, a Wyoming non-profit 501(c)(3) organization that provides financial and logistical support to Wyoming residents seeking abortions; and (6) Circle of Hope Health Care Services, Inc., a Wyoming non-profit corporation located in Casper, Wyoming that will offer abortion and other health-related services to Wyoming residents.
2. Defendants. The Defendants include: (1) the State of Wyoming; (2) the Governor of Wyoming; (3) the Wyoming Attorney General; (4) the Teton County Sheriff; and (5) the Town of Jackson Police Chief. All are sued in their official capacities.

Background

3. The Court acknowledges that the topic of this case incites intense debate based on personal beliefs and philosophies, as well as political and religious affiliations. However, this is not a case about the moral propriety of Wyoming's restrictions under Wyo. Stat. § 35-6-102(a) and the HB 92 Amendment. This case is only about whether the HB 92 Amendment, as written, is constitutional under Wyoming law. At this specific procedural juncture, the Court is only addressing whether a preliminary injunction is appropriate while the Plaintiffs challenge the constitutionality of the HB 92 Amendment.

4. Legislative History: In 1977, the Wyoming State Legislature enacted Wyo. Stat. § 35-6-102 which addresses abortion restrictions. Under Wyo. Stat. § 35-6-102, a woman in Wyoming was permitted to obtain an abortion anytime up to the point of viability or "when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment." The statutory regulation remained unchanged for a period of forty-five years. Abortion is defined under Wyo. Stat. § 35-6-101(a)(i) which states:

> "Abortion" means an act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including the pregnant woman herself, with the intent of producing the premature expulsion, removal or termination of a human embryo or fetus, except that in cases in which the viability of the embryo or fetus is threatened by continuation of the pregnancy, early delivery after viability by commonly accepted obstetrical practices shall not be construed as an abortion.

5. In 2022, the Wyoming State Legislature adopted the H.B. 92 Amendment expanding the restrictions under Wyo. Stat. § 35-6-102 providing:

> (b) An abortion shall not be performed except when necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function, not including any psychological or

> emotional conditions, or the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301.

The H.B. 92 Amendment prohibits all abortion procedures at any time during a woman's pregnancy with three limited exceptions. Wyo. Stat. § 35-6-102(b). The limited exceptions include circumstances where the procedure: (1) is "necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function;" (2) when a pregnancy is a result of incest pursuant to Wyo. Stat. § 6-4-402; or (3) when a pregnancy is a result of sexual assault as defined by Wyo. Stat. § 6-2-301. *Id.*

6. The terms of the amendment provided for an effective date triggered by decisions issued from United States Supreme Court that overrule *Roe v. Wade*, 410 U.S. 113 (1973). On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization,* -- U.S. --, 142 S. Ct. 2228 (2022). In *Dobbs*, the United States Supreme Court held that the United States Constitution does not confer women with the right to obtain an abortion. -- U.S. --, 142 S. Ct. at 2279. As a result, the *Dobbs* decision handed the issue of abortion regulations back to each State. *Id.*

7. In accordance with the HB 92 Amendment, the Wyoming Attorney General issued Report #1465 on July 21, 2022 finding that Wyo. Stat. § 35-6-102(b) is fully authorized pursuant to the *Dobbs* decision. 2022 Wyo. Att'y Gen. Rep. 1465. On July 22, 2022, Governor Mark Gordon certified Wyo. Stat. § 35-6-102(b) to the Wyoming Secretary of State.

8. The HB 92 Amendment became effective on July 27, 2022. However, this Court entered an Order Granting Motion for Temporary Restraining Order on July 27, 2022. That Order stayed the enforcement or application of the HB 92 Amendment until the legal arguments of the parties could be fully briefed and a hearing held on the Plaintiffs' Motion for Preliminary Injunction.

The parties represented to the Court that they are not requesting to consolidate the preliminary injunction hearing with the trial on the merits.

Legal Authority

9. Injunctions are controlled by Wyo. Stat. § 1-28-102 and W.R.C.P. Rule 65. Wyo. Stat. § 1-28-102 states in pertinent part:

> When it appears by the petition that the plaintiff is entitled to relief consisting of restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when during the litigation it appears that the defendant is doing, threatens to do, or is procuring to be done some act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary order may be granted restraining the act.

Under W.R.C.P. Rule 65(a)(1) a preliminary injunction may be issued after notice to the adverse party. Evidence received on a preliminary injunction motion that is admissible at trial becomes part of the trial record. W.R.C.P. 65(a)(2).

10. In *CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp.*, the Wyoming Supreme Court has explained:

> The purpose of a temporary injunction is to preserve the status quo until the merits of an action can be determined. And a temporary injunction rests upon an alleged existence of an emergency, or a special reason for such an order, before the case can be regularly heard.
>
> Also, the award of a temporary injunction is an extraordinary remedy which will not be granted except upon **a clear showing of probable success and possible irreparable injury to the plaintiff, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed**.
>
> In granting temporary relief by interlocutory injunction courts of equity do not generally anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in status quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming a final opinion as to such rights.

2009 WY 113, ¶ 7, 215 P.3d 1054, 1057 (Wyo. 2009) (citations omitted) (emphasis added).

10. Issuing a preliminary injunction during litigation is left largely to the discretion of the district court. *CBM Geosolutions, Inc.*, 2009 WY at ¶ 11, 215 P.3d at 1058. A preliminary injunction is used "to prevent injury, considering the situation of the parties" and will not be disturbed unless there is clear abuse of discretion *Id.* "A court abuses its discretion when it 'acts in a manner which exceeds the bounds of reason under the circumstances.'" *Brown v. Best Home Health & Hospice, LLC*, 2021 WY 83, ¶ 8, 491 P.3d 1021, 1026 (Wyo. 2021) (citations omitted). A district court abuses its discretion when it disregards facts or makes an error of law. *Brown*, 2021 WY at ¶ 8, 491 P.3d at 1026 (citations omitted). "A finding of fact is clearly erroneous . . . when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

11. When issuing a preliminary injunction, the Court must address the issue of a bond. W.R.C.P. 65(c) states in pertinent part:

> (c) *Security*. –The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Legal Analysis

12. Status Quo. Plaintiffs request a preliminary injunction to preserve the status quo, as it existed, prior to the HB 92 Amendment. Defendants did not advance a specific status quo argument, but do contend that Wyoming has legislated this medical procedure since 1869 when Wyoming was a territory up until *Roe* was decided. The definition of status quo is "the existing state of affairs." *In re Kite Ranch, LLC v. Powell Family of Yakima, LLC*, 2008 WY 39, ¶ 29, 181 P.3d 920, 928 (Wyo. 2008) (*citing* Webster's Third New Int'l Dictionary 2230 (2002)). The Tenth Circuit has

"explained that the status quo is the 'last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.'" *Schrier v. University of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (quotations omitted). A court would look to the "last peaceable uncontested status existing between the parties before the dispute developed." *Id.* (quoting 11a Wright & Miller, Fed. Prac. & Proc. § 2948).

13. This controversy arose on July 22, 2022 when Governor Gordon certified the HB 92 Amendment to the Secretary of State. After certifying the HB 92 Amendment, the law became effective on July 27, 2022. Prior to the HB 92 Amendment's effective date, the restrictions under Wyo. Stat. § 35-6-102(a) were in effect for a period of forty-five years. For the purposes of this preliminary injunction, the Court finds that the status quo is the period of time when Wyo. Stat. § 35-6-102(a) bacame effective.

14. Possible Irreparable Harm. "Irreparable harm is, by definition, harm for which there can be no adequate remedy at law." *CMB Geosolutions*, 2009 WY at ¶ 10, 215 P.3d at 1058. An injury is irreparable where monetary compensation cannot atone for it. *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, 714 P.2d 328, 332 (Wyo. 1986).

> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

Notwithstanding the availability of eventual damages, however, it has been recognized that loss of customers, loss of good will, and threats to the viability of a business may support a claim of irreparable injury. *See Tri-State Generation & Transmission Ass'n v.*

Shoshone River Power, Inc., 805 F.2d 351, 356 (10th Cir. 1986) (citations omitted); *Int'l Snowmobile Mfrs. Ass'n. v. Norton*, 304 F.Supp. 2d 1278, 1287 (D. Wyo. 2004); *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181082 (D. Kan. 1988).

15. Plaintiffs allege a number of harms related to mere monetary losses which may not equate to irreparable harm under Wyoming case law. However, the Plaintiffs have alleged, through affidavits, significant potential harms that the Court can fairly find that there is no adequate remedy at law. The Court categorizes the irreparable harm to Plaintiffs into two categories. The first, includes harms to pregnant women located in Wyoming. The second, includes harms to physicians providing medical care to woman in Wyoming.

16. *Pregnant Women in Wyoming*. The HB 92 Amendment may force Ms. Johnson, as a currently pregnant woman, to delay or be denied evidence based medical care in the event of an unforeseen condition, life threatening condition, pregnancy related complication, or a fetal abnormality incompatible with life. The Court cannot identify an adequate remedy for Ms. Johnson in such circumstances. If the preliminary injunction is not granted the Court finds that her alleged potential harms are irreparable under the standards for preliminary injunctions.

17. *Wyoming Physicians*. Dr. Anthony and Dr. Hinkle may be subject to a host of irreparable harms. The harms include: felony prosecution, loss of professional licensure, and up to fourteen years of imprisonment for providing evidence-based health care to her Wyoming patients in need of abortion services. As providers navigating the legal ramifications and limited exceptions of the HB 92 Amendment, physicians may delay providing evidence

based, medically necessary treatment and cause physical damages or even death to a patient. Additionally, physicians may overstep the limited exceptions which are vague and provide no guidance to the doctors, therefore they may face felony prosecution, loss of their licensure, and imprisonment. Dr. Anthony's affidavit states that the HB 92 Amendment:

> Would force women who are pregnant with a fetus with lethal defects to continue the pregnancy until labor occurs or fetal death in-utero. . . Also, the Ban will force me and my ob/gyn colleagues to delay medical and/or deny surgical treatment to pregnant women until they are in life-threatening situation. Examples include treatment of hemorrhage in presence of a live fetus, ectopic pregnancy, and infections with sepsis when water has broken and the fetus I not yet viable, but heartbeat is present. The Ban will lead to hesitation in situations where appropriate medical care has been criminalized. In order for my patients to receive appropriate care, I will be forced to ask them to drive to Colorado. This is contrary to the recommendations by the American College of Obstetrics and Gynecology, the American Medical Association, and myriad of other entities that support evidence-based healthcare. It also destroys any effort to provide ethical, sound care, in the best interests of the patient. It is a violation of the oath that I have taken as a physician.
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> Aff. Giovannina Anthony, M.D. ¶ 12 (July 25, 2022).

18. Under the plain language of Wyo. Stat. § 35-6-102(a), the provision allowing abortion at the point of viability and after was conditioned on "appropriate medical judgment." The HB 92 Amendment removes any language conditioning application of the statute on "appropriate medical judgment." If Ms. Johnson, who is 22 weeks pregnant, suffers from an unforeseen complication, a condition capable of developing into a life-threatening condition, a pregnancy related complication, or a fatal fetal defect, the HB 92 Amendment is not conditioned on Dr. Anthony's ability to employ appropriate medical judgment. The statute lacks any guidance on the providers use of medical judgment as to when to the providers are legally permitted to provide necessary care.

19. Likewise, the statute provides no guidance with respect to when a provider may provide an abortion in the case of incest or sexual assault. What steps must a provider take to follow the law and provide care to a woman who wishes to terminate a pregnancy that is the result of incest or rape? It is unclear, when a provider may overstep the statutory parameters and be subject to felony prosecution. A provider may suffer irreparable harm if they provide an abortion to someone when the law intended to criminalize the act.

20. A reasonable assessment can be made that a misstep by providers in either interpreting the HB 92 Amendment too conservatively or too liberally will subject them to a loss of customers, loss of good will, and threats to the viability of their business. Providers could be subject to criminal prosecution which would no doubt impact their business. The Court therefore finds that the Plaintiffs who are practicing providers in Wyoming have met their burden of establishing irreparable harm for the purposes of entering a preliminary injunction.

21. Probable Success. The Wyoming Supreme Court has acknowledged that one factor the Court's must consider in granting a preliminary injunction is probable success. *CBM Geosolutions, Inc.*, 2009 WY at ¶ 8, 215 P.3d at 1057–58. "When ruling on a request for a preliminary injunction, the court does not make a final decision on the merits; it considers whether the petitioner has clearly shown it is likely to succeed in proving its claims." *Brown v. Best Home Health & Hospice, LLC*, 2021 WY 83, ¶ 12, 491 P.3d 1021, 1027 (Wyo. 2021). In assessing whether a petitioner clearly showed it was likely to succeed in proving its claims, the Supreme Court looks at whether a district court could have concluded that the petitioner is likely to succeed in proving the elements of its claims. 2021 WY at ¶ 12-13, 491 P.3d at 1027. For example, in *Brown*, the Court addressed the propriety of granting a preliminary injunction in the context of enforcing a

non-compete clause in the employment contracts of three former employees. *Brown*, 2021 WY at ¶ 2, 491 P.3d at 1024. The Supreme Court stated, "[o]ur task is to determine whether the district court *could have* concluded Best Home is likely to succeed in proving it gave consideration for the Nurses' agreements not to compete." *Id.* at ¶ 13, 491 P.3d at 1027 (emphasis added).

22. Plaintiffs seek declaratory judgment that the HB 92 amendment violates Plaintiffs' rights under the Wyoming Constitution. Plaintiffs challenge the constitutionality of the HB 92 Amendment under ten provisions of the Wyoming Constitution including: art. 1 §§ 2, 3, 6, 7, 18, 33, 34, 36 and 38. All of Plaintiffs challenges raise important legal questions involving constitutional rights. However, for the purposes of this motion for preliminary injunction, the Court finds three of Plaintiffs' constitutional challenges dispositive with regard to the likelihood of success prong. Specifically, the Court concludes that Plaintiffs can likely succeed in showing that the HB 92 Amendment is unconstitutional under Wyoming Constitution article 1, section 38 and under article 1, section 3. The Court could also find that the HB 92 Amendment is unconstitutionally vague. The Court will therefore focus its findings related to probable success on these three constitutional challenges.

23. *Rules of Statutory & Constitutional Interpretation.* Plaintiffs bear the burden of proving that the HB 92 Amendment is unconstitutional. *Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 304 (Wyo. 2014) (*citing Krenning v. Heart Mt. Irigation Dist.*, 2009 WY 11, 33, 200 P.3d 774, 784 (Wyo. 2009). In *Powers*, the Wyoming Supreme Court summarizes the respective burdens of the Plaintiff and duties of the Court when addressing constitutional challenges:

> The party challenging the constitutionality of a statute bears the burden of proving the statute is unconstitutional. *Pfeil v. Amax Coal West, Inc.,* 908 P.2d 956, 961 (Wyo. 1995). That burden is a heavy one "in that the appellant must 'clearly and exactly show the unconstitutionality beyond any reasonable doubt.'" *Cathcart v.*

> *Meyer;* 2004 WY 49, ¶ 7, 88 P.3d 1050, 1056 (Wyo. 2004), quoting *Reiter v. State*, 2001 WY 116, 7, 36 P.3d 586, 589 (Wyo. 2001). In our analysis, we presume "the statute to be constitutional . . . . Any doubt in the matter must be resolved in favor of the statute's constitutionality." *Thomson v. Wyoming In-Stream Flow Committee*, 651 P.2d 778, 789-90 (Wyo. 1982).
>
> *Krenning v. Heart Mt. Irrigation Dist.*, 2009 Wy. At 33, 200 P.3d at 784. However, we have also recognized that '[t]hough the supreme court has the duty to give great deference to legislative pronouncements and to uphold constitutionality when possible, **it is the court's equally imperative duty to declare a legislative enactment invalid if it transgresses the state constitution**. *Washakie County Sch. Dist. V. Herschler*, 606 P.2d 310, 319 (Wyo. 1980).
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> *Powers*, 318 P.3d at 7, 318 P.3d at 303 (emphasis added).

24. Wyoming's long-standing principles of constitutional interpretation were adopted and explained in *Rasmussen v. Baker*:

> The primary principle underlying an interpretation of constitutions or statutes is that the intent is the vital part, and the essence of the law. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration. **The intent must be found in the instrument itself. If the language employed is plain and unambiguous, there is no room left for construction. It must be presumed that in case of a construction the people have intended whatever has been plainly expressed. Courts are not at liberty to depart from that meaning which is plainly declared.**

7 Wyo. 117, 50 P. 819, 821 (Wyo. 1897) (emphasis added).

25. In *Rasmussen*, the Court also emphasized that the Court is "not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language." *Rasmussen*, 7 Wyo. 117, 50 P. at 821. "The natural import of the words is that which their utterance promptly and uniformly suggests to the mind, --that which common use has affixed to them." *Id* (citations omitted). Courts are, "required to apply the 'fundamental

principle of constitutional interpretation that each and every clause within [the Wyoming] constitution has been inserted for a useful purpose.'" *Johnson v. State Hearing Examiner's Office*, 838 P.2d 158, 164 (Wyo. 1992).

26. *Art. 1, Sec. 38 – Right of Health Care Access*. In 2012, Wyoming voters adopted a constitutional amendment providing all Wyoming residents with the freedom to make their own health care decisions. Voters amended the Wyoming Constitution to include Art. 1, Sec. 38 which states:

    (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.

    (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.

    (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.

    (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

27. Plaintiffs assert that the HB 92 Amendment serves as an impermissible intrusion on a woman's right to make health care decisions under article 1, section 38(a). Plaintiffs contend that article. 1, section 38 unambiguously provides all competent Wyoming citizens with the right to make their own health care decisions. Plaintiffs presented evidence that abortion procedures are an essential health care service for women. Plaintiffs therefore contend that a decision to have an abortion is a "health care decision" and is protected under article 1, section 38.

28. In contrast, Defendants contend that article 1, section 38 does not provide women with an implicit right to an abortion. Defendants contend that it is really just an amendment conferring Wyoming residents with the right to purchase and pay for health care services but only those

services that are legally available. Defendants properly point out that the rights under article 1, section 38(a) are not limitless and are subject to "reasonable and necessary restrictions" in order 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). Further, if article 1, section 38 is found to be ambiguous, Defendants contend that the provision was only adopted to push back against the Affordable Care Act. Defendants therefore assert that the HB 92 Amendment does not unreasonably or unnecessarily restrict a Wyoming woman's right to make health care decisions.

29. The Court could find that the constitutional amendment adopted by the voters of Wyoming under article 1, section 38 unambiguously provides competent Wyoming citizens with the right to make their own health care decisions. The Court has analyzed the words used throughout article 1, section 38 in accordance with their plain and ordinary meaning. That analysis lends itself to a finding that a decision to have an abortion is a health care decision.

30. Black's Law Dictionary defines the term "health care" as: "[c]ollectively, the services provided, usually by medical professionals, to maintain and restore health." Black's Law Dictionary (11th ed. 2019). Merriam-Webster's Dictionary defines the term "decision" as: "a determination arrived at after consideration." Merriam-Webster's Collegiate Dictionary (11th ed. 2020). This Court also finds the Wyoming Legislature's definition of the terms "health care" and "health care decisions" under the Wyoming Health Care Decisions Act instructive and persuasive. In that Act, the Wyoming Legislature defined "health care" as, "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." Wyo. Stat. 35-22-402(a)(viii). Additionally, the Wyoming Legislature has defined

a "health care decision" in pertinent part as a: "decision made by an individual or an individual's agent, guardian, or surrogate, regarding the individual's health care, including: . . . (B) [a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate . . ." Wyo. Stat. 35-22-402(a)(ix). An "abortion" is defined in pertinent part to be a "act procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including the pregnant woman herself, with the intent of producing the premature expulsion, removal or termination of a human embyo or fetus . . . . Wyo. Stat. § 35-6-101(a)(i).

31. Under the standard of review for preliminary injunctions the Court could reasonably make the following findings. Reasonable persons could consistently and predictably agree that an abortion is a procedure, usually provided by a medical professional, that impacts a woman's physical, mental, or emotional well-being. Under the ordinary and plain meaning of the words "health care" and "decision" the Court could find that the decision to have or not have an abortion procedure is unambiguously a health care decision.

32. Under this reading, the Court could find that the Wyoming Constitution affords all Wyoming citizens with a fundamental right to make their own health care decisions and that includes a Wyoming woman's right to make her own decision regarding abortion. A court is not at liberty to assume that the Wyoming voters who adopted article 1, section 38 did not understand the force of language in the provision. Additionally, the Court notes that article 1, section 38 was adopted during a period of time when Wyo. Stat. 35-6-102(a) was in effect which provided Wyoming women with the choice to make their decision regarding abortion up until the point of viability without restrictions.

33. *Reasonable and Necessary Restraint.* Next, the Court must address whether the HB 92 Amendment, as written, constitutes a reasonable and necessary restriction on a woman's right to make her own health care decisions and whether the statute imposes an undue governmental restriction. The right to make one's own health care decisions is obviously not absolute. The Wyoming Legislature clearly has the right to impose regulations on this right pursuant to Wyo. Const. art. 1, Sec. 38(c) which states:

> The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.

However, any reasonable and necessary restrictions to the right to make health care decisions, must also be protected from undue governmental infringement. Wyo. Const. art. 1, §38(e).

34. The Plaintiffs argue that the three limited exceptions to the HB 92 amendment are not reasonable and necessary restrictions on a woman's right to make her own health care decisions. The State notes that Wyoming Legislature's "police powers are an essential attribute of the state as sovereign[.]" *State Highway Comm'n of Wyo. v. Sheridan-Johnson Rural Electrification Ass'n*, 784 P.2d 588, 591 (Wyo. 1989). Therefore, the Legislature, through its police power, may regulate what health care decisions Wyoming women can purchase and receive within the borders of Wyoming.

35. Under the standard for entering preliminary injunctions, the Court could find that the HB 92 amendment interferes with the fundamental right of women in Wyoming to make their own health care decisions. When fundamental rights are at stake, strict scrutiny is applied to determine whether a statute satisfies a citizens due process rights. *Ailport v. Ailport*, 2022 WY 43, 8, 507 P.3d 427, 433 (Wyo. 2022).

> Strict scrutiny "demands identification of a compelling state interest. The compelling state interest then must be balanced against the fundamental right, and the method of protecting that compelling state interest must be the least intrusive by which that interest can be accomplished.

36. In this case, the State has a compelling interest to protect potential life. In order to protect all potential life, the HB 92 Amendment restricts all abortions except in cases of rape, incest, and when a woman is at "serious risk of death" or "substantial and irreversible physical impairment of a major bodily function." The exception related to the risk of death or irrepressible impairment is not conditioned on a physician's appropriate medical judgment. The HB 92 Amendment provides no exceptions for lethal fetal abnormalities that are incompatible with life. It provides no exceptions for the period of time when a fetus is not viable. It provides no exceptions for the risk of death associated with psychological or emotional conditions of the pregnant woman. Further, the statute provides no exceptions for a pregnant woman who is diagnosed with a significant substance abuse disorder.

37. The HB 92 Amendment only has three exceptions. The Court could reasonably find that the HB 92 Amendment is not the least intrusive method of protecting the State's compelling interest to protect potential life. To illustrate this point, the Court points to the following example. Take the heart wrenching situation where a woman with a very much wanted and desired pregnancy is informed that her fetus has a genetic abnormality that is incompatible with life. The HB 92 Amendment affords this woman no right to make her own health care decision in Wyoming nor any right to seek the recommended evidence-based care from her treating Wyoming physician. The Court is unable to identify how restricting a woman's right to make her own health care decision in this circumstance is reasonable and necessary to protect the health and general welfare of the people or to accomplish any other purpose set forth in the Wyoming Constitution.

38. Even under a rational basis test, the Court could find that the HB 92 Amendment transgresses the Wyoming Constitution. Under a rational basis test, the Plaintiffs must demonstrate that the HB 92 Amendment is, "beyond a reasonable doubt, not related to a legitimate government interest." *Hardison v. State*, 2022 WY 45, ¶ 10, 507 P.3d 36, 39 (Wyo. 2022). Under the lethal fetal defect scenario, testimony submitted by Plaintiffs established that certain fetal defects are incompatible with life. Under a rational basis test, the State has a legitimate government interest to protect potential life. When the potential life is found to have a diagnosable genetic defect that is incompatible with life, the Court could find that the HB 92 Amendment is beyond a reasonable doubt, not related to a legitimate government interest.

39. *Article 1, Section 3 –Equal Political Rights.*

The Court could also find that the HB 92 Amendment could violate Art. 1, Sec. 3 which states:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

The natural and civil rights and privileges are to be equally enjoyed by all Wyomingites, regardless of any factor except competence. Wyo. Const. art. 1; sec. 3. The Wyoming Supreme Court has emphasized that "women in Wyoming are men's equals before the law." *State v. Yazzie*, 67 Wyo. 256, 263, 218 P.2d 482, 484 (Wyo. 1950)(holding that females in Wyoming are eligible to serve as jurors)(citations omitted).

40. Plaintiffs argue that the HB 92 Amendment targets a specific group of people, namely woman, and the health care they are able to elect, as well as the health care that their Wyoming physicians can provide to women. The State contends that all persons under the HB 92

Amendment are treated the same. The State asserts that the persons that the statute applies to is limited to providers, both men and women providers, and it treats them uniformly.

41. The statute only restricts a health care procedure needed or elected by woman. The statute restricts a woman's right to make their own health care decisions during pregnancy and discriminates against women on the basis of their sex. Discrimination on the basis of sex is explicitly prohibited under the Wyoming Constitution. The legislature cannot pass a discriminatory law on the basis of sex that restricts the constitutionally protected right to make one's own health care decisions. The statute dilutes the rights available to women in making decisions regarding their health care and whether or not to give birth to a child.

42. *Unconstitutional Vagueness*. Finally, the Court addresses the Plaintiffs contention that the HB 92 Amendment is unconstitutionally vague. Constitutional challenges for vagueness are explained in *Giles v. State:*

> A statute may be challenged for constitutional vagueness "on its face" or "as applied" to particular conduct. *Griego v. State*, at 975. When challenging a statute for unconstitutional facial vagueness the party must demonstrate that the statute reaches a substantial amount of constitutionally protected conduct, or that the statute specifies no standard of conduct at all. *Browning v. State*, at ¶ 11; *Saiz v. State*, at ¶ 9; *Campbell v. State*, at 657; *Moore v. State*, 912 P.2d 1113, 1115 (Wyo. 1996); *Lovato v. State*, 901 P.2d 408, 412 (Wyo. 1995); *Ochoa v. State*, 848 P.2d 1359, 1363 (Wyo. 1993); *Griego v. State*, at 975; and *Scadden v. State*, at 1041-1042. As stated in *Griego* at 975
>
> When a statute is challenged for vagueness on its face, the court examines the statute not only in light of the complainant's conduct, but also as it might be applied in other situations. See *Schwartzmiller v. Gardner*, 752 F.2d 1341 (9th Cir. 1984). Facial review is not appropriate in all cases.
>
> [F]acial vagueness review is not common because ordinary canons of judicial restraint do not permit a party whose particular conduct is adequately described by a criminal statute to 'attach [the statute] because the language would not give

> similar fair warning with respect to other conduct which might be within its broad and literal ambit. (emphasis omitted). *Id.* at 1346 (quoting *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974)).
>
> *Giles v. State*, 2004 WY 101, ¶ 15, 96 P.3d 1027, 1031-32 (Wyo. 2004).

43. The United States Supreme Court has said that a penal statute must:

> Define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory behavior.

Griego v. State, 761 P.2d 973 (Wyo. 1998) (citing *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 1858 (1983).

44. A facial challenge is appropriate in this case. The statute implicates protected conduct, specifically, a woman's right to make a health care decision. The Court finds that the Plaintiffs could show that the application of the exceptions related to rape and incest are unconstitutionally vague. For example, can a physician provide an abortion to patients on their unverified word alone that the pregnancy is a result of rape or incest or does the physician need to verify that a Defendant was charged and/or convicted of rape or incest before performing an abortion? It is unclear when the conduct is permitted or prohibited in this circumstance and it is unclear how different law enforcement agencies and prosecuting attorneys across the State will apply the law.

45. Additionally, the statute lacks any qualification that a physician may invoke the exception relating to the life and health of a woman based on the physician's appropriate medical judgment. The "appropriate medical judgment" qualification is erased from the HB 92 Amendment. The court could conclude that it is unclear how a physician can invoke the important life and health exceptions of the HB 92 Amendment. If it is not qualified by "appropriate medical judgment" does this mean it is qualified by the appropriate judgment of lawyers or prosecutors throughout the state?

46. Balance of Harms. The Court finds that the balance of harms weighs in favor of the Plaintiffs for granting the preliminary injunction at this time. Plaintiffs have met their burden of establishing irreparable harm in the event the HB 92 Amendment is enforced while this action is pending. An entry of a preliminary injunction will toll the irreparable harm Plaintiffs will suffer while the Courts are able to address whether the HB 92 Amendment transgresses the Wyoming Constitution. The Plaintiffs' irreparable harm outweighs the harm caused in delaying the effect of the HB 92 Amendment in the face of the constitutional challenges pending before the Court.

47. Public Interest. The Court finds that it is in the public interest to issue a preliminary injunction. Important constitutional questions based on constitutional provisions that are unique to Wyoming are at issue. Maintaining the status quo while the merits of Plaintiffs' constitutional challenge proceeds through the judicial process is appropriate.

48. Bond. Pursuant to W.R.C.P. 65(c), the Court may only issue a preliminary injunction "if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Plaintiffs seek a preliminary injunction without bond. Defendants do not object. "If the district court finds no likelihood of harm to the defendant, no bond is necessary." *Operation Save Am. V. City of Jackson*, 2012 WY 51, ¶ 98, 275 P.3d 438, 466 (Wyo. 2012). Defendants do not contend that a bond is necessary or that they will incur costs and damages with the entry of a preliminary injunction. The Court therefore finds that no bond is required pursuant to W.R.C.P. 65(c).

49. Under these circumstances, the Court finds that the preliminary injunction should be granted without bond.

IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction is **GRANTED**. The Court **ENJOINS AND RESTRAINS** Defendants, their officers, employees, servants, agents, attorneys, appointees, successors, or any persons who are in active concert or participation with the Defendants from enforcing the abortion restrictions adopted by HB 92 which amends Wyo. Stat. § 35-6-102(a). This Order is effective immediately upon entry and shall remain in effect until the final resolution of this case on its merits unless modified or dissolved by the Court.

IT IS FURTHER ORDERED that this Order shall be entered without the Plaintiffs providing security pursuant to W.R.C.P. Rule 65(c).

IT IS FURTHER ORDERED that Defendants shall provide a copy of this Order Granting Preliminary Injunction to all county and municipal prosecutors.

IT IS FURTHER ORDERED that a telephone status conference is set in this matter on August 24th, 2022 at 10:00 a.m. The telephone status conference will address scheduling. Ten (10) minutes are set aside for the status conference.

DATED this 10th day of August, 2022.

[signature]
Melissa M. Owens
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 10 Day of August 20 22

J Robinson, M Bramlet
J Iede } fax · email
By: L Colasurno
E Wessman pickup · email
by An Stratton