

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

FILED
TETON COUNTY, WYOMING
2023 APR 17 PM 3:13
COURT CLERK
[Signature]

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. 18853

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
TEMPORARY RESTRAINING ORDER**

This matter came before the Court for a hearing on March 22, 2023 on the Plaintiffs' Motion for Temporary Restraining Order filed on March 17, 2023. John Robinson and Marci 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 to 1-28-111 and W.R.C.P. 65. Plaintiffs request the entry of a temporary restraining order enjoining the enforcement of

House Enrolled Act Number 88 (originally House Bill 152) as enacted under Wyo. Stat. §§ 35-6-120 to 36-6-138. Defendants filed a Response to Motion for Temporary Restraining Order on March 21, 2023. Defendants oppose the entry of a temporary restraining order.

This litigation is in its preliminary stage. At this point, the Court's role is limited to assessing the sufficiency of the Plaintiffs' case to warrant staying the enforcement of HB 152 until the merits of this matter can be fully heard by the Court. Temporary restraining orders do not decide the rights of the parties or the constitutional questions such as those raised in this case. Temporary restraining orders merely hold the rights of the parties in status quo while a case proceeds through Wyoming's judicial system. After review of the Plaintiffs' Motion, the Response, and after considering the arguments of counsel at the hearing, the Court finds and concludes that the Motion should be granted. The result of a temporary restraining order in this case means that the regulations enacted in the Legislature's Life as a Human Right Act (Act) will not be effective immediately.

Parties

1. Plaintiffs. Plaintiffs consist of four individuals and two non-profit groups. All were Plaintiffs in *Johnson et al. v. State of Wyoming et al.*, Civil Action No. 18732 (9th Jud. Dist. Ct. Teton Cnty, Wyo. filed July 25, 2022) (*Johnson I*). The Plaintiffs include:
 - a. *Danielle Johnson*. Ms. Johnson is a married individual and registered nurse residing in Teton County, Wyoming. Ms. Johnson was 22 weeks pregnant at the time the case of *Johnson I* was before this Court. She intends to have more children while residing in Wyoming.
 - b. *Kathleen Dow*. Ms. Dow is a woman with plans to become pregnant who resides in Albany County, Wyoming. Ms. Dow is a life-long practitioner of Judaism. Her religious faith

permits abortion to save the life of a mother. Under Jewish law, Ms. Dow's faith teaches that a mother's life takes precedence over a fetus until the majority of the fetus has been born.

- c. *Giovannina Anthony, M.D.* Dr. Anthony is an Obstetrics and Gynecology specialist residing in Teton County, Wyoming. Dr. Anthony provides all forms of gynecologic and obstetric care, including medical abortions. Dr. Anthony faces felony prosecution, up to five years in prison, a fine up to \$20,000, a total loss of her license to practice medicine, and civil penalties in the event of a violation of the Act.
- d. *Rene Hinkle, M.D.* Dr. Hinkle is an Obstetrics and Gynecology specialist residing in Laramie County, Wyoming. Dr. Hinkle provides health care for woman including full obstetric, primary gynecology, and surgery services to her patients. This includes counseling patients regarding all medical options including abortion. Dr. Hinkle treats patients with high-risk pregnancies, miscarriages, ectopic pregnancies, and fetal anomalies. For pregnant patients with lethal fetal anomalies, Dr. Hinkle offers abortion services. Dr. Hinkle also faces felony prosecution, up to five years in prison, a fine up to \$20,000, a total loss of her license to practice medicine, and civil penalties in the event of a violation of the Act.
- e. *Chelsea's Fund.* Chelsea's Fund is a Wyoming non-profit 501(c)(3) organization that provides financial and logistical support to Wyoming residents seeking abortions who could not otherwise afford an abortion. Chelsea's Fund will incur additional expenses due to the increased travel and logistical arrangements necessary for assisting clients with traveling out of state for abortion services.
- f. *Circle of Hope Health Care Services, Inc.* Circle of Hope is a Wyoming non-profit corporation located in Casper, Wyoming. Circle of Hope has advertised and expended funds

and resources in preparation for opening a medical clinic offering abortion care and other health related services.

2. Defendants. The State Defendants include:

- a. *Governor Mark Gordon*. Governor Gordon is the elected head of Wyoming's executive branch and is responsible for ensuring that the laws of the State are faithfully executed.
- b. *Attorney General Bridget Hill*. Ms. Hill is the Attorney General of Wyoming and is responsible for prosecuting and defending all suits instituted by or against the State of Wyoming.
- c. *Teton County Sheriff Mathew Carr and Town of Jackson Police Chief Michelle Weber*. Sheriff Carr is the elected Sheriff for Teton County, Wyoming and Chief Weber is the elected Chief of Police for the Town of Jackson. Each will be responsible for enforcing criminal violations of HB 152 occurring within their jurisdictions.

All are sued in their official capacities.

Background

3. Legislative History: Abortion regulations are not new to Wyoming. Over the course of Wyoming's entire state history abortions have been regulated but always have been allowed to preserve a woman's life. Legislation regulating abortion in Wyoming falls into three historical periods. These periods include: (1) the *Pre-Roe* era; (2) the *Roe* era; and (3) the *Dobbs* era.
4. **Pre-Roe era**. Wyoming's *Pre-Roe* regulations, in effect from 1890 to 1973, permitted abortion only when necessary to preserve a woman's life. 1890 Terr. Wyo. Sess. Laws, ch. 73, § 31 (codified at Wyo. Rev. Stat. § 4969 (1899)). A violation of this regulation carried a maximum

prison sentence of fourteen years. *Id.* This regulation remained in effect without substantial changes for eighty-three years.

5. **Roe era.** In 1973, the United States Supreme Court held that the United States Constitution protects a woman's right to have an abortion before viability. *See Roe v. Wade*, 410 U.S. 113 (1973). Not long after *Roe*, the Wyoming Supreme Court found Wyoming's pre-*Roe* abortion regulations unconstitutional. *Doe v. Burk*, 513 P.2d 643, 644-645 (Wyo. 1973). Four years later, the Wyoming State Legislature enacted its *Roe* era abortion regulation. Wyo. Stat. § 35-6-102(a) (1977).
6. Under that legislation, Wyoming women were 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." Wyo. Stat. § 35-6-102(a) (1977). A violation of this regulation carried a potential prison sentence of not more than fourteen years. Wyo. Stat. § 35-6-110 (1977). This legislation remained in effect without amendment or legal challenge, at the state level, for a period of forty-five years.
7. During this time, Wyoming citizens passed a constitutional amendment that explicitly protects health care access. In 2012, Wyoming voters adopted the Right of Health Care Access (RHCA) amendment. Wyo. Const. art. 1, § 38. RHCA provides all Wyoming citizens with the constitutional right to make their own health care decisions and directly pay their provider for health care services. Wyo. Const. art. 1, §§ 38(a)-(b). RHCA allows the Legislature to place reasonable and necessary restrictions on health care decisions to: (1) "protect the health and general welfare of the people"; or (2) "to accomplish the other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38(c). Finally, the RHCA requires the State of

Wyoming to preserve the right to health care access from “undue governmental infringement.”

Wyo. Const. art. 1, § 38(d).

8. **Dobbs era.** During the 2022 Wyoming Legislative Session, the Legislature passed an amendment to Wyoming’s long standing abortion regulation. The amendment prohibited abortion, at any time during a woman’s pregnancy, with three limited exceptions. Wyo. Stat. § 35-6-102(b) (2022). The limited exceptions included circumstances where abortion: (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 the result of incest pursuant to Wyo. Stat. § 6-4-402; or (3) when a pregnancy is the result of sexual assault as defined by Wyo. Stat. § 6-2-301. *Id.* The terms of the amendment provided for an effective date triggered by decisions issued from the United States Supreme Court overruling *Roe v. Wade*, 410 U.S. 113 (1973).
9. 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). The *Dobbs* decision overturned *Roe v. Wade* by holding that the United States Constitution does not confer women with the right to obtain an abortion. -- U.S. --, 142 S. Ct. at 2279. The *Dobbs* decision handed the authority to regulate and prohibit abortion back to the States and thus began the era that the parties find themselves in today.
10. Procedural History. The effective date of Wyo. Stat. § 35-6-102(b) (2022) was July 27, 2022. Prior to becoming effective, these same Plaintiffs filed *Johnson I* challenging the constitutionality of Wyo. Stat. § 35-6-102(b) under Wyoming’s Constitution. *Johnson I* was pending before this Court during the 2023 Wyoming Legislative Session. Presumably in

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 6 of 32

response to the issues raised in *Johnson I*, the Legislature repealed Wyo. Stat. § 35-6-102(b) and replaced it with HB 152.

11. With HB 152, the Wyoming Legislature enacted a more detailed set of abortion regulations that included definitions, findings, purposes, interests, and additional exceptions. The primary purpose of HB 152 is to protect and preserve all prenatal life, from conception to childbirth. Wyo. Stat. § 35-6-121(a)(i); Wyo. Stat. § 35-6-122(a)(iv). In doing so, the Legislature recognizes all embryonic and fetal life as human beings endowed with certain constitutional rights. Wyo. Stat. § 35-6-121. These rights include the right to life, liberty, and the pursuit of happiness as well as equal protection. Wyo. Stat. §§ 35-6-121(a)(i)-(a)(iii), (a)(v)-(a)(vi).
12. Once the Legislature passed HB 152, Governor Gordon had fifteen days to either sign the Bill into law, veto it, or allow it to become law without his signature. On March 17, 2023, Governor Gordon allowed HB 152 to become law without his signature. That same day, Plaintiffs filed a complaint for declaratory judgment and injunctive relief and a request for a temporary restraining order.
13. This Court held the hearing on Plaintiffs' Motion for Temporary Restraining Order on March 22, 2023. Plaintiffs attached a number of affidavits in support of their Motion for Temporary Restraining Order. Although the Court considered the affidavits submitted by each of the named Plaintiffs, the Court did not consider the remaining affidavits submitted. Additionally, Plaintiffs cited to this Court's Order Granting Preliminary Injunction in *Johnson I* in support of Plaintiffs' argument for granting the temporary restraining order in this matter. The Court agrees with Defendants that the Court's Order Granting Preliminary Injunction in *Johnson I* is irrelevant.

Therefore, the Court did not consider the Plaintiffs' arguments addressing this Court's Order Granting Preliminary Injunction in *Johnson I*.

14. After the hearing, the Court entered the Temporary Restraining Order, in short form, effective immediately. The Court enters this Order to fully identify the findings of this Court for the record.

15. The Act. The "[f]indings and purposes" section of the Act states:

35-6-121. Findings and purposes.

(a) The legislature finds that:

- (i) As a consequence of an unborn baby being a member of the species homo sapiens from conception, the unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution;
- (ii) The legislature acknowledges that all members of the human race are created equal and are endowed by their creator with certain unalienable rights, the foremost of which is the right to life;
- (iii) This act promotes and furthers article 1, section 6 of the Wyoming constitution, which guarantees that no person may be deprived of life or liberty without due process of law;
- (iv) Regarding article 1, section 38 of the Wyoming constitution, abortion as defined in this act is not health care. Instead of being health care, abortion is the intentional termination of the life of an unborn baby. It is within the authority of the state of Wyoming to determine reasonable and necessary restrictions upon abortion, including its prohibition. In accordance with Article 1, Section 38(c) of the Wyoming constitution, the legislature determines that the health and general welfare of the people requires the prohibition of abortion as defined in this act;
- (v) The legislature, in the exercise of its constitutional duties and powers, has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception;
- (vi) Wyoming's "legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 8 of 32

medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.” *Dobbs v. Jackson Woman’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (internal citations omitted).

16. The Act includes the following definitions:

35-6-122. Definitions.

(a) As used in this act:

- (i) “Abortion” means the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby. “Abortion” shall not include any use, prescription or means specified in this paragraph if the use, prescription or means specified in this paragraph are done with intent to:
 - (A) Save the life or preserve the health of the unborn baby;
 - (B) Remove a dead unborn baby caused by spontaneous abortion or intrauterine fetal demise;
 - (C) Treat a woman for an ectopic pregnancy; or
 - (D) Treat a woman for cancer or another disease that requires medical treatment which treatment may be fatal or harmful to the unborn baby.
- (ii) “Pregnant” means the human female reproductive condition of having a living unborn baby or human being within a human female’s body throughout the entire embryonic and fetal stages of the unborn human being from fertilization, when a fertilized egg has implanted in the wall of the uterus, to full gestation and childbirth;
- (iii) “Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved;

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 9 of 32

- (iv) "Unborn baby" or "unborn human being" means an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages from fertilization to full gestation and childbirth;
- (v) "Ectopic pregnancy" means a pregnancy that occurs when a fertilized egg implants and grows outside the main cavity of the uterus;
- (vi) "Lethal fetal anomaly" means a fetal condition diagnosed before birth and if the pregnancy results in a live birth there is a substantial likelihood of death of the child within hours of the child's birth;
- (vii) "Molar pregnancy" means the development of a tumor or cysts that may or may not include placental tissue from trophoblastic cells after fertilization of an egg that results in spontaneous abortion or intrauterine fetal demise;
- (viii) "This act" means W.S. 35-6-120 through 35-6-138.

17. The Act provides the following restrictions to terminating a pregnancy:

35-6-123. Abortion prohibited.

- (a) Except as provided in W.S. 35-6-124, no person shall knowingly:
 - (i) Administer to, prescribe for or sell to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting an abortion; or
 - (ii) Use or employ any instrument, device, means or procedure upon a pregnant woman with the specific intent of causing or abetting an abortion.

35-6-124. Exceptions to abortion prohibition, applicability.

- (a) It shall not be a violation of W.S. 35-6-123 for a licensed physician to:
 - (i) Perform a pre-viability separation procedure necessary in the physician's reasonable medical judgment to prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman, provided that no separation procedure shall be deemed necessary under this paragraph unless the physician makes all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of the unborn baby in a manner consistent with reasonable medical judgment;

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 10 of 32

(ii) Provide medical treatment to a pregnant woman that results in the accidental or unintentional injury to, or the death of, an unborn baby.

(iii) Perform an abortion on a woman when 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. Prior to the performance of any abortion under this paragraph the woman, or the woman's parent or guardian if the woman is a minor or subject to a guardianship, shall report the act of incest or sexual assault to the law enforcement agency and a copy of the report shall be provide to the physician;

(iv) Perform an abortion on a woman when in the physician's reasonable medical judgment, there is a substantial likelihood that the unborn baby has a lethal fetal anomaly or the pregnancy is determine to be a molar pregnancy.

(b) Nothing in this act shall be construed to prohibit the use, sale, prescription or administration of a contraceptive measure, drug, chemical or device if the contraceptive measure, drug, chemical or device is used, sold, prescribed or administered in accordance with manufacturer instructions and is not used, sold, prescribed or administered with the specific intent to cause or induce an abortion.

18. Penalties for violation of the Act include:

35-6-125. Penalties and remedies.

(a) Any person who violates W.S. 35-6-123 is guilty of a felony punishable by a fine not to exceed twenty thousand dollars (\$20,000.00), imprisonment for not more than five (5) years, or both.

(b) Nothing in this act shall be construed to subject a pregnant woman upon whom any abortion is performed or attempted to any criminal penalty under this act.

35-6-126. Professional sanctions; civil penalties.

(a) In addition to any other penalties available under law, a physician or any other professional licensed person who intentionally, knowingly or recklessly violates W.S. 35-6-123 commits an act of unprofessional conduct, and the physician's or person's license to practice in Wyoming shall be immediately revoked by the state board of medicine after due process in accordance with the rules and procedures of the state board of medicine. Any person may file a complaint against physician or other licensed person under this section, or the state board of medicine may on

its own accord initiate a complaint against a physician or other licensed person. The state board of medicine may assess or impose the costs of any investigation, fines not to exceed five thousand dollars (\$5,000.00) and any other disciplinary actions authorized by law that the board deems appropriate.

- (b) No civil penalty shall be assessed against a pregnant woman upon whom an abortion is performed or attempted for a violation of this act.

35-6-127. Civil remedies.

- (a) In addition to any remedies available under law, failure to comply with this act shall provide the basis for a civil action as provided by this section.
- (b) Any pregnant woman upon whom an abortion has been performed, induced or coerced in violation of this act may maintain an action against the person or persons who violated this act for actual and punitive damages. In addition to all other damages and separate and distinct from all damages, a plaintiff prevailing in an action under this section shall be entitled to statutory damages of ten thousand dollars (\$10,000.00) for each violation of this act from each defendant for each violation.
- (c) A separate and distinct cause of action for injunctive relief against any person who has violated this act to enjoin further violation of this act may be maintained by any of the following:
- (i) The woman upon whom an abortion was performed or induced in violation of this act;
 - (ii) The parent or guardian of the pregnant woman if the woman had not attained eighteen (18) years of age at the time of the abortion or if the woman died as a result of the abortion;
 - (iii) A district attorney with proper jurisdiction;
 - (iv) The attorney general.
- (d) If judgment is rendered in favor of the plaintiff in a civil action authorized by this section, the plaintiff shall be entitled to receive reasonable costs and attorney fees from the defendant.

LEGAL STANDARDS

19. Temporary Restraining Orders. Temporary restraining orders (TROs) and 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.

20. Injunctions are extreme remedies. *In re Kite Ranch, LLC v. Powell Family of Yakima, LLC*, 2008 WY 39, ¶ 21, 181 P.3d 920, 926 (Wyo. 2008). Plaintiffs have the burden to establish a clear showing of probable success and possible irreparable injury. *CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp.*, 2009 WY 113, ¶ 8, 215 P.3d 1054, 1057 (Wyo. 2009) (citing *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2002)). In *CBM Geosolutions, Inc.*, 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.

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 13 of 32

2009 WY at ¶ 7, 215 P.3d at 1057 (citations omitted).

21. When issuing a TRO, 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 . . . temporary restraining order 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.

22. Rules of Statutory and Constitutional Interpretation. Addressing the probable success prong requires this Court to construe the Act in relationship to Wyoming’s Constitution. Undertaking this task requires this Court to employ long standing principles of statutory and constitutional construction set forth in Wyoming’s case precedent. Plaintiffs bear the burden of proving that the Act is unconstitutional. *Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 304 (Wyo. 2014) (citing *Krenning v. Heart Mt. Irrigation Dist.*, 2009 WY 11, 33, 200 P.3d 774, 784 (Wyo. 2009)). In *Powers*, the Wyoming Supreme Court summarized the respective burdens of claimants and duties of a 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 Wyo. At 33, 200 P.3d at 784. However, we have also recognized that “[t]hrough 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).

Powers, 318 P.3d at 7, 318 P.3d at 303 (emphasis added).

23. 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).

24. 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).

LEGAL ANALYSIS

25. Status Quo. TROs preserve the status quo until the merits of a case can be decided. Thus, the Court must identify the status quo to be preserved. The definition of status quo is "the existing

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853

Page 15 of 32

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) (emphasis added). 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).

26. The status of abortion regulations in Wyoming has been contested under the Wyoming Constitution since Wyoming’s *Dobbs* era began. The Wyoming abortion restrictions triggered by the *Dobbs* decision were immediately challenged in *Johnson I*. In an acknowledgment of the legal problems present with Wyo. Stat. § 35-6-102(b)(2022), the Wyoming Legislature repealed Wyo. Stat. § 35-6-102(b)(2022) and enacted the Act in its place. Just prior to the effective date of the Act, this case was filed by the Plaintiffs challenging its constitutionality.

27. Prior to *Dobbs*, Wyoming women had access to abortion services up until 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.” Wyo. Stat. § 35-6-102(a) (1977). The *Roe* era lasted from 1973 to 2022, a period of forty-five years. Wyo. Stat. § 35-6-102(a) (1977) was not litigated or challenged at the state level during this period of time. In looking to the last uncontested status between the parties that preceded the controversy, the Court finds and concludes that the status quo in this matter is situated at the point in time where Wyoming women had access to abortion services during the *Roe* era for a period of forty-five years.

28. Probable Success. The Wyoming Supreme Court has acknowledged that one factor the Court's must consider is probable success. *CBM Geosolutions, Inc.*, 2009 WY at ¶ 8, 215 P.3d at 1057–58. In the context of a TRO, the court merely recognizes that a sufficient case has been made. *Id.* at ¶ 7, 1057. Plaintiffs seek a declaratory judgment that the Act violates Plaintiffs' rights under the Wyoming Constitution.
29. Plaintiffs focus their probable success arguments on four constitutional claims. The claims include: (1) the constitutional right of Wyoming citizens to control their own health care, free from undue government influence; (2) the constitutional prohibition on establishment of religion; (3) the constitutional right to equal protection; and (4) the constitutional prohibition on vague criminal statutes that do not provide sufficient notice to regulated parties of what conduct is prohibited. The Court finds the Plaintiffs' claim addressing the constitutional right to control health care dispositive for purposes of this Order. Therefore, the Court addresses the issue of probable success on this claim alone.
30. To address probable success on the constitutional claim regarding health care, the Court will address whether article 1, section 38 confers a right to make health care decisions. Next, the Court will consider whether an abortion qualifies as health care. Finally, the Court will review whether the restrictions in the Act are reasonable and necessary and do not result in undue governmental influence. Each of these issues are addressed in turn below.

A. Have Plaintiffs made a sufficient showing that article 1, section 38 confers a right for Wyoming citizens to make their own health care decisions?

31. The Court must review the Act in conjunction with the RHCA constitutional amendment. RHCA provides:

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

Wyo. Const. art. 1, § 38.

32. Subpart (a) addresses health care decisions. To determine the intent of the drafters, the Court looks to the plain and unambiguous language used in the text of article 1, section 38(a) which states: “[e]ach 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.” (emphasis added). The Court notes that the words utilized in article 1, section 38(a) are commonly used terms.

33. The Wyoming Supreme Court has interpreted the word “shall” to mean “mandatory” and explained that it “intimates an absence of discretion.” *In re MN*, 2007 WY 189, ¶ 5, 171 P.3d 1077, 1080 (Wyo. 2007) (citations omitted). Merriam-Webster Dictionary defines the word “right” in pertinent part as “the power or privilege to which one is justly entitled.” The term “health care” means “[c]ollectively, the services provided, usually by medical professionals, to maintain and restore health.” Black’s Law Dictionary (11th ed. 2019) (alteration in original). Merriam-Webster Dictionary defines the word “decision” in pertinent part as “a determination arrived at after consideration.”

34. When the language of a constitutional clause is plain and unambiguous, Wyoming Supreme Court case precedent establishes that there is no room left for judicial construction. *Rasmussen*, 7 Wyo. 117, 50 P.819, 821 (Wyo. 1897). The Court finds no ambiguity with the words utilized in article 1, section 38(a). Applying the meaning of the words plainly expressed in article 1, section 38(a), the Court finds that Plaintiffs have made a sufficient showing that the drafters intended to give all Wyoming citizens a right to make their own decisions about what health care services they receive from medical professionals to restore and maintain their health.
35. The Court notes that neither party appears to contend that the language employed by article 1, section 38 is ambiguous. Despite this, the Defendants set forth extensive argument regarding the historical circumstances leading to the adoption of the RHCA amendment. Defendants suggest that the RHCA amendment was really just intended to counteract the Affordable Care Act by allowing patients to make direct payments for health care. The Defendants provide no argument or case law identifying why this Court is permitted to consider this argument in light of its finding that the provisions of article 1, section 38 are unambiguous.
36. The Court is bound by the principles of constitutional construction set out under Wyoming's case precedent. A finding that there is no ambiguity with the words utilized in a constitutional clause means that there is no room left for construction. *Powers*, 2014 WY at ¶ 8, 318 P.3d at 304 (citing *Rasmussen*, 7 Wyo. at 128, 50 P. at 189. Put another way, if there is no ambiguity in the words, the intent is found in the instrument itself. *Id.* Since the Court finds no ambiguity with the words utilized in article 1, section 38(a) there is no room left for the Court to dive into the historical circumstances leading to the adoption of the RHCA. The Court is not allowed to second guess the intent that is plainly found on its face.

37. Further, even if this Court could consider Defendants' arguments surrounding the historical circumstances of the RHCA and the Affordable Care Act, Defendants' contention that the intent of article 1, section 38 was only to confer a constitutional right to make direct payments to health care providers cannot be harmonized. When construing constitutional provisions, this Court must follow harmonizing rules:

Our cases explain that every statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and that the constitution should not be interpreted to render any portion of it meaningless, with all portions of it read in *pari materia* and every word, clause and sentence considered so that no part would be inoperative or superfluous.

Powers, 2014 WY at ¶ 19, 318 P.3d at 304 (citing *Geringer v. Bebout*, 10 P.3d 514, 520 (Wyo. 2000); see also *Cathcart*, 2004 WY 49, ¶ 40, 88 P.3d 1050, 1065 (Wyo. 2004); *Management council of the Wyo. Legislature v. Geringer*, 953 P.2d 839, 845 (Wyo. 1998).

The plain language of article 1, section 38 clearly confers a constitutional right to make health care decisions and also confers a constitutional right for patients to directly pay their providers for their health care treatments. To accept Defendants' argument that the RHCA was only intended to address payment of health care services would require the Court to ignore the right granted in article 1, section 38(a). Such an interpretation would not comport with Wyoming's harmonizing rules.

B. Have Plaintiffs made a sufficient showing that an abortion is health care?

38. The Plaintiffs contend that an abortion is a form of health care. In contrast, Defendants argue that a decision to have an abortion is not a health care decision. Defendants assert the Act contains a declaration that excludes "abortion" from health care. Defendants point to the findings and purposes of the Act that states: "[r]egarding article 1, section 38 of the Wyoming constitution, abortion as defined in this act is not health care." According to the Defendants, the Court should

defer to the Legislature's findings that abortion is not health care for purposes of article 1, section 38. Additionally, Defendants contend that an abortion neither maintains nor restores the health of a pregnant woman.

39. Plaintiffs, two of which, have extensive experience as practicing Obstetrics and Gynecology specialists, provided ample evidence in their affidavits that abortions are utilized by medical professionals to restore and maintain the health of their patients. However, even without the affidavit testimony, the Court can find that abortions are utilized by medical professionals to restore and maintain the health of their patients. This can be accomplished by reviewing the plain language of the Act. The words and phrases used throughout the entire Act invalidates the Defendants' argument that an abortion is not a form of health care. The Act defines "abortion" to mean:

"Abortion" means the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby. "Abortion" shall not include any use, prescription or means specified in this paragraph if the use, prescription or means specified in this paragraph are done with intent to:

- (E) Save the life or preserve the health of the unborn baby;
- (F) Remove a dead unborn baby caused by spontaneous abortion or intrauterine fetal demise;
- (G) Treat a woman for an ectopic pregnancy; or
- (H) Treat a woman for cancer or another disease that requires medical treatment which treatment may be fatal or harmful to the unborn baby.

Wyo. Stat. § 35-6-122(a)(i).

The definition of the term “abortion” under the Act uses the following terms and phrases: prescribing, medicine, drug, clinically diagnosable, prescription, save the life, preserve the health, treat a woman, ectopic pregnancy, disease, and medical treatment. Application of the exclusions under the Act requires “reasonable medical judgment” by physicians who: (1) are “knowledgeable about the case”; and (2) are knowledgeable “about the treatment possibilities with respect to the medical conditions involved.” Wyo. Stat. § 35-6-122(a)(iii). A violation of the Act entails, in part, knowingly administering or prescribing a medication, drug, or other substance to cause an abortion or employing a procedure on a pregnant woman with the intent to cause an abortion. Wyo. Stat. §35-6-123. The plain and ordinary meaning of each of these words and phrases strongly suggests that this is a procedure that involves health care.

40. Further, the Act itself acknowledges the medical necessity of abortions in the lives of Wyoming women. This also supports the proposition that an abortion is a form of health care. For instance, the Act clearly identifies scenarios where a woman must terminate their pregnancy because not doing so would or could lead to the death of a pregnant woman. For example, it is not a violation of Wyo. Stat. § 35-6-123 to terminate a pregnancy when necessary to prevent the death of a pregnant woman. Wyo. Stat. § 35-6-124(a)(i). Similarly, it is not a violation of Wyo. Stat. § 35-6-123 to terminate a pregnancy when necessary to prevent the substantial risk of death for a pregnant woman. *Id.* Terminating a pregnancy in either of these scenarios must be based on a “physician’s reasonable medical judgment.”

41. The Defendants argue that there has been no showing that an abortion maintains or restores the health of a pregnant woman. The Court disagrees. The showing is found within the Act itself. The Court cannot find that a procedure that requires medical expertise, the prescription of

medications and drugs, the use of reasonable medical judgment, which must also include medical opinions on the health of the pregnant woman and the fetus, is not a health care procedure.

42. Next, the findings incorporated into the Act are inconsistent. On one hand, the Act declares that abortion is not health care under article 1, section 38. Wyo. Stat. § 35-6-121(a)(iv). On the other hand, the legislative findings declare that the State of Wyoming has the authority to determine reasonable and necessary restrictions to abortion, including its prohibition, pursuant to article 1, section 38(c) of the Wyoming Constitution. Article 1, section 38(c) is the subpart to the RHCA amendment that allows the Legislature to impose restrictions on an individual's right to make their own health care decisions. By resting its authority to regulate abortion under article 1, section 38(c), the Legislature appears to acknowledge that an abortion is the type of "health care decision" under article 1, section 38(a) that it has authority to regulate.

43. Finally, the Act appears to legislate the interpretation of "health care" under the Wyoming Constitution. The Act includes a declaration that an "abortion" is not health care under article 1, section 38. Wyo. Stat. § 35-6-121(iv). The Wyoming Supreme Court has explained:

Declaring the validity of statutes in relation to the constitution is a power vested in the courts as one of the checks and balances contemplated by the division of government into three departments[,] legislative, executive and judicial. *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.3d 310, 318 (1980) (citing Article 2, § 1 of the Wyoming Constitution and *Marbury v. Madison*, (1803), 5 U.S. (1 Cranch) 137, 2 L.Ed. 60). The judiciary will not encroach into the legislative field of policy making; however, as the final authority on constitutional questions, the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution. *State v. Campbell Cty. Sch. Dist.*, 2001 WY 19 ¶ 55, 19 P.3d 518, 540 (Wyo. 2001) (citing *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) ("The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Constitution It is solely the function of the judiciary to do so ..., even when such action serves as a check on the activities of another branch of government.")).

Gordon v. State by and through Capitol Building Rehabilitation, 2018 WY 32, ¶ 55, 413 P.3d 1093, 1109 (Wyo. 2018).

Under Wyoming's system of government, the authority to interpret and construe the meaning of the words and phrases in the constitution is vested in the courts. *Id.* Laws that transgress the separation of powers set forth in article 2, section 1 are unconstitutional. *Id.*

44. To the extent, as Defendants argue, that Wyoming has recognized that legislative findings are controlling in an absence of a controversy questioning their validity, this Court finds that the legislative findings are inconsistent on their face and Plaintiffs have raised ample questions regarding their validity. *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1131 (Wyo. 1978) (citing *Walker v. Alaska State Mortgage Association*, 416 P.2d 245 (AL 1966)). In sum, the Court finds that the Plaintiffs have made a sufficient showing that an abortion constitutes health care under article 1, section 38.

C. Have Plaintiffs made a sufficient showing that the Act violates article 1, section 38.

45. As the Defendants have correctly pointed out, the right to make health care decisions under article 1, section 38 is not unfettered. The Court agrees with the Defendants; to suggest otherwise, would lead to absurd results. However, the Court must address whether the restrictions in the Act are “reasonable and necessary” to “protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution” as well as whether the restrictions are free from undue governmental infringement. Wyo. Const. art. 1, § 38(c)-(d).
46. The review of what constitutes “reasonable and necessary” restrictions to health care decisions that are free from “undue governmental infringement” is a matter of first impression in Wyoming. The stated interests under the Act include: “respect for and preservation of prenatal

life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the presentation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.” Wyo. Stat. § 35-6-121 (a)(vi). None of these interests appear to justify a near total prohibition of a woman’s right to make the decision to terminate her pregnancy throughout her entire pregnancy.

47. The Defendants point out that it is the Wyoming Legislature’s right and duty to regulate health care in Wyoming through its police powers. “The police power can be generally described as a government’s ability to regulate private activities and property usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare.” *Cheyenne Airport Bd. Rogers*, 707 P.2d 717, 726 (Wyo. 1985). The Court agrees with the Defendants but emphasizes that the police power exercised by the Legislature regulating health care decisions must still be reasonable and necessary.
48. Defendants state that article 1, section 38(a) only grants the right for a citizen to make health care decisions that are “legally available.” Defendants contend interpreting “health care” to include abortion would allow Wyoming citizens to engage in otherwise unlawful activities under the guise of “making health care decisions” which would lead to an absurd result. For instance, Defendants suggest that a person who decides to treat their medical condition with marijuana would be constitutionally authorized in Wyoming to do so even though Wyoming laws prohibit the use of marijuana.
49. The Court finds that the Defendants’ analogy of a patient’s decision to treat their medical condition with marijuana to a woman’s decision to treat her medical condition with an abortion

is misplaced. If a pregnancy must be terminated there are no alternative procedures for terminating a pregnancy other than an abortion. Whereas, if a patient has a medical condition that marijuana may be useful to treat, there are ample alternative medications that are available for Wyoming physicians to prescribe. Hence, the reasonable and necessary analysis of prohibiting marijuana to treat a health condition versus regulating abortion to treat a health condition are incongruous.

50. The magnitude of the burden the Act places on pregnant women, their bodies, their physical and emotional health, their well-being, their families, their careers, their right to make health care decisions, and their finances is not lost on the Court. Likewise, the magnitude of employing the drastic remedy of enjoining a legislative enactment is not taken lightly by the Court. However, the Court cannot ignore that the Act suspends a right that every Wyoming woman is normally entitled to on the sole basis that she happens to be pregnant.

51. A woman's right to make her own health care decisions is explicitly protected by Wyoming's Constitution. Wyo. Const. art. 1, § 38. The Act strips this right from all pregnant women. The Act's restrictions begin even at the earliest stages of embryonic development. It makes no distinction between a blastocyst, an embryo, and a fetus. The Act endows embryos, preivable fetuses, and viable fetuses with constitutional rights not previously recognized under Wyoming law that trump a woman's constitutional right to make her own health care decisions.

52. The Act suspends a woman's right to make her own health care decisions for the entire duration of her pregnancy. A pregnancy lasts for approximately forty weeks which is roughly nine months of a woman's life. Courts across the nation have found the interest of protecting prenatal life insufficient to justify near total abortion bans under various state constitutional protections.

Valley Hosp. Ass'n v. Mat-Su Coal. For Choice, 948 P.2d 963, 971 (Alaska 1997); *Comm. To Def. Reprod. Rts. V. Myers*, 625 P.2d 779, 793-707 (Cal. 1981); *In re T.W.*, 551 So.2d 1186, 1192-94 (Fla. 1989); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995); *Armstrong v. State*, 989 P.2d 364, 380-384 (Mont. 1999); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000); *Right to Choose v. Byrne*, 450 A.2d 925, 934-37 (N.J. 1982); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 496 (Kan. 2019). The Court finds those cases persuasive when evaluating the Act in light of Wyoming's explicit constitutional right to make health care decisions in conjunction with the far-reaching restrictions the Act places on pregnant women.

53. On balance, all of these factors tip in favor of an entry of a TRO even in the face of its extreme remedy. Plaintiffs have made an adequate showing that the suspension of a woman's right to make her own health care decisions during the entire duration of her pregnancy constitutes undue governmental interference and does not appear reasonable and necessary under Wyoming's Constitution. Accordingly, the Court finds that the Plaintiffs have asserted a sufficient showing of probable success to warrant enjoining the Act until this matter can be fully resolved on its merits.

54. Possible Irreparable Harm. Plaintiffs must establish that they will suffer possible irreparable injury without the entry of a TRO. *CBM Geosolutions, Inc.*, 2009 WY at ¶ 8, 215 P.3d at 1057 (citations omitted). "Irreparable harm is, by definition, harm for which there can be no adequate remedy at law." *Id.* 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, 1181 (D. Kan. 1988).

55. The Defendants contend that Plaintiffs have failed to allege direct irreparable harm to any of the named Plaintiffs and only assert harms to unnamed, non-parties. Defendants also argue that to the extent that Plaintiffs have alleged harm to the named Plaintiffs, it is too speculative and too remote to qualify as irreparable harm. Defendants cite *Cf. Getty Images News Servs. Corp. v. Dep't of Defense*, where the U.S. District Court for the District of Columbia stated: “[i]t is axiomatic that speculative injury will not support emergency injunctive relief, and that the threat of irreparable injury must be real and imminent.” 193 F.Supp.2d 112, 122 (D.D.C. 2002).

56. The Court does not find Plaintiffs harm purely speculative. The 10th Circuit has addressed the issue of speculative irreparable damages in conjunction with TROs. “[T]o satisfy the irreparable harm factor, the [movant] ‘must establish both that harm will occur, and that, when it does, such harm will be irreparable.’ ” *Cloud Peak Energy Inc. v. U.S. Dep't. of the Int.*, 415 F.Supp. 3d 1034, 1043 (D.Wyo. 2019) (quoting *New Mexico Dep't of Game & Fish v. United States Dep't*

of the Interior, 8554 F.3d 1236, 1251 (10th Cir. 2017) (quoting *Vega v. Wiley*, 259 F. App'x. 104, 105 (10th Cir. 2007) (unpublished)).

57. Additionally, the Wyoming Supreme Court has recognized that injunctive relief can be sought to obtain preventative relief. *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, 714 P.2d 328 (Wyo. 1986) (quoting *Reno Livestock Corporation v. Sun Oil Company (Delaware)*, 638 P.2d 147, 153 (1981). "Prevention of impending future injury is a recognized function of a court of equity. *Reno Livestock Corp.*, 638 P.2d at 153. In Wyoming, an impending injury is sufficient to obtain injunctive relief. *Id.*

58. The 10th Circuit has repeatedly held that the loss of constitutional rights, even for a short period of time, unquestionably constitutes irreparable injury under the TRO analysis. *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976). In *Heideman*, the 10th Circuit found that nude dancers seeking to enjoin an ordinance requiring them to wear "G-strings" and "pasties" during their performances demonstrated irreparable harm based on the alleged infringement of their First Amendment rights. 348 F.3d 1182, 1189-1190 (10th Cir. 2003). The 10th Circuit has also explained:

What makes an injury "irreparable" is the inadequacy of, and the difficulty of calculating a monetary remedy after a full trial. Any deprivation of any constitutional rights fits that bill.

Free the Nipple-Fort Collins v. City of Fort Collins, CO, 916 F.3d 792, 806 (10th Cir. 2019) (citations omitted) (holding that an ordinance criminalizing topless women violated the Equal Protection Clause such that the Plaintiff need not show any further irreparable harm). The Court finds *Heideman* and *Free the Nipple-Fort Collins* persuasive in this case. If a nude dancer is

irreparably harmed for the loss of her first amendment right to dance without “pasties” or “g-strings,” a pregnant woman should likewise satisfy the irreparable harm prong with the loss of her constitutional right to make medical decisions throughout the entire duration of her pregnancy.

59. The Court finds that Plaintiffs Ms. Johnson and Ms. Dow have satisfied the element of irreparable harm. First, pregnancies, like Ms. Johnson’s at the time of *Johnson I*, are of limited duration. A plaintiff cannot place her pregnancy on pause until a final judgment is entered by this Court. There is no ability for a pregnant plaintiff to re-exercise the constitutional rights that are infringed during pregnancy after this issue is resolved in Wyoming. Second, the affidavit testimony of both Ms. Johnson and Ms. Dow verify that each desire to have additional children while residing in Wyoming. Under the Act, when Ms. Johnson and Ms. Dow become pregnant, their constitutional right to make their own health care decisions will be denied for the entire duration of their pregnancy. The loss of their constitutional right constitutes an impending future injury that is irreparable.

60. The Court also finds that the remaining Plaintiffs have established possible irreparable harm to justify an injunction. Drs. Hinkle and Anthony would be subject to felony prosecution, incarceration, and the loss of their ability to practice medicine in the event of misapplying the allegedly unclear exceptions when treating a patient. Loss of customers and an inability to practice medicine across the United States appears to satisfy the element of irreparable harm. *Id.*, *See Also Int’l Snowmobile Mfrs. Ass’n. v. Norton*, 304 F.Supp. 2d 1278, 1278 (D. Wyo. 2004).

61. The Court also finds Chelsea's Fund and Circle of Hope have established possible irreparable harm. The Act will significantly drain the organizational finances and capacity of Chelsea's Fund due to the expenses associated with securing out-of-state travel for clients needing abortions. The Act undermines Circle of Hope's intended and advertised service of providing primary care including medicated and surgical abortions in a region of Wyoming that is not currently served. The Court finds that the Act subjects Chelsea's Fund and Circle of Hope to potential loss of good will as well as loss of patients and clients which satisfies the element of irreparable harm for purposes of entering a TRO. *Id.*
62. In conclusion, the Court finds that all of the Plaintiffs have established irreparable harm if a TRO is not entered.
63. Bond. Pursuant to W.R.C.P. 65(c), the Court may only issue a TRO "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 TRO 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 with the entry of a TRO. The Court therefore finds that no bond is required pursuant to W.R.C.P. 65(c).
64. Conclusion. The Court appreciates that the ultimate resolution of this matter is of great public and legal importance to the State of Wyoming, its system of laws and government, and its citizens. The Court has approached this issue with extreme caution and deliberation. Although the entry of a TRO is a drastic remedy, the Court finds that it is an appropriate remedy in light of

the constitutional rights at stake and the issues of first impression raised. The Court emphasizes once more that TROs do not decide the rights of the parties or the ultimate constitutional questions raised. This Order only holds the parties' rights in status quo until the case proceeds through Wyoming's judicial system. The case will be heard on its merits in this Court and can be reviewed by the Wyoming Supreme Court.

IT IS ORDERED that Plaintiffs' Motion for Temporary Restraining Order is **GRANTED**. The Court temporarily **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 enacted in House Bill 0152 (HB 152) and codified under Wyo. Stat. §§ 35-6-120 to 36-6-138. This Temporary Restraining Order is effective as of March 22, 2023 and shall remain in effect until dissolved or modified by Court order.

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 Temporary Restraining Order to all county and municipal prosecutors in the State of Wyoming.

IT IS FURTHER ORDERED that a telephone scheduling conference will be set after this Court addresses the Motion to Intervene currently pending in this matter.

DATED this 17th day of April, 2023.

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 17 day of Apr 20 23

- J. Robinson M Bramlet via fax
- P. Modlin Cooney via fax to Robinson Bramlet LLC
- J. Jorde via fax
- L. Colasvorno via fax
- E. Weisman via pickup
- F. Namison via fax

Melissa M. Owens
Melissa M. Owens
District Court Judge

Johnson v. State of Wyoming

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Civil Action No. 18853