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

DANIELLE JOHNSON, ET AL.,)	
)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No. 18853
STATE OF WYOMING, ET AL.,)	
)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER AGAINST
ENFORCEMENT OF MEDICATION ABORTION BAN**

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COME NOW Plaintiffs, by and through undersigned counsel, in support of their *Motion for Temporary Restraining Order Against Enforcement of Medication Abortion Ban*, hereby state as follows:

INTRODUCTION AND DISPOSITION REQUESTED

During the 2023 session, the Wyoming legislature passed two statutes restricting abortions. One bans all abortions with limited exceptions and one bans use of medication for abortions, with different limited exceptions. *See* House Enrolled Act Number 88 (House Bill 152), Wyo. Stat. § 35-6-120 to 35-6-138 (“Wyoming Criminal Abortion Ban”); Senate Enrolled Act Number 93 (Senate File 109), § 35-6-120 (“Wyoming Medication Abortion Ban”).¹ The Criminal Abortion Ban became effective on or about March 18, 2023.

At a hearing on March 22, 2023, the Court issued a temporary restraining order enjoining enforcement of the Criminal Abortion Ban, the basis for which is set forth in the Court’s April 17, 2023 Order Granting Motion for Temporary Restraining Order (“TRO Order”). In particular, the Court found that Plaintiffs had demonstrated irreparable injury and a likelihood of success on the merits of their claim that the Criminal Abortion Ban violates article 1, section 38 of the Wyoming Constitution.

The Medication Abortion Ban was signed by Governor Gordon on March 17, 2023 and provides an effective date of July 1, 2023. *See* Senate Enrolled Act No. 93, Section 3. Because virtually all abortions in Wyoming are medication abortions, the Medication Abortion Ban appears calculated to effect a back-door ban on abortions. In addition, the provisions of the Medication Abortion Ban conflict with the Criminal Abortion Ban, such that it is possible an abortion could be legal under the Criminal Abortion Ban, but use of medication would be illegal under the

¹ The two different abortion-related statutes both adopt different versions of Wyo. Stat. § 35-6-120.

Medication Abortion Ban. Such a result will impose even greater irreparable injury on Plaintiffs and other Wyoming citizens while furthering no conceivable governmental interest.

This Court should grant a temporary restraining order enjoining Defendants from enforcing the Medication Abortion Ban during the pendency of this action.

STATEMENT OF FACTS

In the 2022 legislative session, the Wyoming State Legislature adopted House Bill 92 (“Wyoming Trigger Ban”), which prohibited abortion at any point during a woman’s pregnancy, subject to three limited exceptions where (1) an abortion was necessary to protect a woman’s life or to prevent “a serious risk of death or of substantial and irreversible impairment of a major bodily function,” (2) “the pregnancy is a result of incest as defined by W.S. § 6-4-402,” or (3) a patient’s pregnancy was the result of “sexual assault as defined by W.S. § 6-2-301.” HB 0092 provided penalties of 14 years in prison. Wyo. Stat. § 35-6-110.

During the 2023 legislative session, HB 00152 was adopted, repealing the Wyoming Trigger Ban and replacing it with another abortion ban. HB 0152 has different exceptions for situations where (1) in a physician’s reasonable medical judgment an abortion is necessary to protect a woman’s life or to prevent “a serious and permanent impairment of a life-sustaining organ,” (2) the pregnancy is a result of sexual assault or incest that are reported to a law enforcement agency, or (3) a number of enumerated complications exist, including ectopic pregnancy, molar pregnancy, lethal fetal anomaly, or fetal demise, as defined by the statute. Wyo. Stat. §§ 35-6-122(a)(i) & 124.

Also during the 2023 legislative session, SF 109 was passed, providing that “it shall be unlawful to prescribe, dispense, distribute, sell or use any drug for the purpose of procuring or performing an abortion on any person.” Wyo. Stat. § 35-6-120(a). The Medication Abortion Ban has yet a different set of exceptions for 1) certain types of contraceptives; 2) sexual assault and

incest; 3) “natural miscarriage;” and 4) “[t]reatment necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment,” but expressly excluding any such peril resulting from mental or emotional conditions. Wyo Stat. § 35-6-120(b).

Penalties for violating the Medication Abortion Ban include a prison term of up to six months and a fine of up to \$9,000. Although the statute exempts from prosecution “[a] woman upon whom a chemical abortion is performed or attempted,” it is unclear if this would apply to a woman who herself obtains or uses medication for an abortion. Wyo. Stat. § 35-6-120(d).

Under Wyoming law, the Department of Health, Vital Statistics Service maintains statistics for abortions performed in Wyoming. Wyo. Stat. §§ 35-6-131 & 132. Among other things, the state compiles information on the number, timing and types of abortion procedures performed, as well as any complications associated with abortions. Wyo. Stat. §§ 35-6-131(a)(ii) & (iii). In the last two years for which reports are available (2020 and 2021), all but a single abortion in the state was a medication abortion, and zero patient complications were reported for these abortions. *See* Exs. 1 and 2.²

Plaintiffs are Wyoming reproductive-aged women, licensed physicians, a clinic that provides reproductive health care services to pregnant patients, and a Wyoming non-profit agency that ensures impoverished women may access abortion services. Unless this Court issues a TRO, Wyoming’s Medication Abortion Ban will effectively strip Plaintiffs and Wyoming women of their right to control their own health care. Even where abortion is otherwise legal, it could be illegal to use medication for the abortion under the Medication Ban, regardless of whether

² These official state reports can be accessed at <https://health.wyo.gov/wp-content/uploads/2021/06/2020-Induced-Termination-of-Pregnancy-ITOP-Report.pdf> and <https://health.wyo.gov/wp-content/uploads/2022/05/WDH-VSS-State-ITOP-Report-2021.pdf>

medication is a superior option to a surgical abortion, thereby forcing women to unnecessarily undergo a more invasive, expensive and inconvenient procedure. Given the heavy reliance on medication abortion in Wyoming, in some cases the Medication Abortion Ban could result in a denial of an otherwise legal abortion. Additionally, physicians and health care providers will lose the right to continue offering necessary and evidence-based health care services to their patients. The Court should issue a TRO against the Medication Abortion Ban to prevent this infringement of rights under the Wyoming Constitution.

LEGAL STANDARD

Plaintiffs challenge the constitutionality of the Medication Abortion Ban on multiple grounds, but for purposes of this motion, Plaintiffs have focused on their claim under article 1, section 38 of the Wyoming Constitution. Under this provision, Wyoming citizens have the right to control their own health care decisions, subject only to state regulation that is reasonable and necessary to protect public health and welfare and that does not unduly infringe upon this right.

A temporary restraining order is available upon a showing of probable success on the merits and possible irreparable injury. TRO Order at ¶ 20. “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.” *Id.* (quoting *CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp.*, 2009 WY 113, ¶ 7, 215 P.3d 1045, 1057). The current *status quo* includes the availability of pre-viability abortion and the woman’s right to choose, in consultation with her physician, a surgical or medication abortion.

I. WITHOUT A TRO, WYOMING'S MEDICATION ABORTION BAN WILL CAUSE IRREPARABLE HARM TO PLAINTIFFS, THEIR PATIENTS, THEIR CLIENTS, AND OTHER WYOMINGITES.

As was true for Wyoming's Criminal Abortion Ban, the Medication Abortion Ban will irreparably harm each of the Plaintiffs and the Wyomingites whose interests they represent if it is permitted to go into effect on July 1, 2023. Wyomingites, including the Plaintiffs, will be denied constitutional rights they have otherwise enjoyed and which have been subject to protection by this Court pending the outcome of this litigation. *See* TRO Order at ¶ 64; *Planned Parenthood Nw. v. Members of the Med. Licensing Bd. of Indiana*, No. 53C06-2208-PL-001756, at ¶¶ oo-pp (Ind. Cir. Ct. Sept. 22, 2022) (organizations can represent the interests and irreparable harms of their clients), attached as Exhibit 9.

In its order granting a TRO on the Wyoming Criminal Abortion Ban, the Court noted that irreparable injury is “harm for which there can be no adequate remedy at law.” TRO Order at ¶ 54 (citing *CBM Geosolutions, Inc.*, 2009 WL at ¶ 8, 215 P.3d at 1058). The Court went on to observe that “[n]otwithstanding 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.” TRO Order at ¶ 54 (citing *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986)). Moreover, “the Wyoming Supreme Court has recognized that injunctive relief can be sought to obtain preventative relief. . . . In Wyoming, an impending injury is sufficient to obtain injunctive relief.” TRO Order at ¶ 57 (citing *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, 714 P.2d 328 (Wyo. 1986); *Reno Livestock Corporation v. Sun Oil Company (Delaware)*, 638 P.2d 147, 153 (Wyo. 1981)).

Deprivation of constitutional rights is, *per se*, irreparable injury. “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.” TRO Order at ¶ 58 (citing *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189–90 (10th Cir. 2003); *see also Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 805 (10th Cir. 2019) (“Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury.”); *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (emphasizing “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary” (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001))). This applies especially to abortion: “[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.” *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

Affidavits submitted by Plaintiffs in support of this motion show that they will suffer “possible irreparable injury without the entry of a TRO.” TRO Order at ¶ 54 . Each Plaintiff here will suffer a unique harm that cannot be redressed through a “remedy at law.” *CBM Geosolutions, Inc.*, 215 P.3d at 1058.

First, because their constitutionally-protected rights to evidence-based medical care under article 1, section 38 are in jeopardy as a result of the Wyoming Medication Abortion Ban, Plaintiffs have demonstrated that irreparable harm is established without a further showing. *See infra* Part II. As the affidavits of Ms. Dow and Ms. Johnson show, the Medication Abortion Ban will result in the deprivation of their “constitutional right to make medical decisions throughout the entire duration of [their] pregnanc[ies].” TRO Order at ¶ 58; *see also* Ex. 3, Johnson at ¶ 11–17; Ex. 4, Dow at ¶¶ 12–17.

Second, Ms. Johnson, Ms. Dow and similarly situated Wyomingites will face clear irreparable harm unless a TRO is entered because the Medication Abortion Ban will strip them of the right to make their own healthcare decisions in future pregnancies. Ms. Johnson was pregnant at the time this court enjoined the Wyoming Trigger Ban, and she intends to have additional

children in the State of Wyoming, subject to personal and private family-planning decisions made by her family in consultation with her physician. Ex. 3, Johnson at ¶¶ 11–14. Likewise, Ms. Dow intends to become pregnant in Wyoming after her upcoming wedding and will seriously consider leaving the state if her healthcare decisions during pregnancy are not hers to make. Ex. 4, Dow at ¶¶ 15–16.

This Court has already found that when Ms. Johnson and Ms. Dow become pregnant, the loss of “their constitutional right to make their own healthcare decisions” would “constitute[] an impending future injury that is irreparable.” TRO Order at ¶ 59. The Medication Abortion Ban would prevent Ms. Johnson, Ms. Dow, and similarly situated Wyomingites from receiving medication to terminate a pregnancy, even when that pregnancy would impose a severe burden on their physical and emotional health, their well-being, their families, their careers, their right to make health care decisions, and their finances. *See* TRO Order at ¶ 50.

For example, Ms. Johnson and Ms. Dow would both wish to terminate a pregnancy in the event that they were pregnant with a fetus that had lethal defects. Ex. 3, Johnson at ¶ 16; Ex. 4, Dow at ¶ 17. The Medication Abortion Ban would prevent the use of medication to terminate such a pregnancy, regardless of whether Ms. Johnson or Ms. Dow’s physician determined that the use of medication in this instance was safer, less expensive, or otherwise preferable to a surgical abortion.

Furthermore, abortion medication is a necessary component of some surgical abortions. Ex. 6, Hinkle at ¶¶ 18–19. In such cases, the Medication Abortion Ban will either prevent a surgical abortion altogether, or will require the abortion to proceed without medically necessary medication, with the result that women will unnecessarily be at risk. *Id.* Because the Ban strips Ms. Johnson and Ms. Dow of the right to make their own healthcare decisions and receive

evidence-based medical care in connection with their future pregnancies, these Plaintiffs face impending future injury which will cause them to be irreparably harmed.

Third, Dr. Anthony and Dr. Hinkle are physicians and licensed OBGYNs who will risk criminal prosecution and permanent loss of their medical license if they continue to provide evidence-based medical care to their patients after the Medication Abortion Ban has gone into effect. Ex. 5, Anthony at ¶ 37; Ex. 6, Hinkle at ¶ 27. As Dr. Hinkle explains, the Ban’s extremely broad language prohibiting the use of *any* medication to induce or facilitate an abortion means that even medically-indicated inductions of a non-viable fetus, using basic obstetric medication such as Pitocin and Misoprostol, could be criminal. Ex. 6, Hinkle at ¶¶ 11, 18–23.

For Dr. Anthony, prescribing abortion medications for first trimester elective abortions is a common part of the evidence-based medical care she provides. Ex. 5, Anthony at ¶ 9. In fact, medication abortions accounted for all abortion procedures that took place in Wyoming in 2021. *See* Ex. 2; Ex. 5, Anthony at ¶ 10. For those patients desiring or requiring a first trimester abortion, the safe, convenient, and less expensive option of a medication abortion will be unavailable to them under this law, unless Dr. Anthony and other providers are willing to risk their livelihood and freedom to provide it. “Loss of customers” and threats to the “viability” of Dr. Anthony and Dr. Hinkle’s businesses—due to a loss of their ability to practice medicine in United States—satisfies the element of irreparable harm. *Intl. Snowmobile Mfrs. Ass’n. v Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004); *see also* Ex. 6, Hinkle at ¶¶ 7–13; Ex. 5, Anthony at ¶ 10, 14–15, 18, 37.

Fourth, the Medication Abortion Ban will expose Circle of Hope and Chelsea Fund to the same organizational harms and loss of goodwill that this Court found constituted irreparable harm in connection with the Criminal Abortion Ban. *See* TRO Order at ¶ 61.

If the Medication Abortion Ban is not enjoined, at least half of the abortion care Circle Hope exists to provide will be illegal in the State of Wyoming. Ex. 7, Burkhart at ¶ 11. The Ban will also greatly increase Circle of Hope's operation costs because each surgical abortion (that might have been accomplished through the use of medication) requires Circle of Hope to unnecessarily expend resources, such as costs for additional facilities, equipment, and staff.³ *Id.* at ¶¶ 11, 16. Furthermore, the Medication Abortion Ban is so broadly drafted it may prevent abortion providers such as Circle of Hope from using medications (such as Misoprostol) during surgical abortion procedures. *Id.* at ¶ 17. As a result, Circle of Hope will lose patients and goodwill in the community. *Id.* at ¶ 11.

Chelsea's Fund will likewise suffer irreparable harm due to the increased expenses required to accomplish the organization's mission of providing assistance to Wyoming residents who could not otherwise afford an abortion. Ex. 8, Lichtenfels ¶¶ 5, 18. Because of the shortage of surgical abortion providers in Wyoming, the Medication Abortion ban will require Chelsea's Fund clients to travel further and wait longer for abortion care that they could otherwise obtain through a convenient, safe, and less expensive prescription. *Id.* at ¶ 14. The Ban will significantly increase the resources Chelsea's Fund must expend in order to provide support to the same number of clients it currently serves due to the increased cost of each abortion. *Id.* at ¶ 18. These expenses and logistical difficulties will be exacerbated by the fact that many other nearby states have banned abortion, resulting in increased demand for and delay in obtaining appointments for abortions in the states where they are still available. *Id.* at ¶ 17.

³ By forcing women to obtain a more expensive procedure, the Ban also places an unnecessary financial burden on women who seek and are eligible for medical abortions in Wyoming. See Ex. 6, Anthony ¶¶ 30–32.

“A threat to trade or business viability” like the threats faced by Circle of Hope and Chelsea’s Fund, “may constitute irreparable harm,” particularly when these businesses “relied on” prior regulations in making “business decisions.” *Intl. Snowmobile Mfrs. Ass’n*, 304 F. Supp. 2d at 1287. If the Ban is not enjoined, Circle of Hope and Chelsea’s Fund will lose goodwill, patients, and clients, and the Medication Ban will prevent both organizations from continuing to provide healthcare-related services to pregnant women in Wyoming, which is the purpose for which both organizations exist. Ex. 7, Burkhardt at ¶¶ 10–11, 15–16; Ex. 8, Lichtenfels at ¶ 20–21.

Fifth, Wyomingites at large will be harmed by this law. As discussed above and with respect to Plaintiffs’ likelihood of prevailing on the merits, the Wyoming Medication Abortion Ban is a broader ban on abortion healthcare access than the Criminal Abortion Ban which is enjoined. The Medication Ban attacks the primary way that Wyomingites access abortion care—through medication—and with fewer exceptions than the Criminal Abortion Ban. Wyoming is a rural state and the availability of convenient and discrete healthcare options for obtaining an abortion is critical. Ex. 8, Lichtenfels at ¶¶ 11–15.

The result of this law and its narrowly drawn exceptions is to deprive Wyomingites of the ability to make healthcare decisions, and private family planning decisions, during the roughly 9 months of their pregnancies. For instance, the Medication Ban will make it significantly harder for physicians like Dr. Hinkle and Dr. Anthony to provide abortion care when medically indicated, because they, the hospital where the patient is treated, and the pharmacy providing the medication, will have to evaluate whether the patient is in significant enough “peril” to permit the use of medication to terminate the pregnancy and save their life. Ex. 6, Hinkle at ¶ 12; Ex. 3, Anthony at ¶ 15.

Even setting aside the troubling attempts to legislate contrary to standard medical care, the Medication Ban will again result in forced childbirth for Wyomingites and deprivation of the

freedom and liberties that Wyomingites have enjoyed for decades. Each of the Plaintiffs, as well as similarly-situated Wyomingites will therefore suffer immediate, irreparable harms if the Medication Ban is not enjoined. As it did before, the Court should find that Plaintiffs have shown an irreparable harm warranting a temporary restraining order.

II. PLAINTIFFS CAN SHOW A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS⁴

The Court already found that Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the Criminal Abortion Ban unduly infringes on the right of Wyoming citizens to control their own health care under article 1, section 38 of the constitution. The Medication Abortion Ban further infringes on this constitutional right, while adding even more ambiguity, confusion and obstacles to delivery of evidence-based health care.

The Wyoming Constitution provides:

Const. art. 1, section 38: Right of health care access.

(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.

(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.

In interpreting constitutional provisions, a reviewing court undertakes the same analysis that it uses to interpret statutes. *Powers v. State*, 2014 WY 15, ¶ 9, 318 P.3d 300, 304 (Wyo. 2014).

⁴ The State bears the burden to demonstrate the statute's validity. Plaintiffs have no burden to demonstrate the statute's invalidity. See *Hardison v. State*, 2022 WY 45, ¶ 5, 507 P.3d 36, 39 (Wyo. 2022).

To determine the intent of a provision, the Court should look first to the plain and ordinary meaning of the words and phrases used in the law. *Id.*

The Court undertook just such an analysis in enjoining the Criminal Abortion Ban and found that the plain meaning of “health care” includes abortion. *See* TRO Order at ¶ 39. In reaching this decision the Court relied on the common definition of health care as “the services provided, usually by medical professionals, to maintain and restore health.” *Id.* at ¶ 33. The Court further found that the evidence submitted by Plaintiffs established that “abortions are utilized by medical professionals to restore and maintain the health of their patients.” *Id.* at ¶ 39.

On its face, the Medication Abortion Ban plainly regulates health care. The statute refers to abortion as “medical treatment,” and it directly regulates the medical profession, concerns the use of prescription medication, and references “medical testing,” “medical guidelines,” and “medical judgment.” Wyo. Stat. § 35-6-120(b). And under Wyoming law, a physician is “practicing medicine” when he or she “[o]ffers or undertakes to prescribe, order, give or administer drugs which can only be obtained by prescription according to law.” Wyo. Stat. § 33-26-102 (a)(xi)(E).

The medical community considers both surgical and medication abortion to fall within the ambit of essential health care:

The fact is, abortion is an essential component of women’s health care. The American College of Obstetricians and Gynecologists (ACOG), with over 57,000 members, maintains the highest standards of clinical practice and continuing education for the nation’s women’s health physicians. Abortion care is included in medical training, clinical practice, and continuing medical education.⁵

Government agencies agree. According to HHS, “[r]eproductive health care, including access to birth control and safe and legal abortion care, is an essential part of your health and well-

⁵ American College of Obstetricians and Gynecologists, *Facts Are Important: Abortion Is Healthcare*, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> (last accessed Mar. 9, 2023).

being” and “[m]edication abortion has been approved by the FDA since 2000 as a safe and effective option.”⁶ The WHO has likewise commented that “comprehensive abortion care services” entail “simple and common health-care procedure[s]” that are “evidence-based” and “fundamental” to “good health.”⁷ And the Wyoming Department of Health, in reporting abortion statistics, refers to medication abortions as “medical, non-surgical” procedures. Exs. 1 & 2.

Because medication abortion unambiguously is health care under article 1, section 38 of the constitution, the legislature may only 1) “determine reasonable and necessary restrictions” that 2) do not result in “undue governmental infringement” of the right of Wyomingites to control their abortion-related health care. On its face, the Wyoming Medication Abortion Ban violates these constitutional limitations on the legislature’s authority.

There is no conceivable basis for the State to assert that the Medication Abortion Ban is reasonable and necessary to protect the public health and welfare. To the extent abortion is itself illegal, the ban on abortion medication is entirely superfluous. And to the extent abortion is otherwise legal, the medication ban is nonsensical. There is no legitimate government interest in forcing women to undergo a surgical abortion when a medication abortion is the preferred procedure for medical or other reasons.⁸

Virtually all abortions in Wyoming are through medication. Exs. 1 & 2; Ex. 5, Anthony at ¶ 10. Banning medication abortion therefore creates the very real prospect that, because of the Medication Ban, Wyoming women will not be able to obtain abortions that are otherwise legal.

⁶ Dep’t of Health and Human Servs., *Know Your Rights: Reproductive Health Care*, <https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html> (last accessed Mar. 9, 2023).

⁷ World Health Organization, *Abortion*, https://www.who.int/health-topics/abortion#tab=tab_1 (last accessed Mar. 9, 2023).

⁸ In granting a TRO on the Criminal Abortion Ban, the Court did not address the question of whether strict scrutiny applied to Plaintiffs’ claims under article 1, section 38. It likewise is not necessary to address the matter here, as the Medication Abortion Ban cannot survive any level of scrutiny, and on its face violates the express terms of that constitutional provision.

Such a result could not possibly further any governmental interest, because the legislature has already declared that some abortions should be available under the Criminal Abortion Ban.

The State cannot possibly assert that the Medication Ban protects life in the form of a developing fetus. The Medication Abortion Ban does not purport to ban any abortions and therefore it does not seek to preserve any potential life. Moreover, it has no exception for lethal fetal abnormalities incompatible with life, and therefore applies to fetuses that have no potential for life.

Nor can the State plausibly claim that the statute is intended to protect women. Medication abortion is exceptionally safe. After conducting an exhaustive study of the medical evidence, the National Academy of Sciences, Engineering & Medicine in a peer-reviewed, consensus report, unequivocally found that abortions in the United States “whether by medication, aspiration, D&E or induction – are safe and effective. Serious complications are rare.”⁹ This is consistent with the experience of Wyoming women, for whom there have been no reported complications for medication abortions for the two years prior to adoption of the Medication Ban. Exs. 1 & 2.

Moreover, the Medication Abortion Ban explicitly does not permit medication abortions that are necessary to prevent death or serious injury to women due to mental or emotional conditions. Wyo. Stat. § 35-6-120(iii). And the statute does not include an exception for ectopic and molar pregnancies, which are potentially life-threatening to women. As Dr. Hinkle describes, abortion medication is essential to treat such complications, and any delay or denial in access to

⁹ National Academy of Science, Engineering, Medicine, *The Safety and Quality of Abortion Care in the United States* at p. 10 (2018), <https://nap.nationalacademies.org/catalog/24950/the-safety-and-quality-of-abortion-care-in-the-united-states> (last accessed May 9, 2023). The findings in this report also find that “having an abortion does not increase a woman’s risk of . . . mental health disorders.” *Id.* at p. 9.

medication necessary to induce an abortion could harmful or fatal to a woman. Ex. 6, Hinkle at ¶ 22–23. The Medication Ban therefore by its express terms does not protect the health of women.

The ban also undermines medical ethics, because physicians will no longer be free to use the most appropriate method of abortion for a particular patient, and the statute will force physicians to perform surgical abortions when a medication abortion is the more appropriate medical procedure. Ex. 5, Anthony at ¶ 19. In short, the Medication Ban is not related to any government interest, legitimate or otherwise and therefore is neither reasonable nor necessary to protect public health, as required by article 1, section 38.

The Medication Abortion Ban also unduly infringes on women’s right to control their own health care. Where a woman has a legal right to an abortion, the Medication Ban would dictate that she must undergo a surgical abortion, even where a medication abortion is superior from a medical perspective and/or in terms of cost or convenience. And if a woman does not have the time, resources or capability of traveling for a surgical abortion, the Medication Ban could prevent a woman from obtaining a legal abortion.

Moreover, the Medication Ban will interfere with a wide variety of health care. Abortion medication is used in surgical abortions, to treat incomplete miscarriages, to induce delivery of viable fetuses, and to treat a number of pregnancy complications that are potentially harmful or even life-threatening. Ex. 3, Anthony at ¶¶ 14–15. These medications also have a number of uses unrelated to pregnancy that could be impaired by the reluctance of pharmacies to stock or dispense the medications. *Id.* at ¶ 15. And medication abortion is an essential procedure for certain women, including those in rural areas and survivors of abuse. *Id.* at ¶¶ 16, 21. Finally, the exception for “imminent peril,” is so vague that physicians will not know when they are permitted to provide necessary medical care to their patients. *Id.* at ¶ 19; Ex. 6, Hinkle at ¶ 24.

The Court should find that Plaintiffs have established a likelihood of success on the merits of their claim that the Medication Abortion Ban violates article 1, section 38 of the Wyoming Constitution, because it is neither reasonable nor necessary to protect public health, and it unduly infringes on the right of Wyoming women to control their own health care.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES SUPPORT ISSUANCE OF A PRELIMINARY INJUNCTION

Plaintiffs and their patients face far greater harm while Wyoming's Medication Abortion Ban is in effect than Defendants will face if the Court preserves the *status quo*. The State has no "interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). In addition, the public has an interest in a speedy injunction to block a law that fundamentally upsets the longstanding *status quo* on which Wyoming women and their families have relied upon for at least five decades. "The purpose of a preliminary injunction during the pendency of litigation is 'to preserve the status quo until the merits of an action can be determined.'" *Brown v. Best Home Health & Hospice, LLC*, 2021 WY 83, ¶ 7, 491 P.3d 1021, 1026 (Wyo. 2021) (internal citations omitted). Here, the status quo is that Wyoming women can use medication for lawful abortions. The balance of equities and public interest thus weigh decisively in Plaintiffs' favor, further demonstrating that a preliminary injunction is appropriate.

IV. THIS COURT SHOULD ENTER A TEMPORARY RESTRAINING ORDER WITHOUT BOND

Under Wyo. R Civ. P. 65(c) "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). The Court already found that no bond was required for the TRO entered against the Criminal Abortion Ban. TRO Order at ¶ 63.

Plaintiffs request this Court continue to use its discretion to waive the security requirement. Here, the relief sought will result in no monetary loss for Defendants and is necessary to protect the constitutional rights of Plaintiffs, their patients, and women in Wyoming.

CONCLUSION

For the foregoing reasons, Plaintiffs have demonstrated that a temporary restraining order is appropriate pending a full adjudication on the merits of this matter. This dispute implicates serious Constitutional debate and the rights of every Wyomingite to privacy and health care are at risk. Plaintiffs respectfully request this Court enter a temporary restraining order enjoining and restraining Defendants and their officers, employees, servants, agents, appointees, or successors from administering or enforcing Wyoming's Medication Abortion Ban with respect to any abortion provided while such injunction is in effect, including in any future enforcement actions for conduct that occurred during the pendency of this injunction, or during the interim between the Medication Abortion Ban's effective date and the issuance of any injunction, and that such an injunction issue without posting of security.

WHEREFORE Plaintiffs request entry of a temporary restraining order enjoining Defendants from enforcement of the Wyoming Medication Abortion Ban pending trial in this matter.

RESPECTFULLY SUBMITTED this 10th day
of May, 2023

By: 

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CERTIFICATE OF SERVICE

This is to certify that this 10th day of May 2023, a true and correct copy of the foregoing was served as follows:

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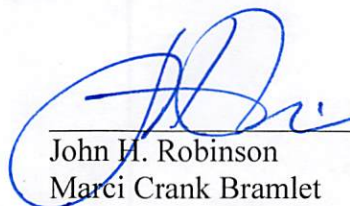
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