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TETON COUNTY WYOMING
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CLERK OF DISTRICT COURT
Alister

*Attorney for Defendants State of Wyoming,
Governor Gordon, Attorney General Hill*

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

DANIELLE JOHNSON; KATHLEEN DOW;)
GIVOANNINA ANTHONY, M.D.; RENE R.)
HINKLE, M.D.; CHELSEA'S FUND; and)
CIRCLE OF HOPE HEALTHCARE d/b/a)
Wellspring Health Access;)

Plaintiffs,)

v.)

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.)

Civil Action No. 18732

**STATE DEFENDANTS' MOTION TO CERTIFY QUESTIONS OF LAW
TO THE WYOMING SUPREME COURT**

Defendants, State of Wyoming, Mark Gordon, Governor of Wyoming, and Bridget Hill, Attorney General for the State of Wyoming (collectively “the State Defendants”), hereby move this Court to certify questions of law in this case to the Wyoming Supreme Court under Rule 11 of the Wyoming Rules of Appellate Procedure. In support of this Motion, the State Defendants state and allege as follows:

1. Under Rule 11, the Wyoming Supreme Court may answer questions of law certified to it by a Wyoming state district court if those questions of law “may be determinative of the cause then pending in the certifying court” and “it appears there is no controlling precedent in the decisions of the supreme court” regarding the questions. Wyo. R. App. P. 11.01.

2. “Rule 11 may be invoked upon the motion of the [state district] court or of any party to the cause.” Wyo. R. App. P. 11.02 (alteration added).

3. If the state district court grants a motion to certify, it must prepare a certification order that sets forth the following information:

- (a) The questions of law to be answered;
- (b) A statement of all facts relevant to the questions certified;
- (c) The nature of the controversy in which the questions arose; and
- (d) A designation of the party or parties who will be the appellant(s), i.e. the party holding the affirmative, in the appellate court.

Wyo. R. App. P. 11.03.

4. If the state district court forwards a certification order to the Wyoming Supreme Court, the Wyoming Supreme Court shall accept or reject the certification order within thirty days of receiving the order. Wyo. R. App. P. 11.04(b).

5. The State Defendants hereby ask this Court to certify the following questions of law in this case to the Wyoming Supreme Court:

a. Does the Wyoming Constitution confer a right to abortion?

b. Does Wyo. Stat. Ann. § 35-6-102(b) violate any of the following provisions in the Wyoming Constitution, either individually or collectively:

(i) Article 1, section 2?

(ii) Article 1, section 3?

(iii) Article 1, section 6?

(iv) Article 1, section 7?

(v) Article 1, section 18?

(vi) Article 1, section 33?

(vii) Article 1, section 34?

(viii) Article 1, section 36?

(ix) Article 1, section 38?

(x) Article 21, section 25?

(xi) A right to privacy, described by Plaintiffs as the right to be left alone?

c. Is Wyo. Stat. Ann. § 35-6-102(b) unconstitutionally vague on its face?

6. A proposed statement of all facts relevant to the certified questions of law is set forth in Attachment A to this Motion.

7. A proposed statement of the nature of the controversy in which the certified questions of law arose is set forth in Attachment A to this Motion.

8. As the parties alleging that Wyo. Stat. Ann. § 35-6-102(b) is unconstitutional, Plaintiffs should be the Appellants in the Wyoming Supreme Court.

9. This Court should grant this Motion for three reasons. First, the questions identified in Paragraph 5 are questions of law because they involve the interpretation and application of the Wyoming Constitution. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (“The interpretation and application of the Wyoming Constitution is a question of law[.]”); *Harris v. State*, 2006 WY 76, ¶ 15, 137 P.3d 124, 129 (Wyo. 2006) (explaining that a facial vagueness challenge to a statute raises a constitutional issue). In addition, to the extent that answering those questions involves the interpretation or construction of Wyo. Stat. Ann. § 35-6-102(b), issues of statutory interpretation and construction are questions of law. *Roman v. State*, 2022 WY 48, ¶ 10, 507 P.3d 453, 456 (Wyo. 2022); *see also Alcalde v. State*, 2003 WY 99, ¶ 15, 74 P.3d 1253, 1260-61 (Wyo. 2003) (addressing a facial vagueness challenge by interpreting the language in the challenged statute).

10. Second, the questions of law identified in Paragraph 5 satisfy the two requirements in Rule 11.01. Plaintiffs have asked this Court to declare that Wyo. Stat. Ann. § 35-6-102(b) is unconstitutional under one or more of the provisions identified in Paragraph 5(b) and under the legal theory identified in Paragraph 5(c). The question of law in Paragraph 5(a) is central to the determination of the questions of law identified in Paragraphs 5(b) and (c). Having the Wyoming Supreme Court decide these questions of law now may, and very likely will, be determinative of the cause pending before this Court.

In addition, it appears that no controlling Wyoming Supreme Court precedent addresses the questions of law identified in Paragraph 5.

11. Third, the public interest and interests of judicial economy weigh strongly in favor of certifying the questions of law to the Wyoming Supreme Court. The answers to the questions of law identified in Paragraph 5 potentially impact many Wyoming citizens. Getting definitive answers to those questions as quickly as possible will benefit the public interest. Certifying the questions of law identified in Paragraph 5 provides the quickest path to getting definitive answers to those questions. Also, any ruling on the merits by this Court will undoubtedly be appealed to the Wyoming Supreme Court, so certifying the questions of law identified in Paragraph 5 to the Wyoming Supreme Court now will allow for the most expeditious resolution of the merits of the case.

12. In accordance with U.R.D.C. 801(a)(7), undersigned counsel conferred via telephone with counsel for Plaintiffs on August 16, 2022, regarding the relief requested in this Motion. Plaintiffs will respond to the Motion after they have reviewed the contents of it and will inform the Court no later than 5 p.m. on Monday, August 22, 2022, as to when they can file a response to the Motion.

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WHEREFORE, Defendants, State of Wyoming, Mark Gordon, Governor of Wyoming, and Bridget Hill, Attorney General for the State of Wyoming, ask this Court to prepare a certification order consistent with this Motion and submit the certification order to the Wyoming Supreme Court.

DATED this 17th day of August, 2022.



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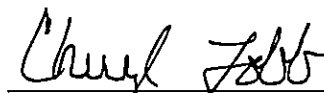
CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2022, a true copy of the foregoing was served via email, and mailed, postage prepaid, to the following:

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Cheryl Lobb, Paralegal
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**PROPOSED STATEMENT OF
ALL FACTS RELEVANT TO THE QUESTIONS CERTIFIED**

1. The first Wyoming Territorial Legislature enacted a criminal abortion statute in 1869. (Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869)). The Territorial Legislature amended this statute in 1884 and again in 1890. (1884 Terr. Wyo. Sess. Laws ch. 1, § 2) (codified at Wyo. Rev. Stat. § 879 (1887)); (1890 Terr. Wyo. Sess. Laws, ch. 73, § 31) (codified at Wyo. Rev. Stat. § 4969 (1899)).

2. In 1890, the first Legislature of the State of Wyoming adopted the 1890 Territorial criminal abortion statute as state law. The 1890 criminal abortion statute read as follows:

Whoever prescribes or administers to any pregnant woman, or to any woman he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years.

(1890 Terr. Wyo. Sess. Laws, ch. 73, § 31) (codified at Wyo. Rev. Stat. § 4969 (1899)).

3. After 1890, the criminal abortion statute remained in effect and substantively unchanged until the 1970's. In January 1973, the United States Supreme Court held that the United States Constitution protects a woman's right to have an abortion before viability. *See generally Roe v. Wade*, 410 U.S. 113 (1973). Seven months after *Roe* was decided, the Wyoming Supreme Court declared the criminal abortion statute to be unconstitutional. *Doe v. Burk*, 513 P.2d 643, 644-45 (Wyo. 1973).

4. After *Doe v. Burk*, the criminal abortion statute remained on the books until 1977, when the Wyoming Legislature repealed it and replaced it with the following statute:

An abortion shall not be performed after the embryo or fetus has reached viability except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment.

1977 Wyo. Sess. Laws ch. 11, §§ 1-2 (codified as Wyo. Stat. Ann. § 35-6-102 (1977)).

Any physician or other person who violated § 35-6-102 was “guilty of a felony punishable by imprisonment in the penitentiary for not more than fourteen (14) years.” 1977 Wyo. Sess. Laws ch. 11, § 1 (codified as Wyo. Stat. Ann. § 35-6-110 (1977)). The 1977 abortion statute remained in effect and substantively unchanged until 2022.

5. During the 2022 Budget Session, the Wyoming Legislature enacted House Enrolled Act Number 57 (original House Bill 0092). Wyoming Governor Mark Gordon signed HEA57 into law and it became effective on March 15, 2022. (*Id.*). Relevant to this case, HEA57 created a new statutory section that provides, in part:

An abortion shall not be performed except when necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions, or the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301. ...

(HEA57, §1 (Wyo. Stat. Ann. § 35-6-102(b))).

6. In HEA57, the Legislature provided that the statute would take effect only after the Governor, “on the advice of the attorney general,” certifies to the Secretary of State that the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) “in a manner that would authorize the enforcement of this subsection ... without violating any conditions, rights or restrictions recognized by the supreme court.” (*Id.*). Section § 35-6-102(b) would take effect five days after such a certification. (*Id.*).

7. HEA57 required Wyoming Attorney General Bridget Hill to review any U.S. Supreme Court decision that overruled *Roe* “to determine whether the enforcement of [Wyo. Stat. Ann. § 35-6-102(b)] would be fully authorized under that decision.” (HEA57, §1 (Wyo. Stat. Ann. § 35-6-102(c))) (alteration added). It also required Attorney General Hill to report the results of any such review to Governor Gordon and the Joint Judiciary Interim Committee of the Wyoming Legislature. (*Id.*).

8. On June 24, 2022, the U.S. Supreme Court issued an opinion in *Dobbs v. Jackson Women’s Health Organization*, — U.S. —, 142 S. Ct. 2228 (2022). In *Dobbs*, a five-Justice majority held that the United States Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.” *Dobbs*, 142 S. Ct. at 2284. The *Dobbs* majority also stated that the U.S. Constitution “does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.” *Dobbs*, 142 S. Ct. at 2279.

9. Attorney General Hill reviewed the *Dobbs* opinion and submitted a report to Governor Gordon and the Joint Judiciary Interim Committee on July 21, 2022. The next day, Governor Gordon certified to the Secretary of State that Wyo. Stat. Ann. § 35-6-102(b) is authorized under the *Dobbs* decision.

10. On July 25, 2022, Plaintiffs, Danielle Johnson, Kathleen Dow, Giovannina Anthony, M.D., Rene R. Hinkle, M.D., Chelsea’s Fund, and Circle of Hope Healthcare d/b/a Wellspring Health Access, filed a complaint for declaratory and injunctive relief in

this Court seeking to have Wyo. Stat. Ann. § 35-6-102(b) declared unconstitutional and enjoined from taking effect, temporarily, preliminarily, and permanently.

11. In this case, Plaintiffs assert that § 35-6-102(b) violates the following provisions in the Wyoming Constitution: article 1, sections 2, 3, 6, 7, 18, 33, 34, 36 and 38, and article 21, section 25. Plaintiffs also assert that § 35-6-102(b) violates a right to privacy protected by the Wyoming Constitution (which they characterize as the right to be left alone) and that § 35-6-102(b) is unconstitutionally vague on its face.

12. Also on July 25, 2022, Plaintiffs filed a motion for a temporary restraining order (TRO). The District Court of Teton County conducted a hearing on the request for a TRO on July 27, 2022. At the conclusion of the hearing, the District Court issued a TRO to enjoin enforcement of § 35-6-102(b) and entered a written order to that effect on July 28, 2022.

13. On August 3, 2022, Plaintiffs filed a motion for preliminary injunction. The District Court heard argument on the motion for preliminary injunction on August 9, 2022. The next day, the District Court issued an order granting the preliminary injunction.

PROPOSED STATEMENT OF THE NATURE OF THE CONTROVERSY IN WHICH THE QUESTIONS AROSE

For more than 100 years before *Roe v. Wade*, the Territory of Wyoming and then the State of Wyoming had a statute that criminalized abortion. In *Roe*, the U.S. Supreme Court held that the United States Constitution protects a woman's right to have an abortion before viability. As a result of *Roe*, the longstanding Wyoming criminal abortion statute was declared unconstitutional by the Wyoming Supreme Court. The Wyoming Legislature subsequently enacted a Wyoming statute to prohibit abortion to the extent allowable under *Roe*. In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overruled *Roe* and held that the U.S. Constitution does not confer a right to abortion. As a result of *Dobbs*, Wyo. Stat. Ann. § 35-6-102(b) took effect. Section 35-6-102(b) prohibits abortion subject to three exceptions. Plaintiffs assert that § 35-6-102(b) is unconstitutional under numerous provisions in the Wyoming Constitution. The question at the heart of this case is whether the Wyoming Constitution confers a right to abortion, either explicitly or implicitly.