IN THE SUPREME COURT
STATE OF WYOMING
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IN THE SUPREME COURT, STATE OF WYOMING

STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming,	)	
Appellants,	)	
v.	)	S-24-0326
DANIELLE JOHNSON; KATHLEEN DOW, GIOVANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D.; CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a WELLSPRING HEALTH ACCESS,	)	
Appellees.	)	

PETITION FOR REHEARING

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Appellants, the State of Wyoming; Mark Gordon, Governor of Wyoming; and Keith G. Kautz, Attorney General for the State of Wyoming,[1] (collectively referred to as "the State"), hereby petition this Court under Wyo. R. App. P. 9.08 to rehear this case so that it may correct a number of legal errors and address an important aspect of the State's argument that this Court did not consider in addressing the merits.

INTRODUCTION

More than a century ago, United States Supreme Court Justice Oliver Wendall Holmes observed:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[2]

In striking down the Life is a Human Right Act and the chemical abortion statute (collectively referred to as "the challenged statutes") as unconstitutional, the majority made numerous mistakes or errors of law and did not consider an important aspect of the State's argument. Specifically, the majority:

- Abandoned its precedent with respect to how this Court evaluates a facial challenge to the constitutionality of a Wyoming statute and thereby removed an insurmountable legal hurdle for the Appellees. Just seven years ago this Court specifically declined to overrule the no set of circumstances test for facial challenges to the

[1] Keith G. Kautz was sworn-in as the Wyoming Attorney General in July 2025.

[2] *N. Sec. Co v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

constitutionality of a Wyoming statute. Now, on its own, without any request or argument, the majority (joined by the specially concurring Justice) overruled that test. In doing so, the majority changed the rules for how facial challenges are considered;

- Acted contrary to the plain language in article 1, section 38(c) when it applied the strict scrutiny test to assess the constitutionality of the challenged statutes instead of applying the test expressly stated in section 38(c);

- Misinterpreted article 1, section 38(d) to conclude that this subsection imposes a burden on the State to justify any statutory restrictions imposed on the right to make health care decisions;

- Departed from its own precedent (this Court's own case law) when it required the State to provide evidence to satisfy each element of the strict scrutiny test;

- Acted contrary to established law when it relied on expert witness opinion testimony in assessing whether the challenged statutes violate article 1, section 38(a). This error effectively substituted this Court's judgment on policy matters for that of the Wyoming legislature; and

- Failed to consider the State's argument that, from conception, an unborn baby has a fundamental right to life under article 1, section 2 of the Wyoming Constitution.

This Court should grant this petition for rehearing to correct these mistakes and re-assess the constitutionality of the challenged statutes in light of the corrections.

ARGUMENT

I. Standard of Review

This Court will grant a petition for rehearing "to address an assertion that this Court has erred in its resolution of the case." *McMackin v. Johnson Cnty. Healthcare Ctr.*, 2004 WY 44, ¶ 3, 491, 492 (Wyo. 2004) (citing Wyo. R. App. P. 9.07). A petition for rehearing allows a party that did not prevail on the merits to ask this Court to address "mistakes or errors of law or of fact, or both," that it allegedly made in the merits decision, and to have this Court "consider[] some point which it overlooked or failed to consider" in the merits decision. *McMackin*, ¶ 3 at 492-93 (citations omitted).

II. Mistakes of Law or Fact, or Both, Made by the Majority (and, in Some Instances, the Specially Concurring Justice)

A. The majority and the specially concurring Justice erred as a matter of law when they overruled the "no set of circumstances" test.

To lay the groundwork for its analysis, the majority overruled the "no set of circumstances" test for assessing whether a statute is unconstitutional on its face. (Slip Op. at ¶¶ 18-23). The specially concurring Justice joined the majority in this holding. (Slip Op. at ¶ 110) (Fenn, J., specially concurring) (stating: "I also agree with the majority's departure from the distinction between facial and as-applied challenges.").

This Court adopted the no set of circumstances test more than two decades ago. *See Dir. of Off. of State Lands & Invs. v. Merbanco, Inc.*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Just seven years ago, this Court invoked stare decisis to maintain the test as precedent. *Gordon v. State*, 2018 WY 32, ¶ 12 n.10, 413 P.3d 1093, 1099 n.10 (Wyo. 2018).

In explaining its reasons for overruling the no set of circumstances test, the majority first noted that the *Gordon* Court had "previously questioned" the "continued adherence" to the test because "it is widely criticized by scholars and federal courts alike, including the U.S. Supreme Court." (Slip Op. at ¶ 18) (citing *Gordon*, ¶ 12 n.10, 413 P.3d at 1099 n.10). The majority then departed from stare decisis to "honor the reservations" expressed in *Gordon*. (Slip Op. at ¶¶ 18, 22). It stated that it

> see[s] no value in adhering to a standard that has been criticized as a distortion of the analysis the U.S. Supreme Court itself conducts in cases involving facial challenges; a standard the Supreme Court itself routinely ignores; and a standard that invites analysis based upon hypothetical scenarios rather than terms of a statute that a facial challenge is meant to focus on.

(Slip Op. at ¶ 22) (internal citation omitted).

This Court may reject stare decisis "when necessary to vindicate plain, obvious principles of law and remedy continued injustice" or when the precedent is "no longer workable" or is "poorly reasoned." *Am. Collection Sys., Inc. v. Judkins*, 2024 WY 66, ¶ 14, 550 P.3d 549, 556 (Wyo. 2024) (citations omitted). In *Gordon*, this Court explicitly invoked the doctrine of stare decisis to maintain the no set of circumstances test as precedent. *Gordon*, ¶ 12 n.10, 413 P.3d at 1099 n.10.

Because of *Gordon*, however, this case does not present the usual stare decisis situation. The question here is not whether this Court should apply stare decisis to maintain the no set of circumstances test as precedent – the key threshold question is whether this Court should give stare decisis effect to the *Gordon* Court's decision to maintain the no set of circumstances test as precedent.

In striking down the no set of circumstances test, the majority improperly focused on whether that test itself was unworkable. (Slip Op. at ¶¶ 21-22). Instead, it should have first focused on whether, in the past seven years, circumstances had changed in a way that made the *Gordon* Court's application of stare decisis unworkable or in a way that called into question the quality of the *Gordon* Court's reasoning for relying on stare decisis to maintain the test as precedent.

The concerns related to the no set of circumstances test are no different or greater today than they were seven years ago when the *Gordon* Court decided to maintain the test as precedent. In addition, nothing has happened since then to call into question the *Gordon* Court's reasoning for maintaining the test. Thus, the majority and the specially concurring Justice had no legitimate reason for not giving stare decisis effect to *Gordon* with respect to the no set of circumstances test.

The only thing of note that has changed in the past seven years is the membership of this Court. Generally speaking, a change in the membership of this Court does not justify departing from precedent in a subsequent case. *See, e.g., Roderick v. State*, 858 P.2d 538, 552 (Wyo. 1993) (Brown, J. (Retired) (specially concurring in part)) (opining that "[w]e do a disservice to Wyoming citizens, the trial bench, and lawyers if we switch back and forth and the law changes depending on the composition of the [C]ourt"); *see also, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (stating: "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political

branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.”).

The doctrine of stare decisis serves to “further the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process.” *Am. Collection Sys.,* ¶ 14, 550 P.3d at 556 (cleaned up). When this Court overrules precedent based on nothing more than a change in membership, it causes lasting injury to these important values.

In *Gordon*, this Court, as an institution, invoked stare decisis to maintain the no set of circumstances test as precedent. By not giving stare decisis effect to *Gordon*, the majority and the specially concurring Justice have changed this Court’s precedent with no good or legitimate reason for doing so. The majority’s stated reasons for rejecting the test are the same concerns that the *Gordon* Court did not think were serious enough to warrant rejecting stare decisis precedent. It thus appears that this precedent was overruled because the one Justice who heard the *Gordon* appeal apparently changed her mind about the stare decisis ruling in that case, and three Justices who did not hear the *Gordon* appeal apparently disagreed with the stare decisis ruling in that case.

The situation would be different here if, as a matter of first impression, this Court addressed whether the no set of circumstances test should be overruled. In that scenario, this Court would be free to reject stare decisis if it had legitimate concerns about maintaining the test as precedent. But, by overruling the test a mere seven years after the *Gordon* Court relied on stare decisis to maintain it, the majority and the specially

concurring Justice have undercut and damaged all of the policy goals served by stare decisis. They have essentially rendered the doctrine of stare decisis meaningless.

Overruling the no set of circumstances test *sua sponte* also raises a practical concern with respect to appellate decision-making. The majority and the specially concurring Justice changed the ground rules for how this case should be analyzed, both by the district court and by this Court, after the fact. Essentially, they changed the legal rules governing this case after the parties had presented briefing and argument under a different set of rules. They did so without the benefit of briefing or argument from the parties. By doing so, the majority and the specially concurring Justice deprived this Court of vigorous adversarial argument on the issue of whether *Gordon* should be given stare decisis effect – argument designed to identify the strengths and weaknesses of the opposing points of view.

The majority and the specially concurring Justice had no legitimate reason for overruling the no set of circumstances test as precedent. Accordingly, this Court should grant this petition for rehearing and apply the no set of circumstances test when it analyzes the constitutionality of the challenged statutes.

B. The majority acted contrary to the Wyoming Constitution when it applied the strict scrutiny test in assessing whether the challenged statutes violate article 1, section 38.

The majority applied the traditional strict scrutiny test to assess whether the challenged statutes violated article 1, section 38 and deliberately refused to apply the constitutionally mandated test in section 38(c). (Slip Op. at ¶¶ 73-106). By doing so, it acted contrary to the plain language in section 38(c).

In addressing what level of constitutional review applies to section 38, the majority

reviewed several cases involving statutes that allegedly infringed upon a fundamental individual right. (Slip Op. at ¶¶ 52-55). Among other things, the majority noted that "[t]here are instances … when [this Court does] not apply strict scrutiny to statutes which purportedly infringe upon fundamental constitutional rights because the express language of the constitution suggests a more appropriate test." (Slip Op. at ¶ 54). Based on this review, the majority concluded "that courts determine the level of constitutional scrutiny by considering the nature of the right guaranteed in the constitution and the express language of the constitutional provision." (Slip Op. at ¶ 56).

Here, section 38(c) does more than just **suggest** a more appropriate test than strict scrutiny – it **requires** this Court to apply the specific test articulated in subsection (c). To evade this constitutional mandate, the majority engaged in a convoluted analysis in an attempt to show that section 38(c) requires the same level of scrutiny as the strict scrutiny test. (Slip Op. at ¶ 61). Nevertheless, even if the majority was correct in concluding that section 38 requires the same level of constitutional review as strict scrutiny (a point that the State does not concede), it was constitutionally obligated to apply the test in section 38(c).

As the majority correctly stated, "it is the exclusive province of this Court to interpret the Wyoming Constitution." (Slip Op. at ¶ 34) (citation omitted). This Court thus has the exclusive authority to interpret section 38. In exercising this authority, however, it remains bound by the express language in section 38, whatever it determines that language to mean. *See State v. Hiteshew*, 292 P. 2, 4 (Wyo. 1930) (acknowledging that the state constitution binds state courts); (*see also* Slip. Op. at ¶ 117) (Fenn, J., specially concurring)

(explaining why the Wyoming Constitution may dictate the standard of review this Court must apply in this case). So, even if the section 38 test and the strict scrutiny test are functionally the same (a point that the State does not concede), this Court must apply the section 38(c) test because it is required to follow the dictates plainly expressed in the Wyoming Constitution. To do otherwise contravenes section 38(c) and thwarts the will of the people.

The majority correctly noted in the opinion that it cannot add language to section 38 under the guise of constitutional interpretation. (Slip Op. at ¶ 41 & n.7); *see also Cnty. Ct. Judges Ass'n v. Sidi*, 752 P.2d 960, 962 (Wyo. 1988) (explaining that this Court may not "interpolate or add to the constitution what it concludes should have been there"). Yet that is precisely what the majority did when it concluded that strict scrutiny applies to section 38(c). Section 38(c) says nothing about compelling interests or narrow tailoring. Therefore, when the majority applied the strict scrutiny test, it violated this long-established rule of constitutional interpretation.

In an attempt to justify its reliance on the strict scrutiny test, the majority asserted that "[n]o part of [section 38] expresses an intention to abrogate our long-standing means for testing the constitutionality of statutes or to disallow use of the strict scrutiny standard to protect the fundamental right granted therein." (Slip Op. at ¶ 62). It found these points to be

> particularly poignant given the legislature knew, when proposing the language of Article 1, § 38 to the people: 1) it was creating a new constitutional right, 2) separation of powers principles assign courts the duty to determine the applicable standard to test the constitutionality of statutes, 3) courts routinely apply strict scrutiny to statutes restricting fundamental

> rights, and 4) the plain language of Article 1, § 38, including the terms "necessary" and "undue governmental infringement," would signal a heightened level of scrutiny.

(*Id.*) (citations omitted).

The majority's view of how section 38(c) should be interpreted fails as a matter of law for at least three reasons. First, any duty to determine the standard for testing statutes under separation of powers principles arises implicitly and is not expressly stated anywhere in the Wyoming Constitution. Such an implied duty must give way if some other provision in the Wyoming Constitution explicitly establishes the test to be used to assess the constitutionality of statutes. Here, section 38(c) does just that – it explicitly establishes the test for assessing the constitutionality of statutes that impose restrictions on the right to make health care decisions. By explicitly providing the applicable constitutional test in section 38(c), the people precluded this Court from exercising its implicit authority under separation of powers principles to devise or to apply a different test.

Second, the word "necessary" in section 38(c) does not signal an intent for a heightened level of scrutiny. To the contrary, long before section 38 was adopted and ratified, this Court opined that "the legislative department of the government is the department primarily constituted to determine what measures are necessary and proper to further the legitimate purposes or objects of the [police] power[.]" *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938). Thus, in the context of the Wyoming legislature exercising the police power, the word "necessary" conveys an intent for a deferential level of scrutiny, not heightened scrutiny.

Third, the logic of the majority's view cannot be squared with the basic rules of constitutional interpretation. The Wyoming legislature is presumed to act "with full knowledge of the existing state of the law," including "with reference to the decisions of the courts." *Albertsons, Inc. v. City of Sheridan*, 2001 WY 98, ¶ 7, 33 P.3d 161, 164 (Wyo. 2001) (citation omitted). When the legislature drafted the language in section 38, the existing law provided that:

1. Generally, an individual right explicitly conferred by the Wyoming Constitution is a fundamental right. *In re Honeycutt*, 908 P.2d 976, 979 (Wyo. 1995);
2. Generally, the strict scrutiny test applies when this Court reviews the constitutionality of a statute that affects a fundamental right. *State in Interest of C*, 638 P.2d 165, 173 (Wyo. 1981);
3. A heightened level of scrutiny does not apply where the constitutional right granted to individuals is "conditioned upon the reasonable exercise of legislative authority." *White v. State*, 784 P.2d 1313, 1315 (Wyo. 1989);
4. "[T]he legislative department of the government is the department primarily constituted to determine what measures are necessary and proper to further the legitimate purposes or objects of the [police] power[.]" *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938);

5. State courts in Wyoming, including this Court, are bound by the Wyoming Constitution. *State v. Hiteshew*, 292 P. 2, 4 (Wyo. 1930) (acknowledging that the state constitution binds state courts);

6. This Court cannot add words to the Wyoming Constitution under the guise of interpretation. *Cnty. Ct. Judges Ass'n*, 752 P.2d at 962.

Therefore, with respect to section 38, it is presumed the Wyoming legislature and, by extension, the people knew that: (1) if section 38 consisted only of the language in section 38(a), strict scrutiny might apply to any claim brought under section 38; (2) including subsection (c) in section 38 would bind this Court to follow the standard in section 38(c); and (3) wording section 38(c) so that it conditioned the right to make health care decisions upon the reasonable and necessary exercise of legislative authority would mean that a heightened level of constitutional review would not apply to claims brought under section 38. Thus, **the very existence** of section 38(c) demonstrates a constitutional intent—a constitutional requirement—to abrogate strict scrutiny in cases such as this one.

The specific language in section 38(c) also demonstrates a clear intent to preclude the use of strict scrutiny in addressing claims under section 38. Had the Wyoming legislature and the people intended for strict scrutiny to apply, they would have worded section 38(c) to expressly say that the strict scrutiny test applies or it would have used terms like "compelling interest" or "narrowly tailored" to describe the extent to which the legislature may restrict rights under section 38. (*See* Slip Op. at ¶ 119) (Fenn, J., specially concurring). The fact that Section 38(c) has very different terminology confirms that the legislature and the people did not want strict scrutiny to apply when a Wyoming statute is

challenged as unconstitutional under section 38. *Cf. Casteel v. News-Record, Inc.*, 875 P.2d 21, 24-25 (Wyo. 1994) (concluding that the word "fair" in a statute did not mean "true or accurate" because, had "the legislature intended such a result, it could have used those precise terms").

To justify its use of the strict scrutiny test, the majority would have the citizens of Wyoming believe that, when the Wyoming legislature adopted section 38 and the people ratified it, they spoke in code – the legislature and the people said "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 other purposes set forth in the Wyoming Constitution" but what they actually meant was the legislature may restrict the rights granted under this section only if the supreme court finds the legislature has a compelling interest to do so and the restrictions impose the least onerous burden on those rights.

At the end of the day, the majority should have analyzed the constitutionality of the challenged statutes under the test articulated in section 38(c). By not doing so, the majority acted contrary to a clearly stated requirement of the Wyoming Constitution – the dictates of section 38(c). Accordingly, this Court should grant this petition for rehearing and assess the constitutionality of the statutes using the test set forth in section 38(c) and without a heightened level of review.

C. The majority and the specially concurring Justice erred as a matter of law in concluding that section 38(d) places the burden on the State to justify any infringement of the rights conferred by section 38.

Article 1, section 38(d) commands that "[t]he state of Wyoming shall act to preserve these rights from undue governmental infringement." Wyo. Const. art. 1, § 38(d). The majority and the specially concurring Justice agreed that section 38(d) places the burden on the State to show that the challenged statutes do not unduly infringe upon the right conferred by section 38(a). (*See* Slip Op. at ¶ 60 n.11); (Slip Op. at ¶ 114 n. 17; at ¶ 121) (Fenn, J., specially concurring).

Their respective analyses suffer from the same fatal interpretive flaw – neither analysis interpreted section 38(d) as a whole, giving effect to every word in it. *See Geringer v. Bebout*, 10 P.3d 514, 520 (Wyo. 2000) (explaining that, when interpreting the Wyoming Constitution, this Court must consider every word).

The majority's interpretation of section 38(d) consisted of a dictionary definition for the word "undue" and a conclusory statement that subsection (d) "places the burden squarely on the State (executive branch) to justify any … infringement" upon an individual's right to make his or her own health care decision. (Slip Op. at ¶ 60 & n.11) (citation omitted). The specially concurring Justice provided no analytical support for his conclusory statement that the "executive branch bears the burden of proving any statutes challenged under [section 38] do not unduly infringe on the rights granted therein." (Slip Op. at ¶ 114 n.17).

By myopically focusing on the term "undue," the majority and the specially concurring Justice did not account for the phrase "shall act to preserve." When section

38(d) was enacted by the Wyoming legislature and ratified by the people of Wyoming, the modal auxiliary verb "shall" was a word "used to express a command or exhortation[.]" *Shall*, *Merriam-Webster's Coll. Dictionary* (11th ed. 2012). The verb "act" meant "to take action[.]" *Act*, *Merriam-Webster's Coll. Dictionary* (11th ed. 2012). The verb "preserve" meant "to keep safe from injury, harm, or destruction: protect." *Preserve*, *Merriam-Webster's Coll. Dictionary* (11th ed. 2012).

Applying the common meaning of these terms, section 38(d) unambiguously commands the State of Wyoming to take action when necessary to protect the rights conferred by section 38 from undue government infringement. This provision creates an affirmative obligation for the State to act to preserve the rights conferred by section 38. It does not create a rebuttable legal presumption that any Wyoming statute enacted under the authority in section 38(c) is unreasonable or unnecessary. Thus, section 38(d) obviously does not apply at all to the burden of proof in a constitutionality case. It obviously directs the State to act in other contexts.

It defies logic and common sense to say that this constitutional command places an affirmative obligation on the State (through the Wyoming Attorney General) to justify any infringement of section 38(a) in a court case challenging the constitutionality of a Wyoming statute under section 38. In such a case, the State (through the Attorney General) would argue that the statute does not impermissibly infringe upon the right to make health care decisions. This would be true whether or not the State has the burden to justify the statutory restrictions. In other words, the State would be taking action to defend the Wyoming legislature's constitutional authority to restrict health care decisions – it would

not be taking action to protect the right of the plaintiff to make her own health care decisions.

The majority and the specially concurring Justice would have the citizens of Wyoming believe that, when the Wyoming legislature adopted section 38 and the people ratified it, they once again spoke in code – when the legislature and the people said "[t]he state of Wyoming shall act to preserve these rights from undue government infringement," they actually meant that the Executive Department has the burden to justify any infringement of the rights conferred in section 38. In fact, the interpretations of section 38(d) by the majority and the specially concurring Justice impermissibly added language to section 38(d). *Cnty. Ct. Judges Ass'n* 752 P.2d at 962 (explaining that this Court may not "interpolate or add to the constitution what it concludes should have been there").

Nothing in the language in section 38(d) can reasonably be interpreted as imposing any type of burden on the State in a court proceeding involving a challenge to the constitutionality of a Wyoming statute under section 38. Accordingly, this Court should grant this petition for rehearing and analyze the constitutionality of the challenged statutes using the test set forth in section 38(c) without regard to section 38(d).

D. The majority erred as a matter of law when it treated this appeal as an evidentiary case.

In rejecting the State's arguments in defense of the challenged statutes, the majority faulted the State for not providing evidence to satisfy each element of the strict scrutiny test. (*See, e.g.,* Slip Op. at ¶ 75) (noting that the State did not present evidence to justify the statutory restrictions on the right to make health care decisions and holding that the

failure to present such evidence was dispositive). In doing so, the majority departed from this Court's precedent regarding the strict scrutiny test.[3]

This Court's precedent clearly establishes that, when the State has the burden to justify the constitutionality of a statute, it does not have to present evidence to establish either element of the strict scrutiny test. Three cases are instructive on this point.

In *Mills v. Reynolds*, this Court applied the strict scrutiny test to assess whether a Wyoming workers' compensation statute violated the fundamental right of access to courts. *Mills v. Reynolds*, 837 P.2d 48, 55 (Wyo. 1992). In applying the test, the *Mills* Court, without considering any evidence or legislative facts, concluded that the challenged statute did not serve a compelling state interest. *Mills*, 837 P.2d at 54-55. The State merely asserted various interests and the Court concluded those interests were not compelling because they did not align with any state interests the Court previously had held to be compelling.[4] *Id.*

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[3] By making this point in terms of strict scrutiny, the State in no way concedes that the strict scrutiny test should apply in this case. As explained above, the majority acted contrary to the Wyoming Constitution when it applied the strict scrutiny test to assess the constitutionality of the challenged statutes.

[4] In *Mills*, this Court cited to five Wyoming cases where it had concluded that the State had a compelling interest. *Mills*, 837 P.2d at 54-55 (citations omitted). In each of these cases, this Court did not rely on evidence or legislative facts presented by the State in addressing the compelling interest element. *See King v. State*, 810 P.2d 119, 123 (Wyo. 1991); *Matter of Adoption of JLP*, 774 P.2d 624, 627 (Wyo. 1989); *Nowack v. State*, 774 P.2d 561, 566

The Court further held that the statute was not the least onerous means for accomplishing the statutory objective based upon the Court's own views of the statute's potential impact on the workplace. *Mills*, 837 P.2d at 55.

In *Michael v. Hertzler*, this Court applied the strict scrutiny test to assess whether a Wyoming statute that authorized grandparents to file suit to establish reasonable visitation rights to a grandchild who is a minor was constitutional. *Michael v. Hertzler*, 900 P.2d 1144, 1144 (Wyo. 1995). The *Michael* Court held that the challenged statute furthered the compelling state interests in protecting the best interests of the child and in maintaining the right of association of grandparents and grandchildren. *Michael*, 900 P.2d at 1149; 1151. To reach this holding, the Court relied on case law from other jurisdictions, not evidence submitted by the State. *Michael*, 900 P.2d at 1148-49; 1150-51. The *Michael* Court relied on its own views of how the statute applied in practice to hold that the challenged statute was "sufficiently narrowly drawn." *Michael*, 900 P.2d at 1151.

In *In re RM*, this Court applied strict scrutiny to determine whether the Wyoming Constitution "require[d] that an alternate education be provided to students who have been lawfully expelled" and whether the expulsion of the two students violated their right to equal protection. *In re RM*, 2004 WY 162, ¶ 29, 102 P.3d 868, 877 (Wyo. 2004). For the first issue, the school district merely asserted that the expulsions further its "compelling interest in providing for the safety and welfare of its students" and this Court agreed. *In re*

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n.6 (Wyo. 1989); *Scadden v. State*, 732 P.2d 1036, 1040 (Wyo. 1987); *Coyne v. State ex rel. Thomas*, 595 P.2d 970, 972-73 (Wyo. 1979).

RM, ¶ 16, 102 P.3d at 873-74. This Court cited a provision in the Wyoming Constitution and a case from another jurisdiction to support its compelling interest holding. *Id.* The *In re RM* Court relied on its own views of how the statute applied in practice to hold that the temporary expulsion of students was narrowly tailored. *In re RM*, ¶ 25, 102 P.3d at 876.

For the second issue, the *In re RM* Court relied on legislative facts recited in a United States Supreme Court case to hold that the school district had "a compelling interest in treating children with disabilities differently than those without disabilities." *In re RM*, ¶¶ 27-28, 102 P.3d at 877. This Court explained that "[p]roviding services to disabled students covered by IDEA, without providing the same services to non-disabled students is narrowly tailored in rectifying the long history of disparity that existed for disabled students. **We can think of no other less onerous means of remedying this disparity**." *In re RM*, ¶ 28, 102 P.3d at 877 (emphasis added).

Viewed together, *Mills*, *Michael*, and *In re RM* establish that, in applying the strict scrutiny test:

(1) This Court does not require the State to present evidence to establish that it has a compelling interest that is furthered by the challenged statute. Typically, this Court identifies *sua sponte* the compelling interest or interests addressed by the challenged statute. *See Michael*, 900 P.2d at 1149, 1151; *In re RM*, ¶¶ 27-28, 102 P.3d at 877. At most, this Court requires the State to assert one or more compelling interests for this Court to evaluate. *See Mills*, 837 P.2d at 54; *In re RM*, ¶ 16, 102 P.3d at 873-74.

(2) This Court does not rely on facts or evidence presented by the State when it assesses whether a challenged statute is narrowly tailored or provides the least onerous

means for accomplishing the compelling state interest. *See, e.g.*, *Mills*, 837 P.2d at 55; *Michael*, 900 P.2d at 1151; *In re RM*, ¶ 25, 102 P.3d at 876, 877.

The foregoing cases establish beyond any doubt that this Court historically has not required the State to provide facts or evidence to prove either element of the strict scrutiny test. The majority therefore had no justification for concluding that the State must proffer evidence to prove each element of the strict scrutiny test

The majority cited two cases from this Court as precedent for the proposition that the State must provide specific evidence to prove the elements of the strict scrutiny test. (Slip Op. at ¶ 74) (citing *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1266 (Wyo. 1995)); (Slip Op. at ¶¶31 n.6; 81) (citing *Operation Save Am. v. City of Jackson*, 2012 WY 51, ¶¶ 78, 80, 275 P.3d 438, 461-62 (Wyo. 2012)). Both cases are easily distinguishable.

In *Campbell County School District*, this Court interpreted a prior case (*Washakie County School District Number One v. Herschler*) to hold that funding disparities in the Wyoming public education system satisfied strict scrutiny only if they were based on differences in the cost of providing education. *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1266. Therefore, in that specific instance, this Court's inquiry required, among other things, evidence of how the cost of education and the distribution of revenues varied between school districts to assess whether the State's education funding formula was equitable. *Id.*

In *Operation Save America*, this Court addressed whether a district court erred in granting an *ex parte* temporary restraining order. *Operation Save Am.*, ¶ 1, 275 P.3d at 442-43. Here, the majority cited to paragraph 78 in the *Operation Save America* opinion as establishing a requirement that the government must provide evidence to establish the

compelling interest element of the strict scrutiny test. (Slip Op. at ¶ 31) (saying that the *Operation Save America* Court concluded that the record had no evidence to support the compelling interests asserted by the town); (Slip Op. at ¶ 81) (concluding that paragraph 78 in *Operation Save America* dictates that a governmental entity must substantiate any asserted compelling interest). The majority misread paragraph 78.

In paragraph 78, the *Operation Save America* Court expressly stated that it had no concerns with the compelling interest asserted by the City of Jackson. *Operation Save Am.*, ¶ 78, 275 P.3d at 461. Instead, it found that the record contained no evidence of irreparable harm. (*Id.*). The party seeking an *ex parte* temporary restraining order must present evidence to establish irreparable harm. *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951 (3d ed. Sept. 2025 Update) (explaining "that a court planning to issue a temporary restraining order must be particularly careful that the movant has produced compelling evidence of the threatened irreparable injury").

This case is nothing like *Campbell County School District* or *Operation Save America*. Accordingly, those cases do not apply here.

The majority departed from this Court's precedent when it required the State to present evidence to justify the constitutionality of the challenged statutes under the strict scrutiny test.[5] As explained above, the strict scrutiny test does not apply here but, if the

[5] The specially concurring Justice improperly treated the section 38(c) test as an evidentiary inquiry. (Slip Op. at ¶ 110; at ¶ 122) (Fenn, J., specially concurring) (holding that the State failed to meet its burden of proof under section 38(c)).

State is not required to present evidence under strict scrutiny, it should not be required to present evidence under the test established in section 38(c). Accordingly, this Court should grant this petition for rehearing and analyze the constitutionality of the challenged statutes under the test articulated in section 38(c) without making an evidentiary inquiry or requiring the State to submit evidence to satisfy the requirements of that test.

The majority also erred when it considered non-legislative facts in addressing the constitutionality of the challenged statutes. To justify its use of non-legislative facts (largely in the form of expert witness opinion testimony), the majority created a false dichotomy by comparing the State's supposedly "narrow definition of legislative facts" with the "broader used of legislative facts" by courts in jurisdictions in constitutional cases. (Slip Op. at ¶¶ 30-31). It leveraged this false dichotomy to conclude that the State's "narrow definition of legislative facts … would essentially force [it] to decide this case with blinders on." (Slip Op. at 31). The majority then declared that it "declined to limit [its] consideration to the materials proffered by the State." (*Id.*).

The majority apparently believes that an appellate court determines legislative facts only from facts presented to a trial court and contained in the court record. That belief is simply wrong, and disregards the ability (obligation) of the reviewing court to find legislative facts on its own, from any source. Unlike adjudicative facts, which are restricted to the trial record, legislative facts are subject to independent determination by an appellate court. The Court's authority to conduct its own research outside the record is well-settled. (*See* Br. of Aplts. at 21-23) (citing authority from several jurisdictions for this proposition). For example, in *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983), the Fifth

Circuit said "[t]he writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court."

Condemning the State for not relying on a broader array of legislative facts does not justify the majority's reliance on the Appellees' proffered expert witness opinion testimony. This Court was required to consider any legislative facts, regardless of the source, if it believed that it needed to do so to properly address the constitutionality of the challenged statutes. (Br. of Aplts. at 21-23). However, the majority was not free to consider non-legislative facts like the expert opinion testimony in its analysis.

As explained above, no heightened level of review should apply when this Court assesses the constitutionality of the challenged statutes. As a result, the Wyoming legislature was not required "to articulate its reasons for enacting [the statutes.]" *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003). In addition, the "legislative choice is not subject to courtroom fact-finding and need not be based upon evidence or empirical data." *Id.* By requiring the State to present evidence to justify the constitutionality of the challenged statutes and by relying on the expert witness testimony to find that the statutes are unconstitutional, the majority impermissibly engaged in courtroom fact-finding to second-guess the policy decisions of the legislature.

The issues in this case, even as defined by the majority, are not appropriately considered on the basis of expert opinion testimony. The State's "compelling interest," if required, is the life of an unborn human being. Whether that unborn human being is worthy of state protection is not a question for competing expert opinions, nor is it a question for

determination by judges. The "narrow tailoring," if required, balances the life of the unborn against the health care choices of the mother. Similarly, that question cannot be resolved by adjudicative evidence, with a more persuasive expert prevailing to a court—that is a question for the Wyoming legislature. Those questions are answered by legislative facts.

The majority appears to think that the expert opinion testimony qualifies as legislative facts in this case just because the Appellees offered the opinions in an attempt to show why the challenged statutes are unconstitutional. (*See* Slip Op. at ¶ 28) (noting that the Appellees "offered a variety of evidence as legislative facts," including "expert affidavits"). Offering facts for this Court to consider in assessing the constitutionality of a statute does not make them legislative facts – they must be legislative facts in order for this Court to consider them. As explained in the State's opening brief, expert witness opinion testimony is not and cannot be legislative facts. (Br. of Aplts. at 48-49).

Although the majority deemed the expert affidavits to be legislative facts, it cited no legal authority to support that conclusion. The majority cited six cases from other jurisdictions to justify its "broader use of legislative facts" here, but none of those cases expressly held that such opinion testimony qualifies as legislative fact. (Slip Op. at ¶ 30) (citations omitted). In some of those cases, the court considered either witness testimony or expert witness testimony. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009) (stating that the court would review all materials presented by the parties, including witness testimony, in assessing the constitutionality of a statute); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 888-94 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (the Court considered findings of fact based

on the testimony of numerous expert witness regarding the effect of the challenged statute). The fact that two courts considered witness testimony in assessing the constitutionality of a statute does not mean that, as a matter of law, such testimony qualifies as legislative facts.

The majority's reliance on the testimony of the prosecutorial expert highlights why such testimony falls outside of the realm of legislative facts. This expert "attested to facts based on his many years of experience as a prosecuting attorney, including over 200 jury trials for crimes that included sexual assault and child sexual abuse." (Slip Op. at ¶ 28). Relying on his "training and experience," he gave his personal opinion on how the reporting requirement in the sexual assault and incest exception in the Life Act likely will impact the "abortion care." (Slip Op. at ¶ 105).

"Legislative facts are **established** truths, facts or pronouncements that do not change from case to case but apply universally[.]" *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (emphasis added); *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998) (quoting *Gould*). The prosecutorial expert's personal opinion on how the statutory exception might impact abortion is speculation based upon his personal experiences and therefore not an established truth. His personal opinion is entirely irrelevant to the constitutional inquiry because his opinion is not a legislative fact.

The majority erred when it considered non-legislative facts (in the form of expert witness opinion testimony) in assessing whether the challenged statutes are constitutional. Accordingly, this Court should grant this petition for rehearing and analyze the constitutionality of the challenged statutes without considering the expert witness opinion testimony proffered by the Appellees.

III. Point that the Majority did not Consider

A. The majority did not address whether an unborn baby from conception has a constitutionally protected right to life under article 1, section 2 of the Wyoming Constitution.

The majority declared the challenged statutes to be unconstitutional without considering whether an unborn baby from conception has a right to life protected by article 1, section 2 of the Wyoming Constitution. By disregarding this significant aspect of the State's argument under section 38(c), the majority failed to fully consider the merits of the State's argument regarding the reasonableness and necessity of the challenged statutes. This failure ignores the most essential part of the Life Act.

In the Life Act, the Wyoming legislature unequivocally stated an "unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution." Wyo. Stat. Ann. § 35-6-121(a)(i). A mother's right to make her own decision about aborting the unborn baby **must** be balanced against the effect of that decision on the baby's right to life and the state's interest in preserving that life. The majority's failure to do so is judicial legislation – it effectively repeals § 35-6-121(a)(i).

In Wyoming, "legislative findings are controlling in the absence of a controversy questioning their validity." *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1131 (Wyo. 1978). Robust legislative facts support the finding in § 35-6-121(a)(i). *See Mackie v. Mackie*, 52 S.E.2d 352, 354 (N.C. 1949) (stating that "[b]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb"); *Verkennes v. Corniea*, 38 N.W.2d 838, 840 (Minn. 1949) (citing a federal district court case for the proposition that civil law recognizes that a child is a human being from

the moment of conception); *Steggall v. Morris*, 258 S.W.2d 577, 578 (Mo. 1953) (en banc) (quoting *American Jurisprudence* in saying that "[b]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb"); *Steinberg v. Brown*, 321 F.Supp. 741, 747 (N.D. Ohio 1970) (explaining that, "[b]iologically speaking, "the life of a human being begins at the moment of conception in the mother's womb") (citing 42 Am.Jur.2d, *Infants* § 2 (1968)); *Sylvia v. Gobeille*, 220 A.2d 222, 223-24 (R.I. 1966) (referring to the "medical fact that a fetus becomes a living human being from the moment of conception").

To the extent § 35-6-121(a)(i) can be deemed to be a legislative interpretation of article 1, section 2, this Court should defer to it. In Wyoming, a legislative interpretation of the Wyoming Constitution does not bind this Court, but this Court should "be loath to interpret the constitution otherwise." *Geringer*, 10 P.3d at 522.

This Court also was not free to ignore the State's argument under article 1, section 2. To comply with the dictates of section 38(c), the challenged statutes must be "reasonable and necessary" to, *inter alia*, "accomplish other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38(c). In its opening brief, the State argued that the Life Act is necessary to protect the constitutional rights of both the pregnant woman and the unborn baby. (Br. of Aplt's at 41). In support of this argument, the State explained that an unborn baby is a human being from conception and therefore a member of the human race from conception with a constitutionally protected right to life under article 1, section 2. (Br. of Aplt's at 41-42). The State then further detailed how the Life Act is both

reasonable and necessary to protect the constitutionally protected rights of both the unborn baby and the pregnant woman. (Br. of Aplt's at 42-44).

Admittedly, the State made this argument based on its belief that the Wyoming Constitution does not confer or protect a right to abortion. This Court now has unanimously held that the right to make health care decisions conferred by article 1, section 38(a) includes the right for a pregnant woman to decide to have an abortion. (Slip Op. at ¶ 107) (stating: "A woman has a fundamental right to make her own health care decisions, including the decision to have an abortion."); at ¶ 40 (stating that "the phrase 'health care' includes abortion care"); at ¶ 110 (Fenn, J., specially concurring) (stating: "I agree with the majority the decision to terminate or continue a pregnancy is a woman's own health care decision."; at ¶ 124 (Gray, J., dissenting) (stating: "I agree with the Majority that the decision to terminate or continue a pregnancy is a health care decision and that it is a woman's own health care decision under article 1, section 38.").

This holding does not change the State's reasonable and necessary argument in any significant manner. In applying the section 38(c) test in light of this holding, the fundamental right to make health care decisions would simply need to be factored into the assessment of whether the Life Act strikes a reasonable balance between the fundamental constitutional right of the unborn baby and the fundamental constitutional rights of the pregnant woman. Regulating abortion requires the Wyoming legislature to account for the competing constitutional rights, so the Life Act is necessary to balance those rights. Fairness requires that, in balancing the competing rights, each right must be subordinate to

the other in some (but not all) circumstances. The Life Act strikes such a balance and therefore satisfies the reasonableness requirement in section 38(c).

In its merits argument, the State relied heavily on the fact that article 1, section 2 protects the life of an unborn baby to defend the constitutionality of the challenged statutes. To completely address the State's argument, and to provide sufficient guidance to the State regarding how it can regulate abortion going forward, the majority must either: (1) recognize that an unborn baby has a constitutionally protected right to life and considering this right when analyzing the constitutionality of the statutes; or (2) cogently explain why an unborn baby does not have a constitutionally protected right to life under article 1, section 2. By not doing one or the other, the majority did not fully consider the State's argument under section 38(c).

When all is said and done, article 1, section 2 either protects the life of an unborn baby or it does not. If section 2 protects the life of an unborn baby, then this Court must account for that constitutional right in its merits analysis. In other words, this Court must address whether article 1, section 2 protects the life of an unborn baby. This Court therefore, should grant this petition for rehearing and address the State's argument based on article 1, section 2.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for rehearing and, on rehearing: (1) apply the no set of circumstances test to assess the constitutionality of the challenged statutes; (2) if that test is not dispositive, then apply the test in section 38(c) without a heightened level of scrutiny to assess the constitutionality of the statutes; (3) fully

consider the State's argument under section 38(c) without relying on section 38(d) to impose a burden or proof on the State; (4) disregard the expert witness opinion testimony proffered by the Appellees in assessing the constitutionality of the statutes; and (5) answer whether an unborn baby from conception has a constitutionally protected right to life under article 1, section 2 of the Wyoming Constitution.

Dated this 20th day of January 2026.

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CERTIFICATE REGARDING ELECTRONIC FILING AND SERVICE

I, Jay Jerde, hereby certify that the foregoing PETITION FOR REHEARING was filed and served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 20th day of January 2026, on the following parties:

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The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Jay Jerde
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