

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

FILED
TETON COUNTY WYOMING
2022 JUL 28 PM 3:46
Clerk of District Court

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

v.)

Civil Action No. 18732

STATE OF WYOMING; MARK)
GORDON, Governor of Wyoming;)
BRIDGET HILL, Attorney General for the)
State of Wyoming; MATTHEW CARR,)
Sheriff Teton County, Wyoming; and)
MICHELLE WEBER, Chief of Police,)
Town of Jackson, Wyoming,)
Defendants.)

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

This matter came before the Court for a hearing on July 27, 2022 at 10:00 a.m. on the Plaintiffs' Motion for Temporary Restraining Order *Emergency Hearing Requested* filed on July 25, 2022. John H. Robinson and Marci C. Bramlet appeared for the Plaintiffs. Jay Jerde appeared for Defendants the State of Wyoming, the Governor of Wyoming, and the Wyoming Attorney General. Erin Weisman appeared for the Teton County Sheriff. Lea M. Colasuonno appeared for the Town of Jackson Chief of Police.

Plaintiffs motion is filed pursuant to Wyo. Stat. § 1-28-101, *et seq.* and W.R.C.P. 65. Plaintiffs requested this Court immediately enter a temporary restraining order against the Defendants enjoining the enforcement of Wyo. Stat. § 35-6-102 (Wyoming's Abortion Restriction Statute) as unconstitutional. Defendants, the State of Wyoming, Mark Gordon, and

Bridget Hill filed a Response to Motion for Temporary Restraining Order on July 27, 2022. After reviewing the briefs of the parties, attached affidavits, and having considered their arguments at the hearing, the Court hereby **GRANTS** the Plaintiff's Motion for the reasons set forth in this Order.

Parties

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

Background

3. Legislative History: In 1977, the Wyoming State Legislature enacted Wyo. Stat. § 35-6-102(a) which addresses abortion restrictions. For the last forty-five years, Wyoming women were permitted to obtain an abortion anytime up to the point of viability or “when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment.” Wyo. Stat. § 35-6-102(a).
4. The Wyoming State Legislature adopted House Bill 92 (HB 92) during the 2022 legislative session. H.B. 92, 66th Legis., Budget Sess. (Wyo. 2022). HB 92 amends Wyo. Stat. § 35-6-102. The amendment prohibits abortion, at any time during a woman’s pregnancy, with three limited exceptions. Wyo. Stat. § 35-6-102. The limited exceptions include circumstances where abortion: (1) is “necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function;” (2) when a pregnancy is a result of incest pursuant to Wyo. Stat. § 6-4-402; or (3) when a pregnancy is a result of sexual assault as defined by Wyo. Stat. § 6-2-301. *Id.*
5. The terms of the amendment provide for an effective date triggered by decisions issued from United States Supreme Court that overrule *Roe v. Wade*, 410 U.S. 113 (1973). On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women’s Health Organization*, -- U.S. --, 142 S. Ct. 2228 (2022). In *Dobbs*, the United States Supreme Court held that the United States Constitution does not confer women with the right to obtain an abortion. -- U.S. --, 142 S. Ct. at 2279. The *Dobbs* decision provides each State with the authority to regulate and prohibit abortion. *Id.*

6. HB 92 provided the Wyoming Attorney General with thirty days from the date of any decision by the United States Supreme Court related to *Roe v. Wade*, 410 U.S. 113 (1973) to determine whether the enforcement of Wyo. Stat. § 35-6-102(b) is authorized. On July 21, 2022, the Attorney General of Wyoming issued Report #1465 finding that Wyo. Stat. § 35-6-102(b) is fully authorized pursuant to the *Dobbs* decision. 2022 Wyo. Att’y Gen. Rep. 1465. On July 22, 2022, Governor Mark Gordon certified Wyo. Stat. § 35-6-102(b) to the Wyoming Secretary of State. The amendment to Wyo. Stat. 35-6-102 became effective on July 27, 2022.

Legal Authority

7. Temporary restraining orders and injunctions are controlled by Wyo. Stat. § 1-28-102 and W.R.C.P. Rule 65. Wyo. Stat. § 1-28-102 states in pertinent part:

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

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

The purpose of a temporary injunction is to preserve the status quo until the merits of an action can be determined. And a temporary injunction rests upon an alleged existence of an emergency, or a special reason for such an order, before the case can be regularly heard.

Also, the award of a temporary injunction is an extraordinary remedy which will not be granted except upon **a clear showing of probable success and possible irreparable injury to the plaintiff, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed.**

In granting temporary relief by interlocutory injunction courts of equity do not

generally anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in status quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming a final opinion as to such rights.

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

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

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

Legal Analysis

10. Status Quo. The definition of status quo is “the existing state of affairs.” *In re Kite Ranch, LLC v. Powell Family of Yakima, LLC*, 2008 WY 39, ¶ 29, 181 P.3d 920, 928 (Wyo. 2008) (*citing Webster’s Third New Int’l Dictionary* 2230 (2002)). The Tenth Circuit has “explained that the status quo is the ‘last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.’” *Schrier v. University of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (quotations omitted). A court would look to the “last peaceable uncontested status existing between the parties before the dispute developed.” *Id.* (quoting 11a Wright & Miller, Fed. Prac. & Proc. § 2948).
11. Wyoming women have had access to abortion services up until the point of viability or “when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment” since 1977. Wyo. Stat. § 35-6-102(a) (1977). This was the last uncontested status between the parties before the present dispute arose.

The Court finds that the status quo in this matter is situated at the point in time where Wyoming women had access to abortion services pursuant to Wyo. Stat. § 35-6-102(a).

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

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

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

Notwithstanding the availability of eventual damages, however, it has been recognized that loss of customers, loss of good will, and threats to the viability of a business may support a claim of irreparable injury. *See Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (citations omitted); *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 304 F.Supp. 2d 1278, 1287 (D. Wyo. 2004); *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181082 (D. Kan. 1988).

13. The Court acknowledges that Plaintiffs allege a number of harms related to mere monetary losses which may not equate to irreparable harm under Wyoming case law. However, the Plaintiffs also allege, through affidavits, a vast amount of potential harms that the Court can fairly find that there is no adequate remedy at law. The Court points to Plaintiffs Ms. Johnson and Dr. Anthony’s potential harms in particular. While the merits of this case are addressed in more fulsome proceedings, the HB 92 amendment will force

Ms. Johnson, as a currently pregnant woman, to delay or be denied evidence based medical care in the event of an unforeseen condition, life threatening condition, or pregnancy related complication. The Court cannot identify an adequate remedy for Ms. Johnson in such a circumstance and finds her alleged potential harm irreparable at this initial stage of this case.

14. With respect to Dr. Anthony in her capacity as a physician, the Court also finds Plaintiffs have met their burden to establish potential harms for which no adequate remedy at law exists. Dr. Anthony may be subject to felony prosecution, loss of her professional licensure, and up to fourteen years of imprisonment for providing evidence-based health care to her Wyoming patients in need of abortion services. As a provider navigating the legal ramifications and limited exceptions of the HB 92 amendment, she may delay providing evidence based medically necessary treatment and cause physical damages or even death to a patient. Or, Dr. Anthony may overstep the limited exceptions and face felony prosecution and imprisonment. Dr. Anthony's affidavit states that the HB 92 amendment:

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

Aff. Giovannina Anthony, M.D. ¶ 12 (July 25, 2022).

15. Under the plain language of Wyo. Stat. § 35-6-102(a), the provision allowing abortion at the point of viability and after is conditioned on “appropriate medical judgment.” The HB 92 amendment removes any language conditioning application of the statute on “appropriate medical judgment.” If Ms. Johnson, who is 22 weeks pregnant, suffers from an unforeseen complication, a condition capable of developing into a life-threatening condition, or a pregnancy related complication, the HB 92 amendment is not conditioned on Dr. Anthony’s ability to employ appropriate medical judgment. This results in an ambiguity in the statute. The statute lacks any guidance on the providers use of medical judgment as to when to provide necessary care.
16. Likewise, the statute provides no guidance with respect to when a provider may provide an abortion in the case of incest or sexual assault. Can a provider rely on their patient’s word alone that the patient’s pregnancy is the result of incest or sexual assault? Or perhaps, a provider must wait until charges are filed before providing an abortion to a patient? It is unclear, when a provider may overstep the statutory parameters and be subject to felony prosecution. Therefore, a provider may suffer irreparable harm if they provide an abortion to someone when the law intended to criminalize the act.
17. A reasonable assessment can be made that a misstep by Dr. Anthony in either interpreting the HB 92 amendment too conservatively or too liberally will subject her to a loss of customers, loss of good will, and threats to the viability of her business in the event she is subject to criminal prosecution or civil liability for delaying or denying care and criminal prosecution and civil litigation itself. The Court therefore finds that the Plaintiffs who are practicing providers in

Wyoming have met their burden of establishing irreparable harm at this early stage of this controversy.

18. Probable Success. The Wyoming Supreme Court has acknowledged that one factor the Court's must consider is probable success. *CBM Geosolutions, Inc.*, 2009 WY at ¶ 8, 215 P.3d at 1057–58. In the context of a temporary restraining order, the court merely recognizes that a sufficient case has been made. *Id.* at ¶ 7, 1057. Plaintiffs seek declaratory judgment that the HB 92 amendment violates Plaintiffs' rights under the Wyoming Constitution. Plaintiffs challenge the constitutionality of HB 92 under ten provisions of the Wyoming Constitution including: art. 1 §§ 2, 3, 6, 7, 18, 33, 34, 36 and 38. All of Plaintiffs challenges raise important legal questions involving constitutional rights and require statutory and constitutional interpretation.
19. Wyoming's case law interpreting the constitutionality of abortion restriction statutes were issued in the era of *Roe* based on the protections afforded under the U.S. Constitution. *Doe v. Burk*, 513 P.2d 643 (Wyo. 1973). The Wyoming Constitution provides protections and individual rights separate and independent from the protections afforded by the U.S. Constitution. *O'Boyle v. State*, 2004 WY 83, ¶ 23, 117 P.3d 401, 408 (Wyo. 2005). The issues presently before the Court in the dawn of the *Dobbs* decision have not been interpreted under the protections afforded in the Wyoming Constitution.
20. For example, the HB 92 amendment appears to conflict with art. 1, Sec. 38 that provides, "[e]ach competent adult shall have the right to make his or her own health care decisions." Further, the Plaintiffs who are providers, have made a sufficient showing of ambiguity in following the statute in a manner that provides medically recommended care that does not expose the providers to felony prosecution. The Court finds that Plaintiffs have made a sufficient showing of probable

success, to warrant the preservation of the rights at issue and preserve the status quo at this early stage of the proceeding before the Court can hear the Plaintiffs request for preliminary injunction.

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

IT IS ORDERED that Plaintiff’s Motion for Temporary Restraining Order is **GRANTED**. The Court temporarily **ENJOINS AND RESTRAINS** Defendants, their officers, employees, servants, agents, attorneys, appointees, successors, or any persons who are in active concert or participation with the Defendants from enforcing the abortion restrictions adopted by HB 92 which amends Wyo. Stat. § 35-6-102(a). This Temporary Restraining Order is effective immediately upon entry on this 27th day of July, 2022 at 12:00 p.m. and shall remain in effect until August 10, 2022 at 12:00 p.m., unless earlier extended, dissolved, or modified by this Court.

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

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

IT IS FURTHER ORDERED that a hearing on the Plaintiff's request for a preliminary injunction is set for **August 9, 2022 at 10:00 a.m.** in the District Courtroom of the Teton County Courthouse. Ninety (90) minutes are set aside for the hearing of this matter.

DATED this 28th day of July, 2022.

1210

Melissa M. Owens
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 28 day of July 2022. 7/28/22

J. Robinson / M. Bramlet via fax

J. Jade via fax

By Refutation L. Calasvino via fax

E. Weisman via pickup