Wyoming Law Review

Manuscript 1496

Unintended Consequences? How Wyoming's Response to the Affordable Care Act Created a Constitutional Right to Abortion and Medical Aid in Dying

Emily S. Madden

WYOMING LAW REVIEW

VOLUME 24 2024 **NUMBER 1**

Unintended Consequences? How Wyoming's Response to the Affordable Care Act Created a Constitutional Right to Abortion and Medical Aid in Dying

Emily S. Madden[*]

[*] Associate Attorney at The Spence Law Firm. J.D., University of Wyoming College of Law, 2019; B.A., University of Dallas, 2015.

With gratitude to one of my greatest mentors, Professor Melissa B. Alexander, who offered guidance as I authored much of this article as a student and encouraged me to publish thereafter. In tribute to the Professor John M. Burman (1955–2019) who I never got to meet but whose scholarship I greatly admire. Many thanks to James Bell, Heather Bradford, Hannah Clancy, Jack Martin, Nathan Wise, and the entire editorial board for their invaluable assistance. All opinions and errors are mine alone.

I. INTRODUCTION

Almost immediately after President Obama signed the Patient Protection and Affordable Care Act (ACA) into law, states began filing lawsuits and drafting legislative measures to oppose its most contentious provisions.[1] The ACA's individual mandate, which required most Americans to pay a fine if they failed to obtain health insurance, was a primary target of state oppositional efforts.[2] In fact, several states passed statutes or constitutional amendments designed to nullify the individual mandate and to establish state standing to challenge its constitutionality.[3]

Wyoming's opposition materialized in a constitutional amendment that is now enshrined in Article I, § 38 of Wyoming's Constitution.[4] Article I, § 38(b)—which protects the right to pay directly for health care without penalty—is undoubtedly a response to the individual mandate.[5] However, § 38(b) has been said to have "limited relevance" since the Supreme Court of the United States (SCOTUS) upheld the constitutionality of the individual mandate in June 2012.[6] While no court has considered whether

---

1 *See infra* Part II.

2 *See* 26 U.S.C. § 5000A(d) (2010); Nat'l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

3 *See infra* Part II. Nullification occurs when states declare congressional acts unconstitutional and pursue measures to void the congressional act within the state's borders. Robert S. Claiborne, Jr., Comment, *Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917, 924 (2012).

4 *See infra* Part III; WYO. CONST. art. I, § 38.

5 *See infra* Part III. *Compare* 26 U.S.C. § 5000A(d) (2010), *with* WYO. CONST. art. I, § 38(b).

6 *See* ROBERT B. KEITER, THE WYOMING STATE CONSTITUTION 110 (G. Alan Tarr ed., 2d ed. 2017) ("Because the U.S. Supreme Court, *in National Federation of Independent Business v. Sebelius* (2012), upheld the [ACA], this section seems largely preempted by that federal law and thus of limited relevance."); Nat'l Fed'n of Indep. Bus., 567 U.S. at 588.

§ 38(b) is preempted for obstructing the ACA's congressional objectives,[7] at least some academics have presumed as much.[8] But preemption would not make Article I, § 38 wholly irrelevant if other provisions do not obstruct Congress's objectives,[9] and only one subsection—the right to pay directly for health care services without penalty under § 38(b)—obstructs the individual mandate.[10] The other subsections, including the right make health care decisions under § 38(a), are still operative.[11]

Exactly what "health care decisions" Wyomingites have a constitutionally protected right to make under § 38(a) has recently been the center of state-wide debate and national news.[12] The attention began

---

[7] Preemption occurs "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Union Tel. Co. v. Wyo. Pub. Serv. Comm'n, 2022 WY 55, ¶ 59, 508 P.3d 1078, 1096 (Wyo. 2022); *Preemption*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

[8] *See* KEITER, *supra* note 6, at 110. Courts also invalidated similar legislation or dismissed similar litigation altogether for lack of standing. *E.g.*, Coons v. Lew, 762 F.3d 891, 902 (9th Cir. 2014); Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011) ("Virginia lacks standing to challenge the individual mandate because the mandate threatens no interest in the 'enforceability' of the [Virginia Health Care Freedom Act]."). For further discussion on the issue of state standing in ACA litigation, please *see generally* Elizabeth Weeks Leonard, *Affordable Care Act Litigation: The Standing Paradox*, 38 AM. J.L. & MED. 410 (2012) [hereinafter *The Standing Paradox*].

[9] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[10] *Cf. Coons*, 762 F.3d at 902 (holding The Arizona Health Care Freedom Act, contained in Arizona's Constitution, was preempted under the Supremacy Clause as it impeded the federal objective "to expand minimum essential health coverage nationwide through the individual mandate"). *Compare* WYO. CONST. art. I, § 38(b), *with* 26 U.S.C. § 5000A(d).

[11] *See infra* Part III.C.

[12] *See* Complaint for Declaratory Judgment and Injunctive Relief, Johnson v. State (*Johnson I*), No. 18732, 2022 WL 3009719 (Wyo. Dist. Ct. July 25, 2022) [hereinafter *Johnson I* Complaint] (available at 2022 WL 3009977); Amended Complaint for Declaratory Judgment and Injunctive Relief, Johnson v. State (*Johnson II*), No. 18853, 2023 WL 2825375 (Wyo. Dist. Ct. Mar. 21, 2023) [hereinafter *Johnson II* Amended Complaint]; Aedan Hannon, *New Wyoming Abortion Legal Battle Centers on Questions of Health Care*, CASPER STAR TRIB. (Aug. 30, 2023), https://trib.com/news/state-and-regional/govt-and-politics/health/new-wyoming-abortion-legal-battle-centers-on-questions-of-health-care/article_8870f0d8-c9a2-11ed-b301-77587eefbd95.html [https://perma.cc/D2N3-7GMR] ("In 2012, Wyoming voters approved an amendment to the constitution guaranteeing each adult 'the right to make his or her own health care decisions.'"); Kelcie Moseley-Morris, *Wyoming Legislature Passes Bills to Ban Medication Abortion and Exempt Abortion as Health Care*, IDAHO CAP. SUN (Mar. 4, 2023, 4:35 AM), https://idahocapitalsun.com/2023/03/04/wyoming-legislature-passes-bills-to-ban-medication-abortion-and-exempt-abortion-as-health-care/ [https://perma.cc/Q3ST-ZCMW] ("New law would create path around state's constitutional health care provision adopted in 2012"); Annika Kim Constantino, *Wyoming Abortion Ban Blocked Due to Obamacare-Era Amendment*, CNBC (Mar. 24, 2023, 3:29 PM),

shortly after SCOTUS overruled prior precedent establishing a federal constitutional right to an abortion without undue governmental interference in *Dobbs v. Jackson Women's Health Organization*.[13] The *Dobbs* decision triggered enforcement of a Wyoming statute that overhauled the state's longstanding statutory right to an abortion in accordance with prior Supreme Court precedent.[14] Before the law could be enforced, a group of six plaintiffs filed suit against several state actors (*Johnson I*) seeking injunctive and declaratory relief against enforcement of the statute on the basis that Wyomingites have a constitutionally protected right to make their own health care decisions under § 38(a).[15] According to the *Johnson I* plaintiffs, § 38(a) protects the right to decide to have an abortion.[16] The state defendants opposed the lawsuit arguing, among other things, that § 38 does not establish a right to abortion since it was designed to oppose the ACA.[17]

When *Johnson I* was filed, the issue of what "health care decisions" Wyomingites have a constitutionally protected right to make under § 38(a) was largely uncharted legal territory. At the time, the first and only published interpretation of Article I, § 38 was a 2017 *Wyoming Law Review* article by Professor John Burman and Cameron Pestinger.[18] Using rules of

https://www.cnbc.com/2023/03/24/wyoming-abortion-ban-blocked-due-to-obamacare-era-amendment.html [https://perma.cc/QFB3-4F73]; Pam Belluck, *Wyoming Judge Temporarily Blocks the State's New Abortion Ban*, N.Y. TIMES (Mar. 22, 2023, 2:38 PM), https://www.nytimes.com/2023/03/22/health/wyoming-abortion-ban.html [https://perma.cc/B5LX-RE3C] ("Wyoming's Constitution guarantees a right to make individual health care decisions. The new ban attempts to circumvent that right by declaring that abortion is not health care.").

13 Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022); Planned Parenthood of Se. Penn. V. Casey, 505 U.S. 833, 887 (1992), *overruled by* Dobbs v. Jackson, 142 S. Ct. 2228 (2022); Roe v. Wade, 401 U.S. 179 (1973), *overruled by* Dobbs v. Jackson, 142 S. Ct. 2228 (2022).

14 *Johnson II* Amended Complaint, *supra* note 12, ¶¶ 18–19; WYO. STAT. ANN. § 35-6-102(c) (2022).

15 *Johnson I* Complaint, *supra* note 12; *see infra* Part IV.B.2.

16 *See Johnson I* Complaint, *supra* note 12, ¶ 38; *see infra* notes 149–62 and accompanying text.

17 Order Granting Motion for Temporary Restraining Order at *5, *Johnson I*, 2022 WL 3009719 (Wyo. Dist. Ct. July 28, 2022) [hereinafter *Johnson I* Order Granting TRO].

18 *See* John M. Burman & Cameron T. Pestinger, *Implementing Provider Aid in Dying in Wyoming*, 17 WYO. L. REV. 1 (2017). Professor Burman was a prolific writer, beloved human, Emeritus Carl M. Williams Professor of Law & Ethics at the University of Wyoming College of Law, and the Faculty Supervisor of the Legal Services Program. Professor Burman retired from the College of Law at the age of 58 due to disabilities stemming from an incurable brain disease that affected his sight and speech. Notwithstanding his disabilities, Professor Burman continued to contribute meaningfully to the law by dictating his thoughts to someone who would write them down. This process was used by Professor Burman and his co-author, Cameron Pestinger, to write *Implementing Provider Aid in Dying in Wyoming*, 17 WYO. L. REV. 1 (2017).

constitutional interpretation, Burman and Pestinger conclude Wyomingites have a constitutional right to medical aid in dying under Article I, § 38(a) of Wyoming's Constitution.[19]

In 2023, and in response to *Johnson I*, the Wyoming Legislature passed new legislation regulating abortion access, prohibiting abortion pills, and declaring abortion is not health care under § 38.[20] This response caused the *Johnson I* plaintiffs to file another case (*Johnson II*) contending the new laws infringe on Wyomingites' constitutional right to make their own health care decisions under § 38(a).[21] While the district court granted preliminary injunctions and temporary restraining orders in both *Johnson I* and *Johnson II*,[22] the ultimate question of what health care decisions Wyomingites have a right to make under § 38(a) has yet to be decided by any court in any context.[23] This Article seeks to answer that question.

To do so, this Article examines the arguments made by Burman and Pestinger and the *Johnson* parties, as well as the conclusions made by the

---

To read more about the incredible life of Professor Burman, please s*ee* Stephen D. Easton, *Professor John M. Burman: A Tribute*, UNIV. OF WYO. COLL. OF L. (Feb. 21, 2019), https://www.uwyo.edu/law/news/2019/02/john-burman.html [https://perma.cc/PU7H-2WKX]; Melinda S. McCorkle, *The Lasting Legacy of John M. Burman*, WYO. LAW., March 2019, at 16, https://digitaleditions.walsworth.com/publication/?m=10085&i=577175&p=16&ver=html5; John Burman, *The Luckiest Human on the Face of the Earth*, 16 WYO. L. REV. 127, 127–28 (2016); *John M. Burman*, UNIV. OF WYO. COLL. OF L., https://www.uwyo.edu/law/directory/john-burman.html [https://perma.cc/B25E-7P9E] (last visited Oct. 9, 2023); *Professor Burman's Publications*, UNIV. OF WYO. COLL. OF L., https://www.uwyo.edu/law/directory/publications/burman.html [https://perma.cc/AZZ4-ZQCD] (last visited Nov. 2, 2023) (compiling a list of Professor Burman's publications); Leah C. Schwartz, *But for John M. Burman*, WYO. LAW., March 2019, at 12, https://digitaleditions.walsworth.com/publication/?m=10085&i=577175&p=12&ver=html5

19 Burman & Pestinger, *supra* note 18, at 7–12. Burman and Pestinger use the phrase "provider aid in dying." *Id.* at 2. This Article uses the phrase "medical aid in dying" interchangeably with Burman and Pestinger's idea of provider aid in dying.

20 WYO. STAT. ANN. § 35-6-121(a)(iv) (2023); S. File 109, 67th Leg., Gen. Sess. (Wyo. 2023); Order Granting Temporary Restraining Order ¶ 10, *Johnson II*, 2023 Wyo. Trial Court Order LEXIS 1 (Wyo. Dist. Ct. Mar. 22, 2023) [hereinafter *Johnson II* Order Granting TRO]; *Johnson II* Amended Complaint, *supra* note 12, ¶ 22.

21 *Johnson II* Amended Complaint, *supra* note 12.

22 *See infra* Parts IV.B.2, IV.B.4.

23 Order Granting Preliminary Injunction ¶ 29, *Johnson I* (Wyo. Dist. Ct. Aug. 10, 2022) [hereinafter *Johnson I* Order Granting Preliminary Injunction] [https://perma.cc/MY52-39GU] ("The Court *could* find that the constitutional amendment adopted by the voters of Wyoming under [Art. I, § 38] unambiguously provides competent Wyoming citizens with the right to make their own health care decisions." (emphasis added)); *Johnson I* Order Granting TRO, *supra* note 17, ¶ 20 ("the HB 92 amendment *appears* to conflict with [Art. I, § 38]" (emphasis added)); *Johnson II* Order Granting TRO, *supra* note 20, ¶ 53 (finding "Plaintiffs have asserted a sufficient showing of *probable success* to warrant enjoining the Act *until this matter can be fully resolved on its merits*" (emphasis added)).

district court in *Johnson I* and *Johnson II*. But first, Part II of this Article discusses the legal underpinnings of state responses to the ACA.[24] This discussion provides context for Part III, which details Wyoming's response to the ACA: ratification of a constitutional amendment that is now enshrined in Article I, § 38 of Wyoming's Constitution.[25] Part IV provides context for the historical and legal landscape of medical aid in dying and abortion, including how the law has treated each on both a statutory and constitutional level.[26]

Finally, Part V of this Article applies rules of constitutional interpretation to Article I, § 38 and concludes § 38(a) plainly and unambiguously confers Wyomingites the constitutional right to make their own health care decisions.[27] Since the language is plain and unambiguous, the historical context of § 38 does not impact the analysis.[28] But even if the historical context is considered, it clarifies that § 38(b) was the only provision responsive to the ACA.[29] Moreover, the plain language of § 38 demonstrates that the right to make health care decisions under § 38(a) is separate and distinct from the right to pay directly for health care services without penalty under § 38(b), and the suggestion that the historical context of § 38(b) nullifies the rights conferred under § 38(a) runs afoul of well-established rules of constitutional interpretation.[30]

Since the decision to have an abortion or to request medical aid in dying are both health care decisions, § 38(a) confers Wyomingites with the constitutional right to make those decisions.[31] This right is not malleable by preexisting statutes or subsequent legislative findings, but it is also not unfettered. Instead, the Legislature may properly place reasonable and necessary restrictions on the right to make health care decisions as prescribed by § 38(c).[32] Therefore, a limitation on or prohibition of the right to make certain health care decisions must be considered under § 38(c)'s reasonable and necessary standard, and the analysis must not focus on whether the right to make a specific health care decision exists under § 38(a).[33]

---

24 *See infra* Part II.

25 *See infra* Part III.

26 *See infra* Part IV.

27 *See infra* Part V.

28 *See infra* Part V.

29 *See infra* Part V.

30 *See infra* Part V.

31 *See infra* Part V.

32 *See infra* Part V.

33 *See infra* Part V. Whether the statutes at issue in *Johnson I* and *Johnson II* place reasonable and necessary restrictions on the right to decide whether to have an abortion is outside the scope of this Article. Moreover, this Article's analysis focuses exclusively on applying rules of constitutional interpretation to Article I, § 38, and it should not be construed to offer opinions on the propriety of abortion or medical aid in dying.

II. STATE RESPONSES TO THE CONTENTIOUS AFFORDABLE CARE ACT

The ACA was highly controversial, largely because of its length and contentious provisions.[34] The ACA's individual mandate, which required "most Americans to maintain 'minimum essential' health insurance coverage" or pay a fine, was perhaps the most contentious of them all.[35] The mandate sparked concerns regarding state sovereignty even before it became law, which led to quick and substantial state action as soon as it did, most notably in the form of new state statutes and constitutional amendments.[36] Since a state ordinarily cannot litigate the constitutionality of congressional acts on behalf of its citizens,[37] it was unclear whether states had standing to challenge the constitutionality of the individual mandate in court.[38] To establish standing, states had to show the individual mandate infringed on a sovereign interest, such as the state's ability to enforce its own laws.[39] Consequently, the new state laws had a dual purpose: to establish state standing and to nullify the individual mandate.[40]

---

[34] *See* Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 539 (2012) ("The [ACA's] 10 titles stretch over 900 pages and contain hundreds of provisions."); KEITER, *supra* note 6, at 110; *State Legislation and Actions Challenging Certain Health Reforms,* NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2017), http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx [https://perma.cc/B2UW-UM7K] (stating the individual mandate was a focal point for state opposition).

[35] *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 539 (citing 26 U.S.C. § 5000A(d) (2010)); Christopher B. Serak, Note, *State Challenges to the Patient Protection and Affordable Care Act: The Case for a New Federalist Jurisprudence,* 9 IND. HEALTH L. REV. 311, 314 (2012). Some Americans were not required to obtain health insurance, such as prisoners and undocumented aliens. 26 U.S.C. § 5000A(d).

[36] *See* Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 614 (2015). In addition to state responses, some members of the U.S. House of Representatives offered a bill to repeal the ACA in the session following enactment, but this effort was largely symbolic since President Obama was almost certain to veto the bill. JANET L. DOLGIN & LOIS L. SHEPHERD, BIOETHICS AND THE LAW 475 (Vicki Been et al. eds., 3rd ed. 2013).

[37] Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

[38] *The Standing Paradox, supra* note 8, at 418. To bring a lawsuit, a plaintiff must establish standing to sue. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977), *superseded on other grounds by statute,* Worker Adjustment and Retraining Notification Act, Pub. L. 100-379, 102 Stat. 890, 29 U.S.C. § 2101–2109. To establish standing, a plaintiff must demonstrate: "(i) an injury-in-fact that is both concrete and particularized as well as actual or imminent; (ii) an injury that is traceable to the conduct complained of; and (iii) an injury that is redressable by a decision of the court." Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1241 (10th Cir. 2008). For a discussion of these elements in the context of ACA litigation, please *see generally* Timothy Stoltzfus Jost & Mark A. Hall, *Not So Fast—Jurisdictional Barriers to the ACA Litigation*, 365 NEW ENG. J. MED. 34 (2011).

[39] Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982) (stating the power to create and enforce laws is a recognized sovereign interest); *Crank*, 539 F.3d at 1242.

[40] *See generally* S.B. 1088, 50th Leg., 1st. Reg. Sess. (Ariz. 2011); H.B. 1053, 88th

By the end of 2010, more than 115 legislative proposals were considered in forty states.[41] Most of the proposals were imitations of model legislation advanced by the American Legislative Exchange Council's *State Legislators Guide to Repealing Obamacare* (the Guide).[42] The Guide was marketed to state legislators as "an essential tool" to combat the ACA.[43] With respect to the individual mandate, the Guide's model legislation

Gen. Ass., 2011 Reg. Sess. (Ark. 2011); H.B. 353, 145th Gen. Assemb., 2nd Sess. (Del. 2010); H.B. 1193, 2011 Leg., Reg. Sess. (Fla. 2011) (a bill prohibiting laws that compel participation in health insurance discussed in the context of the ACA); H.B. 104, 152nd Gen. Assemb., 2013 Reg. Sess. (Ga. 2013) (a bill to nullify the ACA); H.J. Res. 5, 84th Gen. Assemb., 1st Sess. (Iowa 2011); H. Con. Res. 5007, 84th Leg. Sess., 2011 Reg. Sess. (Kan. 2011); S.B. 26, 2010 Leg., Reg. Sess. (La. 2010); H.B. 880, 2011 Leg., Reg. Sess. (Md. 2011); H.B. 4050, 96th Leg. Sess., 1st Reg. Sess. (Mich. 2011); S.B. 2512, 2013 Leg., Reg. Sess. (Miss. 2013); H.J. Res. 19, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); H.B. 312, 62nd Leg., Reg. Sess. (Mont. 2011); Legis. B. 219, 102nd Leg., 1st Sess. (Neb. 2011); Assemb. Con. Res. 109, 214th Leg. Sess. (N.J. 2010); H.B. 323, 50th Leg., Reg. Sess. (N.M. 2011); H.B. 2, 2011 Gen. Assemb., 2011 Sess. (N.C. 2011); H.B. 1291, 62nd Leg. Assemb. (N.D. 2011); H.B. 91, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (a bill requiring the attorney general to seek injunctive relief for violations of state public policy); S.B. 1313, 194th Gen. Assemb., 2009 Reg. Sess. (Pa. 2009); H.B. 5152, 2011 Leg., Reg. Sess. (R.I. 2011); H.B. 3096, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013) (a bill to circumvent the ACA); S.B. 1680, 108th Gen. Assemb., (Tenn. 2014); H.B. 10, 2010 Leg., Reg. Sess. (Va. 2010); H.B. 1946, 62nd Leg. Sess., 2011 Reg. Sess. (Wash. 2011): H.B. 3002, 79th Leg., Reg. Sess. (W.V. 2009); Elizabeth Weeks Leonard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 U. RICH. L. REV. 784 (2012).

[41] Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 5, 2011) https://leg.mt.gov/content/Publications/Committees/session/StateLegislation_Opposing-6pages_NCSL.pdf [https://perma.cc/Z8FQ-4M9J]. One state even called for a 28th amendment to the U.S. Constitution that would prohibit Congress from requiring citizens "to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to" do so. *Id.*

[42] AM. LEGIS. EXCHANGE COUNCIL, THE STATE LEGISLATORS GUIDE TO REPEALING OBAMACARE 12 (2011) https://alec.org/wp-content/uploads/2015/12/2011-State_Leg_Guide_to_Repealing_ObamaCare.pdf [https://perma.cc/PS65-XX6H]. The American Legislative Exchange Council is a "voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism." *About ALEC*, AM. LEGIS. EXCHANGE COUNCIL, https://alec.org/about/ [https://perma.cc/K9LQ-6M97] (last visited Oct. 9, 2023). The model legislation was lauded as a means to establish state standing for the initial oppositional litigation and to establish additional Tenth Amendment grounds if the initial litigation failed. AM. LEGIS. EXCHANGE COUNCIL, *supra* note 42, at 12. Virginia's claim of standing based on this theory was ultimately unsuccessful. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 271 (4th Cir. 2011) ("To permit a state to litigate whenever it enacts a statute declaring its opposition to a federal law, as Virginia has done in the [Virginia Health Care Freedom Act], would convert the federal judiciary into a 'forum' for the vindication of a state's generalized grievances about the conduct of government." (internal citations and quotations omitted)).

[43] *The State Legislators Guide to Repealing Obamacare*, AM. LEGIS. EXCHANGE COUNCIL, https://alec.org/publication/the-state-legislators-guide-to-repealing-obamacare/ [https://perma.cc/6KHZ-52N4] (last visited Oct. 9, 2023).

aimed to prohibit the compelled purchase of health insurance and to protect the right to pay directly for health care services.[44] Ultimately sixteen states passed some variation of this provision; eleven states passed new statutes and five states passed constitutional amendments.[45] Attorneys general or governors of these sixteen states used these new laws to initiate or join litigation challenging the individual mandate.[46] Ten more states

---

[44] AM. LEGIS. EXCHANGE COUNCIL, *supra* note 42, at 12. According to the Guide, these sample provisions could materialize in either statutory form or as a constitutional amendment. *Id.*

[45] ARIZ. REV. STAT. § 36-1301 (2010); FLA. STAT. § 624.24 (2011); GA. CODE. ANN. § 31-1-11 (2010); IDAHO CODE § 39-9003(2) (2011); IND. CODE. § 4-1-12-3 (2011); KAN. STAT. ANN. § 65-6231 (2011); MO. REV. STAT. § 1.330 (2010); MONT. CODE. ANN. §50-4-902 (2011); N.D. CENT. CODE § 26.1-36-45 (2011); UTAH CODE ANN. § 63M-1-2505.5(3)(a) (West 2011); VA. CODE. ANN. §38.2-3430.1:1 (2010); ALA. CONST. art. I, § 36.04(a); ARIZ. CONST. art XVII, § 2(A), *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014); OHIO CONST. art, I, § 21; OKLA. CONST. art. II, § 37(B); WYO. CONST. art. I, § 38. At least one statute became effect retroactively to the day President Obama signed the bill, ARIZ. REV. STAT. § 36-1301, while another state's constitutional amendment is inapplicable to laws in effect prior to the ACA's enactment. *Compare* OHIO CONST. art. I, § 21(D) ("This section does not affect laws or rules in effect as of March 19, 2010"), *with* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) (March 19, 2010, was a Friday, and March 23, 2010, was a Monday). Other states implemented measures challenging other provisions of the ACA, such as Medicaid Expansion. Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010,* NAT'L CONF. OF STATE LEGISLATURES (Jan. 5, 2011), http://www.ncsl.org/research/health/new-health-reform-database.aspx [https://perma.cc/8W6P-FDS8]. Whether states had standing to challenge the ACA's Medicaid expansion efforts was never questioned. *The Standing Paradox, supra* note 8, at 418.

[46] These states were Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, North Dakota, Ohio, South Carolina, Texas, Utah, and Wyoming. *See* Florida *ex rel.* Atty. Gen. v. U.S. Dep't Health & Human Servs., 648 F.3d 1235, 1240 n.2 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519 (2012); *Compare id.*, *with supra* note 44 (listing state measures based off the Guide).

became involved in similar litigation by January 2011,[47] including Wyoming.[48]

III. WYOMING'S RESPONSE TO THE ACA: ARTICLE I, § 38

Wyoming was one of five states to pass a constitutional amendment in response to the ACA.[49] To amend the Wyoming Constitution, an

---

[47] The largest suit, which was filed just "minutes after the President signed" the ACA into law, was brought on behalf of 26 states. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011), and *aff'd in part, rev'd in part sub nom. Atty. Gen.*, 648 F.3d 1235, *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus.*, 567 U.S. 519. This suit included Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, and Wyoming. *Id.* at 1263 n.1; Elizabeth Weeks Leonard, *Rhetorical Federalism, The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 115 (2011). Virginia and Oklahoma filed suit separately. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011); Oklahoma *ex rel.* Pruitt v. Burwell, 51 F.Supp.3d 1080 (E.D. Okla. 2014), *reversed by* 2015 WL 13824466 (10th Cir. July 28, 2015). Virginia and Oklahoma arguably chose to file separate actions because they believed they had "stronger sovereign interest standing than other states' general Tenth Amendment Challenges." *The Standing Paradox*, *supra* note 8, at 428.

[48] *See* Meredith F. Asay, *The Affordable Care Act*, WYO. LAW, Oct. 2013, at 20; Amy Richards, *Wyoming to Join Florida Lawsuit Challenging Health Care Mandate*, KGAB AM 650 (Jan. 7, 2011), https://kgab.com/wyoming-to-join-florida-lawsuit-challenging-health-care-mandate/ [https://perma.cc/3E5H-8GC6].

[49] *See* WYO. CONST. art. I, § 38; Asay, *supra* note 48, at 20 (declaring Article I, § 38 a response to the ACA); KEITER, *supra* note 6, at 110 (opining that § 38 "is perhaps best described as a 'message amendment,' expressing the state's displeasure with the controversial federal [ACA]"). Several news sources published ahead of the 2012 General Election classified the Amendment as a nullification effort. Jeremy Pelzer, *Health Care Amendment Makes Wyoming Ballot*, CASPER STAR TRIB. (Feb. 20, 2011), http://trib.com/news/state-and-regional/govt-and-politics/article_e059b0c1-1a2a-5f2a-9645-a1602437c54d.html (describing the amendment as "an attempt to resist the federal health care reform law passed last year—especially a provision requiring most Americans to buy health insurance."); John Schwartz, *Wyoming Election 2012*, N.Y. TIMES, https://www.nytimes.com/elections/2012/results/states/wyoming.html [https://perma.cc/NMS5-E4KH] (last visited Nov. 21, 2023) (stating Wyoming voters overwhelmingly passed a law "intended to allow the state to come up with alternatives to the Obama administration's [ACA]."); Anthony Pollreisz, *Three Proposed Constitutional Amendments on the November Ballot*, KTWO RADIO (Oct. 31, 2012), http://k2radio.com/three-proposed-constitutional-amendments-on-the-november-ballot; *Wyoming Voters Nullify Health Mandates*, TENTH AMENDMENT CTR., http://blog.tenthamendmentcenter.com/2012/11/wyoming-voters-nullify-health-mandates/ [https://perma.cc/A9GA-7B4S] (last visited Nov. 21, 2023) ("This summer, the Supreme Court ruled the Obama Administration's health care mandates to be constitutional as a 'tax.' Today, the people of the state of Wyoming joined the state of Alabama in telling the Supreme Court to shove it!").

amendment must pass through both legislative houses, be signed by the governor, and receive a majority of total votes cast in the general election.[50]

A. Legislative History

Wyoming's constitutional amendment was first introduced in the 2011 General Session as Senate Joint Resolution 0002 (the Resolution).[51] As introduced, the Resolution was titled "Health care freedom," and it sought to amend Article VII of the Constitution.[52] The Resolution's original stated purpose provided that "no federal or state law shall compel participation in any health care system by any person, employer or health care provider."[53] The Resolution's original title and stated purpose were slight variations of the Guide's model legislation.[54] However, neither the original title nor the original stated purpose were adopted. The final version, passed by both legislative bodies and signed by the governor, was titled "Right of health care access" rather than "Health care freedom," and the final stated purpose was to give "the right to make health care decisions" directly to the citizens.[55] The amendment, as originally introduced, was to be included

[50] WYO. CONST. art. XX, § 1; WYO. CONST. art. III, § 31; Geringer v. Bebout, 10 P.3d 514, 521 (Wyo. 2000) ("[I]t is plainly declared that legislature measures, however denominated, which propose an amendment to the constitution, must be presented to the Governor for approval or disapproval."); State *ex rel.* Blair v. Brooks, 99 P. 874, 874 (Wyo. 1909) (interpreting Article XX, § 1 to mean the majority of the voters in the election, not the majority of voters who voted on the amendment or question).

[51] S.J. NO. 66-2, Gen. Sess. at 1 (Wyo. 2011) https://wyoleg.gov/2011/SenateDigest.pdf [https://perma.cc/MLS2-ETU4]. A "Joint Resolution (Formal)" is "[a] formal resolution . . . adopted by the House and Senate through the same process by which a bill is adopted. Formal resolutions may (1) make recommendations about official government action to government officials, officers, or entities; (2) propose ratifications of amendments to the U.S. Constitution or resolutions calling for constitutional conventions; or (3) propose amendments to the Wyoming Constitution to be submitted to the vote of the electors." *Glossary of Words and Terms*, *Joint Resolution (Formal)*, STATE OF WYO. LEGISLATURE, https://wyoleg.gov/citizenEngagement/Glossary [https://perma.cc/6VDJ-73CF] (last visited Sept. 20, 2023) (click on tab I–L).

[52] STATE OF WYO., S.J. RES. NO. SJ0002: HEALTH CARE FREEDOM (2011) [hereinafter SJ0002 Introduced] https://wyoleg.gov/2011/Introduced/SJ0002.pdf [https://perma.cc/8NUR-NNTJ].

[53] *Id.*

[54] The Guide asserted Health Care Freedom Acts should "prohibit any person, employer, or health care provider from being compelled to purchase or provide health insurance. *Compare* AM. LEGIS. EXCHANGE COUNCIL, *supra* note 42, *with* S.J. Res. 0002, 61st Leg., Gen. Sess. (Wyo. 2011). The only notable difference between the two is that the original stated purpose replaced the Guide's "purchase or provide" language with "participation." *See id.*

[55] S.J. Res. 0002, 61st Leg., Gen. Sess. (Wyo. 2011) https://wyoleg.gov/2011/Bills/SJ0002.pdf [https://perma.cc/4TGE-XG4U] (enrolled Joint Resolution No. 2, Senate). The enrolled version includes the revisions of "a bill after passage by both bodies of the Legislature, by incorporating therein all amendments

in Article VII of the Constitution, but it was moved to Article I in its final form.[56]

The change from Article VII to Article I is notable. Article VII includes amendments pertaining to education and the promotion of health.[57] Article I encompasses Wyoming's Declaration of Rights, among which are the rights to due process of law, free speech, and religious liberty.[58] Article I has been amended only five times in state history.[59] Yet, during the Legislature's consideration of the Resolution, one senator proposed the amendment be placed in Article I since it was designed to empower the people, not to determine rules of general governance.[60] In doing so, he said: "People, this [right of health care access] belongs to you. You can cherish it. You can use it. You can do what you wish with it. But we're going to give it to you."[61]

B. Ratification by the Electorate

Since the Resolution proposed a constitutional amendment, it was submitted to the citizens for vote in the 2012 General Election.[62] The Legislature approved the following language to appear on the ballot:

---

adopted by both bodies." *Glossary of Words and Terms*, *Enroll To,* STATE OF WYO. LEGISLATURE, https://wyoleg.gov/citizenEngagement/Glossary [https://perma.cc/6VDJ-73CF] (last visited Sept. 20, 2023) (click on tab E-H).

56 *Compare* SJ0002 Introduced, *supra* note 52, *with* S.J. Res. 0002, 61st Leg., Gen. Sess. (Wyo. 2011).

57 WYO. CONST. art. VII.

58 WYO. CONST. art. I, § 23 (right to an education); WYO. CONST. art. I, § 6 (right to due process of law); WYO. CONST. art. I, § 8 (right to open courts); WYO. CONST. art. I, § 9 (right to a jury trial); WYO. CONST. art. I, § 11 (right against self-incrimination and double jeopardy); WYO. CONST. art. I, § 14 (right to have an opportunity to hunt, fish, and trap); WYO. CONST. art. I, § 18 (right to religious liberty); WYO. CONST. art. I, § 23 (right to an education). In this sense, Wyoming's Declaration of Rights resembles the Federal Bill of Rights. *See* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1172 (1992).

59 *Johnson II* Amended Complaint, *supra* note 12, ¶ 14.

60 *Senate Floor Debate*, LEGISLATURE OF THE STATE OF WYO. (Jan. 28, 2011), http://legisweb.state.wy.us/2011/audio/senate/s0128am1.mp3 [https://perma.cc/6ZHA-CDZE] (Senator Schiffer) ("Article I is where we empower the people.").

61 *Id.* The same senator also said, "I can't predict where health care's going, but what I can assure you, if you pass this amendment, the citizens of this state will be assured that they can make the decision. What is good for me in terms of my health care. And each of us is different. And we should be." *Id.*; *accord* Burman & Pestinger, *supra* note 18, at 6 ("While Wyoming is a traditionally red, Republican state, Wyomingites of every philosophy share one common desire. That is, we do not want politicians making personal decisions for us. Rather, such decisions should be reserved for individuals." (footnote omitted)).

62 *See* S.J. Res. 0002, 61st Leg., Gen. Sess. (Wyo. 2011).

> The adoption of this amendment will provide that the right to make health care decisions is reserved to the citizens of the state of Wyoming. It permits any person to pay and any health care provider to receive direct payment for services. The amendment permits the legislature to place reasonable and necessary restrictions on health care consistent with the purposes of the Wyoming Constitution and provides that this state shall act to preserve these rights from undue governmental infringement.[63]

The Resolution was ratified with 72% of Wyomingites voting in its favor.[64] It is now enshrined in Wyoming's Declaration of Rights, and it provides:

> (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
>
> (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.
>
> (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.

---

[63] WYO. ELECTIONS DIV., 2012 GENERAL ELECTION BALLOT ISSUES 2 (2012) https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf [https://perma.cc/8J5Z-YA7Y].

[64] *Id.*; *Johnson II* Amended Complaint, *supra* note 12, ¶ 15 n.4 ("The Amendment, voted on in the general election on November 6, 2023, passed 72.59% to 21.70%"). To amend the Wyoming Constitution, a proposed amendment must pass both houses and then be presented to the governor for signature. WYO. CONST. art. XX, § 1; Geringer v. Bebout, 10 P.3d 514, 521 (Wyo. 2000) ("[I]t is plainly declared that legislative measures, however denominated, which propose an amendment to the constitution, must be presented to the Governor for approval or disapproval."). Once signed by the governor, the proposed amendment must be ratified by a majority of voters in the next general election. WYO. CONST. art. XX, § 1. A proposed constitutional amendment is ratified by a majority of voters in the election, not a majority of voters who vote on the amendment in question. State *ex rel.* Blair v. Brooks, 99 P. 874, 874 (Wyo. 1909). In the 2012 General Election, 250,701 total ballots were cast. WYO. ELECTIONS DIV., *supra* note 63, at 1. Of the 250,701 total votes cast in the 2012 General Election, 181,984 were in favor of the Amendment, and 54,405 were against it. *Id.*

> (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.[65]

C. Modern Relevance

Interestingly, ratification occurred approximately six months after SCOTUS upheld the constitutionality of the individual mandate.[66] For this reason, one of the leading scholars on Wyoming's Constitution opines that § 38 is of "limited relevance."[67] And while no court has considered whether § 38(b) is preempted since it stands as an obstacle to Congress's objectives, preemption is reasonably presumed given judicial treatment of similar obstructionist legislation.[68]

For example, Arizona passed a similar constitutional amendment in response to the ACA.[69] Like Wyoming's § 38(b), Arizona's constitutional amendment sought to protect the right to pay directly for health care services without penalty.[70] Since this provision allowed Arizonans to "forego minimum health insurance coverage and abstain from paying penalties," it stood "as an obstacle to Congress's objective to expand minimum essential health coverage nationwide through the individual mandate[.]"[71] Therefore, the U.S. Court of Appeals for the Ninth Circuit held the entirety of Arizona's amendment is preempted under the Supremacy Clause of the U.S. Constitution.[72]

---

65 WYO. CONST. art. I, § 38.

66 *See* Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519 (2012). The case was decided on June 28, 2012. *Id.*

67 KEITER, *supra* note 6, at 110 ("Because the U.S. Supreme Court, *in National Federation of Independent Business v. Sebelius* (2012), upheld the [ACA], this section seems largely preempted by that federal law and thus of limited relevance.").

68 Preemption can be express or implied. State v. Anaya-Espino, 114 So.3d 1248, 1258 (La. Ct. App. 2013) (Brown, J., dissenting). "[E]xpress preemption occurs where the federal statute contains explicit preemptive language." *Id.* Implied preemption occurs in one of two situations: "(1) field preemption (a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject) and (2) conflict preemption." *Id.* "Conflict preemption typically occurs in one of the two following scenarios: (a) in the rare case where it is impossible to comply with both the federal and state statute; or (b) in the more prevalent situation where the state law impedes the achievement of the congressional objective." *Id.*

69 *See* ARIZ. CONST. art. XXVII, § 2, *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014).

70 ARIZ. CONST. art. XXVII, § 2(A)(1), (2), *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014). When Wyoming's Senate was debating whether certain language should be included in the amendment, one senator urged his colleagues to reference Arizona's "similar legislation." *Senate Floor Debate*, *supra* note 60 ("This isn't a novel idea. And this language is much closer to what has been done in other states as we have just previously adopted. I urge you to look at . . . Arizona's language.").

71 Coons v. Lew, 762 F.3d 891 (9th Cir. 2014).

72 *Id.*

Unlike Wyoming's amendment, Arizona's constitutional amendment focused exclusively on the purchase of health insurance, the payment for health care services, and the prohibition of penalties.[73] Arizona's amendment did not include a provision like Wyoming's right to make health care decisions under § 38(a).[74] Thus, even if preemption is presumed in Wyoming, only one subsection—the right to pay directly for health care services without penalty under § 38(b)—stands "as an obstacle to Congress's objective to expand minimum essential health coverage nationwide through the individual mandate" and is preempted on this basis.[75] But state law is preempted only "to the extent of any conflict with a federal statute."[76] So long as § 38's other provisions are not obstructive of any Congressional objectives, they remain operative.[77]

A court has yet to decide what "health care decisions" Wyomingites have a constitutional right to make under § 38(a).[78] However, in 2017, Burman and Pestinger published the first interpretation of the provision and concluded it encompasses the right to decide whether to request

---

[73] *See* ARIZ. CONST. art. XXVII, § 2(A)–(B), *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014). ("To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person employer or health care provider to participate in any health care system. 2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services. B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule."). Arizona's amendment also defined "penalties or fines" as "any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee with similar effect established by law or rule by a government established, created or controlled agency that is used to punish or discourage the exercise of rights protected under this section." *Id.* art. XXVII, § 2(D).

[74] *Compare* WYO. CONST. art. I, § 38, *with* ARIZ. CONST. art. XXVII, § 2, *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014).

[75] *See Coons*, 762 F.3d at 902; *compare* WYO. CONST. art. I, § 38(b), *with* 26 U.S.C. § 5000A(d).

[76] Hillman v. Maretta, 569 U.S. 483, 490 (2013) ("State law is preempted '*to the extent* of any conflict with a federal statute." (emphasis added) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000)).

[77] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[78] The district court granted preliminary injunctions and temporary restraining orders in both *Johnson I* and *Johnson II*. *See infra* Parts IV.B.2, IV.B.4. These rulings do not answer the ultimate question of whether Article I, § 38(a)'s right to make health care decisions encompasses the right to decide whether to have an abortion. *See Johnson I* Order Granting Preliminary Injunction, *supra* note 23, at *5; *Johnson II* Order Granting TRO, *supra* note 20, at 13. Preliminary injunctions and temporary restraining orders require "a clear showing of probable success and possible irreparable injury [to the plaintiff.]" *See Johnson I* Order Granting Preliminary Injunction, *supra* note 23, at *5 (quoting CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp., 2009 WY 113, ¶ 7, 215 P.3d 1054, 1057 (Wyo. 2009)).

medical aid in dying.[79] More recently, in 2022, the *Johnson I* plaintiffs claimed Wyomingites have a right to decide whether to have an abortion and challenged a statute largely prohibiting abortion on that basis.[80] This issue is currently being litigated in *Johnson II*, albeit with respect to new state laws that prohibit prescribing abortion pills and declare that abortion is not health care.[81]

According to Burman and Pestinger and the *Johnson* plaintiffs, the decision to request medical aid in dying and the decision to have an abortion are health care decisions and, if § 38(a) protects Wyomingites' right to make their own health care decisions, it protects the right to medical aid in dying and abortion.[82] However, this reasoning has been created heaps of consternation and has been met with staunch resistance,[83] presumably because of how the very "health care decisions" at issue have been viewed societally and treated legally over time.[84] As discussed in the following section, abortion and medical aid in dying are widely debated topics and the law has long grappled with how best to address them.[85]

IV. THE HISTORICAL AND LEGAL TREATMENT OF MEDICAL AID IN DYING AND ABORTION

Wyoming's Constitution does not contain provisions expressly protecting the right to abortion or medical aid in dying. In fact, Wyoming has traditionally regulated abortion by statute and repeatedly rejected legislative attempts to authorize medical aid in dying.[86] The historical and legal treatment of these procedures is essential to understand the novelty of the arguments advanced by Burman and Pestinger and the *Johnson* plaintiffs in both respects.

A. Medical Aid in Dying

With advances in medicine and technology, Americans are living longer than ever before.[87] This reality forces considerations of "how best to protect dignity and independence at the end of life[.]"[88] Some advocate that dignity and independence at the end of life are best protected through medical aid in dying, which "permits mentally competent, adult patients

79 *See* Burman & Pestinger, *supra* note 18.
80 *See infra* Part IV.B.2.
81 *See infra* Part IV.B.4.
82 *See infra* Parts IV.A.1, IV.B.2, IV.B.4.
83 *See infra* Parts IV.B.2, IV.B.4.
84 *See infra* Part IV.
85 *See infra* Part IV.
86 *See infra* Parts IV.A–B.
87 Washington v. Glucksberg, 521 U.S. 702, 716 (1997).
88 *Id.*

with terminal illness to request a prescription for life-ending medications from their physician."[89] Once prescribed, "[t]he patient must self-administer and ingest the medication without assistance."[90] The self-administration requirement distinguishes medical aid in dying from euthanasia (a criminal act) and the withdrawal or refusal of life-sustaining medical treatment (a federally protected constitutional right).[91] When states legalize medical aid in dying, the law effectively creates a right against state interference in the physician's act of prescribing the lethal medication.[92]

---

[89] DEATH WITH DIGNITY, https://deathwithdignity.org/ [https://perma.cc/P89N-A843] (last visited Nov. 21, 2023); *Glossary of Terms*, DEATH WITH DIGNITY, https://deathwithdignity.org/resources/assisted-dying-glossary/ [https://perma.cc/FWD8-PJH9] (last visited Nov. 3, 2023) (defining "Assisted Death").

[90] *Id.* Since medical aid in dying requires the patient to self-ingest the lethal medication, "a patient who is in a coma, completely paralyzed, or otherwise physically incapable, is unable to benefit from a law legalizing [medical aid in dying]." Cyndi Bollman, Comment, *A Dignified Death? Don't Forget About the Physically Disabled and Those Not Terminally Ill: An Analysis of Physician-Assisted Suicide Laws,* 34 S. ILL. U. L. J. 395, 399 (2010).

[91] *See Glucksberg*, 521 U.S. at 722–23, 725, 728 (1997) ("[W]e certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide."); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990); *Physician-Assisted Suicide and the Right to Die with Assistance,* 105 HARV. L. REV. 2021, 2022, 2031 ("Many states expressly prohibit suicide assistance and all states have homicide laws that could be construed to bar such acts. Considered in isolation, these laws imply that patients do not have a right to authorize suicide assistance. However, current right-to-die case law strongly suggests the opposite—that patients do have a right to determine how and when they die." (footnote omitted)); Katherine Ann Wingfield & Carl S. Hacker *Physician-Assisted Suicide: An Assessment and Comparison of Statutory Approaches Among the States*, 32 SETON HALL LEGIS. J. 13, 16–17 (2007) ("Because [a] person has the right to refuse any medical treatments, the person has a 'right to die.' Such a right in this context, however, does not imply a right to receive a lethal dose of medication." (footnote omitted)); DOLGIN & SHEPHERD, *supra* note 36, at 475. Euthanasia involves both the voluntary and involuntary administration of lethal medication by another person. *Id.* For a discussion on the difference between voluntary and involuntary euthanasia, please *see* Wingfield & Hacker, *supra* note 91, at 15–16.

[92] *Physician-Assisted Suicide and the Right to Die with Assistance, supra* note 91, at 2024. Oregon's Death with Dignity Act "exempts from civil or criminal liability state-licensed physicians who, in compliance with the specific safeguards of [the Act], dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient." Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (citing OR. REV. STAT. § 127.800 (2003)). Even in jurisdictions that have legalized medical aid in dying, unwilling physicians are not required to prescribe lethal drugs to requesting patients. *Physician-Assisted Suicide and the Right to Die with Assistance, supra* note 91, at 2025. This is because "most medical care is not governed by statute or court decision, but is instead governed by professional practice standards, also referred to as best practices, or standard of care." Kathryn L. Tucker, *When Dying Takes Too Long: Activism for Social Change to Protect and Expand Choice at the End of Life*, 33 WHITTIER L. REV. 109, 113 (2011).

Medical aid in dying is commonly referred to as physician-assisted suicide.[93] Proponents of medical aid in dying contend the reference to suicide is derogatory to both the patient and the patient's family.[94] Proper terminology, according to proponents, includes death with dignity, physician-assisted dying, or medical aid in dying, while inappropriate terminology includes "mercy killing, suicide, or euthanasia."[95] Some also believe the reference to suicide is medically incorrect since the request is limited to terminally ill patients.[96] They argue that, when limited in this way, the lethal medication merely hastens the process of dying that has already begun for those who are terminally ill.[97] Nevertheless, the procedure is commonly associated with assisted suicide.[98] Because of how the law has traditionally treated assisted suicide, this association has proven particularly problematic for those seeking legal recognition of the right to request medical aid in dying.

The common law ranked suicide among the highest crimes and punished the act by forfeiting the person's property (both real and personal) to the State and burying the body ignominiously.[99] The early American colonies initially adopted this approach, but gradually moved away from it because of the "growing consensus that it was unfair to punish" the deceased's family.[100] Even still, "suicide remained a grievous, though nonfelonious, wrong . . . confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide."[101]

Today, suicide is not criminalized, but it remains a crime to assist a suicide "in almost every western democracy" and in nearly every state.[102]

93 DOLGIN & SHEPHERD, *supra* note 36, at 475.

94 *Id.*; Browne Lewis, *A Deliberate Departure: Making Physician-Assisted Suicide Comfortable for Vulnerable Patients*, 70 ARK. L. REV. 1, 5–6 (2017) ("The word 'suicide' has a negative connotation for many people.").

95 DEATH WITH DIGNITY, *supra* note 89.

96 *See* Lewis, *supra* note 94, at 7.

97 *Id.*

98 DOLGIN & SHEPHERD, *supra* note 36, at 475.

99 Washington v. Glucksberg, 521 U.S. 702, 711–12 (1997) (internal alterations omitted); 83 C.J.S. Suicide § 5 (Aug. 2023 update).

100 *Glucksberg*, 521 U.S. at 712–13.

101 *Id.* at 714.

102 *Id.* at 710; s*ee, e.g.*, ALASKA STAT. § 11.41.120(a)(2) (2006) (a person commits manslaughter by "intentionally aid[ing] another person to commit suicide"); ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (2014) (manslaughter is "intentionally providing the physical means that another person uses to die by suicide, with the knowledge that the person intends to die by suicide'); ARK. CODE. ANN. § 5-10-104(a)(2) (2007); CAL. PENAL CODE § 401 (Deering 1905); COLO. REV. STAT. § 18-3-103(1)(b) (2012); CONN. GEN. STAT. § 53a-56(a) (1969); DEL. CODE. ANN. tit. 11 § 645 (1953); FLA. STAT. § 782.08 (1868); GA. CODE. ANN. § 16-5-5(a) (2015); HAW. REV. STAT. § 707-702(b) (2006); 720 ILL. COMP.

Assisted suicide is classified as manslaughter or an independent crime in thirty-four jurisdictions, while other states "imply criminal prohibition of assisted suicide" through other, non-specific statutes or by common law.[103] The continued criminalization of assisted suicide reflects the same "interests in the sanctity of life that are represented by the criminal homicide laws."[104] In this sense, the criminal laws seek to punish "one who expresses a willingness to participate in taking the life of another," even if the participation is "with the consent, or at the request, of the suicide victim."[105]

Against this backdrop, Oregon became the first state to legalize medical aid in dying in 1994.[106] Today, only ten states and the District of Columbia have recognized a statutory right to request medical aid in dying.[107] No jurisdiction has recognized a constitutional right to medical

---

STAT. ANN. 5/12-34.5 (2011); IND. CODE § 35-42-1-2.5(b) (2014); IOWA CODE § 707A.2 (1995); KAN. STAT. ANN. § 21-5407 (2011); KY. REV. STAT. ANN. § 216.302 (LexisNexis 1994); LA. REV. STAT. § 14:32.12 (1995); ME. STAT. tit. 17-A, § 204 (1978); MD. CODE ANN., CRIM. LAW § 3-102 (LexisNexis 2002); MICH. COMP. LAWS § 750.329a (LexisNexis 1998); MINN. STAT. § 609.215 (1998); MISS. CODE. ANN. § 97-3-49 (1942); MO. REV. STAT. § 565.023 (2017); NEB. REV. STAT. § 28-307 (1977); N.J. STAT. ANN. § 2C:11-6 (West 1978); N.M. STAT. ANN. § 30-2-4 (1963); N.Y. PENAL LAW § 125.15(3) (LexisNexis 1967); N.D. CENT. CODE § 12.1-16-04 (1991); OKLA. STAT. tit. 21, § 813 (2011); OR. REV. STAT. § 162.125(b) (1999); 18 PA. CONST. STAT. § 2505 (1972); 11 R.I. GEN. LAWS § 11-60-3 (1996); S.C. CODE ANN. § 16-3-1090 (1998); S.D. CODIFIED LAWS § 22-16-37 (2005); TENN. CODE. ANN. § 39-13-216 (1993); WASH. REV. CODE § 9A.36.060 (2011); WIS. STAT. § 940.12 (2001); *Physician-Assisted Suicide and the Right to Die with Assistance*, *supra* note 91, at 2024.

[103] Emily Newcomb, Comment, *Physician Aid in Dying: Physician-Assisted Suicide as a Constitutionally Protected Liberty Interest Under the Nebraska Constitution*, 101 NEB. L. REV. 799, 804, n.30 (citing statutes). *E.g.,* AR. STAT. § 5-10-106(C) ("Physician-assisted suicide is a Class B felony."); S.D. CODIFIED LAWS § 22-16-37 ("Any person who intentionally in any manner advises, encourages, abets, or assists another person in taking or in attempting to take his or her own life is guilty of a Class 6 felony.").

[104] *Glucksberg*, 521 U.S. at 716 (quoting MODEL PENAL CODE § 210.5 cmt. 5 (Official Draft and Revised Comments 1980)).

[105] Washington v. Glucksberg, 521 U.S. 702, 716 (1997) (quoting MODEL PENAL CODE § 210.5 cmt. 5 (Official Draft and Revised Comments 1980)).

[106] Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (citing OR. REV. STAT. § 127.800 (2003)); *Glucksberg*, 521 U.S. at 717 (citing OR. REV. STAT. § 127.800 *et. seq.* (1996)).

[107] Maine, New Jersey, Vermont, New Mexico, Montana, Colorado, Oregon, Washington, California, Hawaii, and the District of Columbia. Chris Haring, *Medical Aid in Dying as an End-Of-Life Option Offers Death With Dignity*, (Mar. 29, 2023), https://deathwithdignity.org/news/2023/03/3-29-23-senior-guide/ [https://perma.cc/SN4S-PMQW]. *E.g.*, Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2011); Washington Death with Dignity Act, WASH. REV. CODE §§ 70.245.010–.904 (2011); Patient Choice and Control at the End of Life Act, VT. STAT. ANN. tit. 18, §§ 5281–5292 (2013); End of Life Options Act, COLO. REV. STAT. §§ 25-48-101 to -123 (2016); End of Life Option Act, CAL. HEALTH & SAFETY CODE §§ 443–443.22 (2016); Death with Dignity Act, D.C. CODE §§ 7-661.01 to .17 (2017); Maine Death with Dignity Act, ME.

aid in dying.[108] In fact, in 1997, SCOTUS held there is no federally protected constitutional right to the procedure.[109] That SCOTUS decision resulted in "many significant changes in state laws" concerning end-of-life decision making "and the attitudes th[o]se laws reflect."[110]

The legal developments that followed resulted in a "fragmented, incomplete, and sometimes inconsistent set of rules" governing end-of-life decision making.[111] The fragmented scheme led to the development of the Uniform Health Care Decisions Act (UHCDA).[112] The UHCDA "acknowledges the right of a competent individual to decide all aspects of his or her own health care in all circumstances, including the right to decline health care or to direct that health care be discontinued, even if death ensues."[113] Nevertheless, numerous states have provisions in their UHCDA equivalents that state opposition to, but do not expressly criminalize, medical aid in dying.[114] These provisions demonstrate that, "[d]espite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision making," states have generally refused to retreat from the traditional prohibition on assisted suicide, even in the medical context.[115]

STAT. tit. 22 § 2140 (2019). Before Montana legislatively recognized a right to medical aid in dying, its Supreme Court recognized an affirmative defense to those who medically aided a patient's death. Baxter v. State, 2009 MT 449, ¶ 50, 354 Mont. 234, 251, 224 P.3d 1211, 1222 ("We therefore hold that under [Montana's Consent as a Defense Statute, MONT. CODE. ANN. § 45-2-211 (2015)], a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply.").

108 Some classify the liberty interest at stake as the right to commit suicide. DOLGIN & SHEPHERD, *supra* note 36, at 489. Others consider the liberty interest to be more broadly inclusive of the right to determine the time and manner of one's death and the right to hasten one's death. *Id.*

109 *Glucksberg*, 521 U.S. at 728.

110 *Id.* at 716.

111 UNIF. HEALTH CARE DECISIONS ACT (UNIF. L. COMM'N 1993) (prefatory note).

112 *Id.*

113 *Id.*

114 *See, e.g.*, ALA. CODE § 22-8A-10 (1974); IDAHO CODE § 39-4514 (2017); MASS. GEN. LAWS ANN. ch. 111 § 227 (2017); NEV. REV. STAT. § 449.670(2) (1995); N. H. REV. STAT. ANN. § 137-J:10 (2015); OHIO REV. CODE. ANN. § 2133.12(D) (West 2017); TEX. HEALTH & SAFETY CODE ANN. § 166.050 (West 1999); UTAH CODE ANN. § 75-2a-122 (West 2008); VA. CODE ANN. § 54.1-2990 (2009); W. VA. CODE § 16-30-15 (West 2000); WYO. STAT. ANN. § 35-22-414(c) (2005). The Wyoming Health Care Decisions Act exists at WYO. STAT. ANN. §§ 35-22-401 to -416. A "majority of jurisdictions have adopted a variation of such statutes permitting surrogates to make decisions regarding the withdrawal or withholding of life-sustaining treatment, subject to a variety of safeguards." *In re* Doe, 37 N.Y.S. 3d 401, 424 (N.Y. Sup. Ct. 2016). This includes Wyoming. *See id.* at 424 n.36 (citing WHCDA).

115 Washington v. Glucksberg, 521 U.S. 702, 719 (1997). For example, President Clinton "signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibit[ed] the use of federal funding in support of physician-assisted suicide." *Id.* at 718.

Wyoming's criminal code does not expressly criminalize assisted suicide.[116] However, Wyoming's statutory definition of criminally negligent homicide has been interpreted as "sufficiently broad to encompass aiding, assisting, causing or promoting suicide."[117] Wyoming has never created a statutory right to medical aid in dying. Instead, the Wyoming Legislature has consistently rejected attempts to do so.[118] Wyoming's Health Care Decisions Act (WHCDA), which was adopted in 2005, distinguishes the withholding or withdrawal of health care from suicide and homicide and expressly provides that the WHCDA does not authorize "mercy killing, assisted suicide, or euthanasia."[119] Most recently, when the Legislature created Wyoming's Palliative Care Advisory Council in 2017, it included a provision expressly prohibiting the Council from being "construed or expanded to advocate, legitimize or otherwise provide for euthanasia or assisted suicide."[120]

1. Burman and Pestinger contend Wyomingites have a constitutional right to request medical aid in dying under Article I, § 38(a)

In applying general rules of constitutional interpretation, Burman and Pestinger argue the phrase "health care decisions" is unambiguous because choosing whether to request medical aid in dying is a health care decision.[121] Burman and Pestinger contend reasonable persons would consistently agree that choosing medical aid in dying comports with the WHCDA's definition of "health care decisions."[122] They argue in the

---

116 *See* Compassion in Dying v. State, 79 F.3d 790, 847 (9th Cir. 1996) (citing WYO. STAT. ANN. § 6-2-107) (Beezer, J., dissenting), *rev'd sub nom. Glucksberg*, 521 U.S. 702.

117 *See id.* Section 6-2-107 provides "a person is guilty of criminally negligent homicide if he causes the death of another person by conduct amounting to criminal negligence." WYO. STAT. ANN. § 6-2-107. Wyoming abolished all common law crimes in 1983. WYO. STAT. ANN. § 6-1-102 (1983).

118 The Wyoming Legislature considered a Death with Dignity Act in 2004, but the bill failed introduction. S. File 0007, 57th Leg., 2004 Budget Sess. (Wyo. 2004). In 2015, a Death with Dignity bill was introduced in the House and died in committee. H.B. 0119, 63rd Leg., 2015 Gen. Sess. (Wyo. 2015). In 2017, the House did not even consider a similar Death with Dignity bill for introduction. H.B. 0122, 63rd Leg., 2017 Gen. Sess. (Wyo. 2017). The last time a Death with Dignity bill was introduced in the Wyoming Legislature was 2017. *See id.*

119 WYO. STAT. ANN. § 35-22-414(b).

120 WYO. STAT. ANN. § 35-1-1202(g)(vii) (2017). The section addressing assisted suicide was an amendment adopted during the Committee of the Whole. *See* S. File 0088, 63rd Leg., 2017 Gen. Sess. (Wyo. 2017). When the amendment was addressed on the floor of the Senate, there was no debate on the matter, and the amendment passed unanimously. *Senate Floor Debate*, LEGISLATURE OF THE STATE OF WYO. (Jan. 20, 2017), http://legisweb.state.wy.us/2017/audio/senate/s012017am1.mp3 [https://perma.cc/W2K3-838P] ("This is as blunt of a statement as we can find.").

121 *See* Burman & Pestinger, *supra* note 18, at 8–12.

122 *Id.* at 10.

alternative that, even if the provision is ambiguous, rules of constitutional interpretation, when applied to Article I, § 38(a), compel a finding that medical aid in dying is a constitutionally protected "health care decision."[123] Specifically, and because the statutory definition of "health care decisions" preceded § 38(a) and there's no legislative indication the two provisions should be construed differently, the two phrases should be construed identically, according to Burman and Pestinger.[124] And if the provisions are construed together, Burman and Pestinger posit the phrase "health care decisions" includes medical aid in dying.[125]

B. Abortion

In *Roe v. Wade*, SCOTUS recognized a federally protected constitutional right to an abortion "free of interference by the State."[126] This right existed until the fetus reached viability, which is the point during the pregnancy where the fetus could potentially "live outside the mother's womb, albeit with artificial aid."[127] "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[128] After viability, the state could prohibit abortion, according to *Roe*, "except when it is necessary to preserve the life or health of the mother."[129] "Not long after *Roe*, the Wyoming Supreme Court found Wyoming's pre-*Roe* abortion regulations unconstitutional."[130] In the years that followed, "[t]here was substantial speculation about the possibility of a new case overruling or

---

123 *Id.* at 10–12.

124 *Id.* at 9. Burman and Pestinger also apply the doctrine of *ejusdem generis* to the definition of "health care decisions" in the WHCDA. *Id.* at 10–12; *Ejusdem Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language *or any other farm animals* – despite its seeming breadth – would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens."). Burman and Pestinger rely on the definition of "health care" in the Health Care Decisions Act, which is defined as "any care . . . to maintain, diagnose, or otherwise affect an individual's physical or mental condition." Burman & Pestinger, *supra* note 18, at 9; WYO. STAT. ANN. § 35-22-402 (2007). Burman and Pestinger argue "maintain" and "diagnose" are both ends in health care, which forms a general class. Burman & Pestinger, *supra* note 18, at 11. They posit that medical aid in dying relieves pain, which is also an end in health care, and therefore *ejusdem generis* requires "health care decisions" to include medical aid in dying. *Id.* at 10–11.

125 Burman & Pestinger, *supra* note 18, at 9.

126 Roe v. Wade, 410 U.S. 113, 163–64 (1973).

127 *Id.* at 160.

128 *Id.*

129 *Id.* at 163–64.

130 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 5 (citing Doe v. Burk, 513 P.2d 643, 644–45 (Wyo. 1973)).

undercutting the principles articulated in *Roe*."[131] But SCOTUS "ended this speculation" in 1992 by affirming *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[132]

From 1977 to 2022, in accordance with the *Roe* and *Casey* framework, 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 endanger[ed] her life or health, according to appropriate medical judgment.'"[133] Wyoming codified this statutory right in § 35-6-102.[134]

1. Dobbs v. Jackson Women's Health Organization *triggers enforcement of Wyoming's abortion ban*

The Wyoming Legislature passed House Bill 92 (HB 92) during the 2022 legislative session.[135] HB 92 amended § 35-6-102 to "prohibit[] abortion, at any time during a woman's pregnancy," unless the pregnancy was the product of incest or sexual assault or if abortion was "necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function."[136]

Since the Legislature passed HB 92 while *Roe* and *Casey* were still the law of the land,[137] the Legislature directed Wyoming's attorney general to

131 Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 287 (Wyo. 1994) (discussing *Roe* and *Casey*).

132 *Id.* at 287 (discussing *Roe* and *Casey*).

133 *Johnson I* Order Granting TRO, *supra* note 17, at *1 (quoting WYO. STAT. ANN. § 35-6-102(a) (1977) (titled "No abortion after viability")); *Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 5, 6. "Viability was defined as the earliest point at which the state's interest is constitutionally adequate to justify a legislative ban on non-therapeutic abortions. Under federal law, it is the point in time at which the realistic possibility exists of maintaining and nourishing life outside the womb." *Karpan*, 881 P.2d at 287.

134 WYO. STAT. ANN. § 35-6-102 (1977).

135 H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022).

136 *Johnson I* Order Granting TRO, *supra* note 17, at *1 (quoting WYO. STAT. ANN. § 35-6-102 (2022)); H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022); WYO. STATE LEGISLATURE, H.B. 0092 SUMMARY (2022), https://wyoleg.gov/2022/Summaries/HB0092.pdf [https://perma.cc/8YKK-BG3J]; *Johnson II* Order Granting TRO, *supra* note 20, ¶ 8 (quoting WYO. STAT. ANN. § 35-6-102 (2022)).

137 House Bill 92 was passed on March 15, 2022. H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022). *Dobbs* was decided on June 24, 2022. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). In addition to overturning longstanding precedent, *Dobbs* will likely be remembered as leaked draft opinion. On May 2, 2023, Politico published a draft of the *Dobbs* opinion. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2023, 8:32 PM EDT), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/M6YT-VBVQ]. The leak is widely considered "one

review any abortion-related SCOTUS decision to determine whether HB 92 could be lawfully enforced.[138] Within thirty days of any such decision, HB 92 required the attorney general to "report the results of each review" to Wyoming's governor and the Legislature's Joint Judiciary Interim Committee.[139] If the attorney general determined the amendments were authorized by a SCOTUS decision, the governor could certify to the Wyoming secretary of state that enforcement of § 35-6-102, as amended, was lawful.[140] Under HB 92, § 35-6-102's statutory abortion ban would become effective five days after the governor's certification to the secretary of state.[141]

On June 24, 2022, SCOTUS decided *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe* and *Casey* and "returned" the authority to regulate abortion to the people of each state and their elected representatives.[142] On July 21, 2022, Wyoming Attorney General Bridget Hill determined § 35-6-102(b), as amended, "would be fully authorized under" *Dobbs*.[143] The very next day, Wyoming Governor Mark Gordon

of the worst breaches of trust" in SCOTUS's history. SUPREME CT. OF THE U.S., STATEMENT OF THE COURT CONCERNING THE LEAK INVESTIGATION 1 (2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [https://perma.cc/NCL2-A98J]. Thus, the preemptory nature of HB 92, while interesting, was likely not the product of the leak since HB 92 was passed more than six weeks before it occurred.

138 H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022).

139 *Id.*

140 *Id.*

141 *Id.* For this reason, HB 92's amendments are commonly referred to as a "trigger ban" since its effective date was "triggered by decisions issued from [SCOTUS] overruling *Roe*." *Johnson II* Order Granting TRO, *supra* note 20, ¶ 8.

142 *Dobbs*, 142 S. Ct. at 2284, 2234.

143 OFF. OF THE ATTY. GEN., REPORT #1465 – 2022 HOUSE ENROLLED ACT 57 (HB0092) (2022), https://drive.google.com/file/d/1C5VYoXTTfQdvtrK6XsAqpkKVI3SNx2xB/view?pli=1. Notably, Attorney General Hill's analysis was limited to that directed by the Legislature—namely, whether § 35-6-102(b) was authorized under *Dobbs*—and did not address "additional factors." *Id.* The "additional factors" presumably refer to whether HB 92 would be authorized under any other laws, such as Article I, § 38(a) of Wyoming's Constitution. *See id.*

certified that enforcement of HB 92 was lawful.[144] In accordance with HB 92, the abortion ban became enforceable on July 27, 2022.[145]

2. Johnson I

Two days before the law became enforceable, the *Johnson I* plaintiffs filed suit seeking declaratory and injunctive relief against five state defendants—including the State of Wyoming, Governor Gordon, and Attorney General Hill—regarding the constitutionality of HB 92's amendments.[146] The *Johnson I* plaintiffs asserted HB 92's amendments, as codified in § 35-6-102(b), violated several provisions of the Wyoming Constitution, including Article I, § 38(a)'s right of each competent adult to make his or her own health care decisions.[147] In fact, § 38(a) was the

[144] *Johnson I* Order Granting TRO, *supra* note 17, at *2; *Bills Signed by Governor Gordon*, WYO. GOVERNOR, https://governor.wyo.gov/state-government/bills [https://perma.cc/U68D-3G9G] (last visited Sept. 18, 2023) (listing HB 92 as a bill Governor Mark Gordon has signed into law); Valeria Fugate, *Gov. Mark Gordan Signs into Effect House Bill 92 Wyoming's Abortion Trigger Bill*, WYO. NEWS NOW (Jul. 22, 2022, 4:17 PM MDT) https://www.wyomingnewsnow.tv/2022/07/22/governor-mark-gordon-signs-into-effect-house-bill-92-wyomings-abortion-trigger-bill/ [https://perma.cc/K6WK-TYU2] (including a photograph of Governor Gordon's certification to then-Secretary of State Buchanan); @GovernorGordon, TWITTER (July 22, 2022), https://twitter.com/GovernorGordon/status/1550573931081306112 [https://perma.cc/5SQF-PM36] ("I have certified HB 92 following the Attorney General's analysis. I believe that the decision to regulate abortion is properly left to the states. As a pro-life Governor, my focus will continue to be on ensuring we are doing all we can to support mothers, children and families.").

[145] WYO. STAT. ANN. § 35-6-102(b) (as amended by H.R. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022); *Johnson I* Order Granting TRO, *supra* note 17, at *2; *Johnson II* Order Granting TRO, *supra* note 20, ¶ 10.

[146] *Johnson I* Complaint, *supra* note 12; *see Johnson I* Order Granting TRO, *supra* note 17, at *1 (naming the parties and detailing the parties' identities).

[147] *Johnson I* Complaint, *supra* note 12, ¶ 95; *see Johnson I* Order Granting TRO, *supra* note 17, at *4. In addition to Article 1, § 38's right to health care access, the plaintiffs allege § 35-6-102 violates nine other state constitutional provisions, including Article I, §§ 2, 3, 6, 7, 18, 33, 34, and 36. *See id.* at * 4; WYO. CONST. art. I, § 2 ("Equality of all. In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."); WYO. CONST. art. I, § 3 ("Equal political rights. Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."); WYO. CONST. art. I, § 6 ("Due process of law. No person shall be deprived of life, liberty or property without due process of law."); WYO. CONST. art. I, § 7 ("No absolute, arbitrary power. Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."); WYO. CONST. art. I, § 18 ("Religious liberty. The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief

starting point of the plaintiffs' position offered in support of their Motion for a Temporary Restraining Order (TRO), which was filed contemporaneously with their complaint.[148] According to the plaintiffs, a TRO was necessary to preserve the status quo and to protect Wyomingites' constitutional right to make their own health care decisions, which included the right to have an abortion.[149] In response, the state defendants relied on the historical context surrounding ratification of § 38, which was to express the state's "displeasure with the controversial federal [ACA]."[150] Thus, according to the state defendants, a TRO would be inappropriate because the plaintiffs failed to show "how a provision intended to address concerns about the [ACA] implicitly protects the right to abortion."[151]

An emergency hearing was held on the morning of July 27, 2022, the day the law was set to go into effect.[152] The district court granted the TRO that day, finding the plaintiffs made a clear showing of probable success and possible irreparable injury.[153] In doing so, the district court stated "the HB 92 amendment appears to conflict with" § 38(a)'s right of each

whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state."); WYO. CONST. art. I, § 33 ("Compensation for property taken. Private property shall not be taken or damaged for public or private use without just compensation."); WYO. CONST. art. I, § 34 ("Uniform operation of general law. All laws of a general natural shall have a uniform operation."); WYO. CONST. art. I, § 36 ("Rights not enumerated reserved to people. The enumeration in this constitution, or certain rights shall not be construed to deny, impair, or disparage others retained by the people.").

148 Memorandum in Support of Motion for Temporary Restraining Order Emergency Hearing Requested, *Johnson I*, 2022 WL 3010126 ("To illustrate this point, one can begin by reading the Constitutional provision securing the right to access and make independent health care decisions." (citing WYO. CONST. art. I, § 38)); *see Johnson I* Order Granting TRO, *supra* note 17, at *1; Motion for Temporary Restraining Order Emergency Hearing Requested, *Johnson I*, No. 18732, 2022 WL 3009719 (Wyo. Dist. Ct. July 25, 2022) [hereinafter *Johnson I* Motion for TRO] (available at 2022 WL 3009978).

149 *See* Memorandum in Support of Motion for Temporary Restraining Order Emergency Hearing Requested, *Johnson I*, No. 18732, 2022 WL 3009719 (Wyo. Dist. Ct. July 25, 2022) [hereinafter *Johnson I* Memo in Support of Motion for TRO] (available at 2022 WL 3010126).

150 Defendant's Response to Motion for Temporary Restraining Order, *Johnson I*, No. 18732, 2022 WL 3009719 (Wyo. Dist. Ct. July 25, 2022) [hereinafter *Johnson I* Response to Motion for TRO] (available at 2022 WL 3009976).

151 *Id.*

152 *See Johnson I* Order Granting TRO, *supra* note 17, at *1; WYO. STAT. ANN. § 35-6-102(b) (as amended by H.R. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022); *supra* note 141 and accompanying text; Order Granting Motion for Temporary Restraining Order, *Johnson II*, *supra* note 78, ¶ 10.

153 *See Johnson I* Order Granting TRO, *supra* note 17, at *1, 5. The district court issued an oral ruling on the record at the conclusion of the emergency hearing, and the TRO went into effect at 12:00 p.m. on July 27, 2022. *Johnson II* Amended Complaint, *supra* note 12, ¶ 19 n.6. A written order was issued one day later. *Johnson I* Order Granting TRO, *supra* note 17.

competent adult to "have the right to make his or her own health care decisions."[154]

The plaintiffs subsequently filed a motion for preliminary injunction.[155] The plaintiffs "presented evidence that abortion procedures are an essential health care service for women" and argued the "decision to have an abortion is a 'health care decision'" protected under § 38(a).[156] The state defendants again argued § 38(a)'s right to make health care decisions does not implicitly include abortion, and the rights bestowed are those explicitly mentioned: the right to pay for health care services, "but only those services that are legally available."[157] The district court issued a preliminary injunction on August 10, 2022, reasoning it could find § 38 "unambiguously provides competent citizens with the right to make their own health care decisions."[158]

The district court later certified twelve questions of law with no controlling precedent to the Wyoming Supreme Court.[159] One of the certified questions was whether HB 92, as codified, violates § 38.[160] In reference to the state defendants' legislative history argument and emphasis on the ACA, the district court's certification order cited Wyoming's ratification of the Amendment in 2012.[161] The Wyoming Supreme Court declined to answer the certified questions.[162]

---

154 *Johnson I* Order Granting TRO, *supra* note 17, at *5.

155 *See Johnson I* Order Granting Preliminary Injunction, *supra* note 23, at 1 (Aug. 10, 2022) [available at https://perma.cc/4GFM-D63Q].

156 *Id.* ¶ 27.

157 *Id.* ¶ 28.

158 *Id.* ¶ 29.

159 Certification Order at 1, *Johnson I*, No. 18732, 2022 WL 3009719 (Wyo. Dist. Ct. Dec. 9, 2022) [hereinafter *Johnson I* Certification Order]. For a timeline of the litigation and links to court documents, please *see Abortion Litigation in Wyoming—Fighting to Stop Unconstitutional Restrictions on Our Freedom to Make Personal Decisions About Our Bodies, Futures and Health Care*, CHELSEA'S FUND [hereinafter *Abortion Litigation in Wyoming*], https://chelseasfund.org/litigation/#top [https://perma.cc/3U63-WMTR] (last visited Nov. 21, 2023). The district court's certification was a product of the state defendants filing a Motion to Certify Questions of Law to the Wyoming Supreme Court, which was filed on August 18, 2022. Certification Order, *Johnson I*, *supra* note 159, at 1. The plaintiffs opposed the state defendants' Motion. *Id.*

160 *Johnson I* Certification Order, *supra* note 159, at 2, 4.

161 *Id.* ¶ B.3. ("In the general election held November 6, 2023, Wyoming citizens adopted by vote Wyoming Constitution [Article I, § 38] (right of health care access) which was certified on November 14, 2012 and went into effect as law.").

162 Notice of Declination to Answer Certified Questions at 1, Johnson v. Wyoming, No. S-22-0294 (Wyo. Dec. 20, 2022) (citing Matter of Certified Question from U.S. Dist. Ct., Dist. of Wyo., 549 P.2d 1310, 1311 (Wyo. 1976)).

3. The Legislature responds to Johnson I *with more abortion regulations, prohibitions, and declarations*

Perhaps unsurprisingly, the Legislature reacted to the TRO and preliminary injunction in *Johnson I* by attempting to remedy the perceived problems in HB 92 during the 2023 legislative session.[163] The Legislature passed HB 152, which repealed § 35-6-102 altogether and created the Life is a Human Right Act (LHRA).[164] Section 35-6-121 of the LHRA makes several legislative findings.[165] Regarding § 38 in particular, the Legislature declared that "abortion as defined in this act is not health care. Instead of being health care, abortion is the intentional termination of the life of an unborn baby."[166] Regarding § 38(c), the Legislature declared that prohibiting abortion is a "reasonable and necessary restriction upon abortion" and determined "the health and general welfare of the people requires the prohibition of abortion as defined in this act[.]"[167] "At the same time it enacted HB 152, the legislature also passed SF 109, a statute

163 *See Johnson II* Amended Complaint, *supra* note 12, ¶ 21; *Johnson II* Order Granting TRO, *supra* note 20, ¶ 10 ("Presumably in response to the issues raised in *Johnson I*, the Legislature repealed Wyo. Stat. § 35-6-102(b) and replaced it with HB 152."); H.B. 0152, 67th Leg., Gen Sess. (Wyo. 2023); Aedan Hannon, *Senate approves new Wyoming abortion ban*, WYO. TRIB. EAGLE (Mar. 1, 2023), https://www.wyomingnews.com/news/local_news/senate-approves-new-wyoming-abortion-ban/article_c2927066-b89a-11ed-b4f6-9742986fcbf8.html [https://perma.cc/VKT4-77FM] ("The bill was meant to react to the ongoing litigation that has suspended last year's abortion ban and hedge off potential lawsuits. However, the new ban could also have a tangible and significant impact for women in Wyoming.").

164 H.B. 0152, 67th Leg., Gen Sess. (Wyo. 2023). The LHRA exists at Wyoming Statute §§ 35-6-120 through -139. Violating § 35-6-123 amounts to a felony that is punishable by fines up to $20,000 and imprisonment of not more than five years, or both. WYO. STAT. ANN. § 35-6-1259(a) (2023). Physicians or licensed medical providers who "intentionally, knowingly, or recklessly" aid in an abortion "commit[] an act of unprofessional conduct," and face immediate of revocation of their Wyoming licenses and the potential for up to $5,000 in civil penalties. WYO. STAT. ANN. § 35-6-126(a). Violations of § 35-6-123 may also serve as a basis for a civil action allowing for statutory damages of $10,000 per violation, as well as a separate and distinct cause of action for injunctive relief may be maintained against violators. WYO. STAT. ANN. § 35-6-127(b)–(c). One provision of the LHRA also requires abortion reporting forms to be kept for seven years by the state office of vital records services. WYO. STAT. ANN. § 35-6-132(a).

165 WYO. STAT. ANN. § 35-6-121(a)(i) (2023).

166 WYO. STAT. ANN. § 35-6-121(a)(iv) (2023). Additionally, the LHRA states that it "promotes and furthers [Article I, § 6] of the Wyoming [C]onstitution, which guarantees that no person may be deprived of life or liberty without due process of law[.]" WYO. STAT. ANN. § 35-6-121(a)(iii) (2023). This legislative finding is notable because Article 1, § 6 of the Wyoming Constitution is one provision the *Johnson I* plaintiffs used in their attempt to invalidate HB 92's amendments. *Johnson I* Order Granting TRO, *supra* note 17, at *4. The *Johnson I* plaintiffs also relied on Article 1, § 2. *Id.* The LHRA includes a legislative finding that unborn babies constitute "member[s] of the human race under [Article I, § 2] of the Wyoming [C]onstitution[.]" WYO. STAT. ANN. § 35-6-121(a)(i) (2023).

167 WYO. STAT. ANN. § 35-6-121(a)(iv) (2023).

purporting to ban the use of medication for an abortion, subject to certain limited exceptions that are different from the exceptions in HB 152."[168]

4. Johnson II

In anticipation of the new abortion laws and their impact on mooting the *Johnson I* litigation, the same six plaintiffs filed another suit seeking declaratory and injunctive relief against the same state defendants regarding the constitutionality of HB 152 and SF 109 on March 21, 2023.[169] While the plaintiffs' complaint in *Johnson II* sought to invalidate the new abortion laws under several state constitutional provisions,[170] the plaintiffs focused exclusively on § 38 in support of their TRO request.[171] The plaintiffs engaged in similar analyses and the presentation of similar evidence as in *Johnson I* to argue they established a likelihood of success on the merits that the new abortion laws violate § 38 because "it unduly infringes on the rights of Wyoming women to control their own health care."[172]

"To address probable success on the constitutional claim regarding health care," the district court analyzed whether § 38 "confers a right to make health care decisions" and, if so, whether "an abortion qualified as health care."[173] In doing so, the district court found a Wyoming "woman's right to make her own health care decisions is explicitly protected by

---

168 *Johnson II* Amended Complaint, *supra* note 12, ¶ 22.

169 *Johnson II* Amended Complaint, *supra* note 12. *But see Abortion Litigation in Wyoming*, *supra* note 159 (stating *Johnson II* was filed on March 17, 2023). Interestingly, Governor Gordon signed SF 109 on March 17, 2023, and it was set to take effect on July 1, 2023. *Johnson II* Amended Complaint, *supra* note 12, ¶ 24. Governor Gordon allowed HB 152 to take effect without his signature, and it went into effect on March 17, 2023. *Id.* ¶ 24; *see* WYO. STAT. ANN. § 35-6-123 (2023) (noting effective date as March 17, 2023); H.B. 0152, 67th Leg., Gen Sess. (Wyo. 2023) ("This act is effective immediately upon completion of all acts necessary for bill to become law as provided by [Article IV, § 8] of the Wyoming Constitution."); WYO. CONST. art. IV, § 8 ("If any bill is not returned by the governor within three days (Sundays excepted) after its presentation to him, the same shall be a law, unless the legislature by its adjournment, prevent its return, in which case it shall be a law, unless he shall file within the same his objections in the office of the secretary of state within fifteen days after such adjournment."); *Johnson II* Order Granting TRO, *supra* note 20, ¶ 12.

170 *Johnson II* Amended Complaint, *supra* note 12, ¶ xxxvii (referring to WYO. CONST. art. I, §§ 2, 3, 6, 7, 18, 19, 33, 34, 36, 38; WYO. CONST. art. VII, § 12; and WYO. CONST. art. XXI, § 25).

171 Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order Emergency Hearing Requested at 8, *Johnson II*, No. 18853, 2023 WL 2825375 (Wyo. Dist. Ct. Mar. 17, 2023) (available at [https://perma.cc/99PF-W76H]) ("Plaintiffs challenge the constitutionality of the Medication Abortion Ban on multiple grounds, but for purposes of this motion, Plaintiffs have focused their claim under article 1, section 38 of the Wyoming Constitution.").

172 *Id.* at 20.

173 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 30.

Wyoming's Constitution" and that Wyoming's new abortion laws "strip[] this right from all pregnant women."[174] The district court held the plaintiffs "made an adequate showing" that, under the new laws, women's "constitutional right to make their own health care decisions will be denied for the entire duration of their pregnancy" and "[t]he loss of their constitutional right constitutes an impending future injury that is irreparable."[175] Therefore, the district court granted the TRO and temporarily enjoined the State from enforcing the new laws until modified by the court.[176] At the time of publication, the TRO is still in place.

V. ANALYSIS

A. Principles of constitutional interpretation

Accepted principles of statutory construction are used to interpret the Wyoming Constitution.[177] As with any interpretive exercise, the fundamental purpose is to ascertain the intent of those who drafted and ratified the law.[178] To do so, the first step is to determine whether the language at issue is plain and unambiguous.[179] Language is plain and unambiguous if reasonable persons can agree on its meaning with consistency and predictability.[180] Conversely, language is ambiguous if it's uncertain or subject to more than one reasonable interpretation.[181] If the language is plain and unambiguous, it's presumed the drafters and voters "intended whatever has been plainly expressed."[182] Therefore, the inquiry

---

174 *Id.* ¶ 50.

175 *Id.* ¶ 59.

176 *Id.* at 32.

177 Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2, 2006 WY 57, ¶¶ 6, 39, 133 P.3d 983, 985, 1065 (Wyo. 2006); RM v. Washakie Cnty. Sch. Dist. No. 1, 2004 WY 162, ¶ 7, 102 P.3d 868, 870 (Wyo. 2004); Dir. of the Off. of State Lands & Inv. v. Merbanco, Inc., 70 P.3d 241, 252 (Wyo. 2003).

178 *See* Cathcart v. Meyer, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004); Brimmer v. Thompson, 521 P.2d 574, 580 (Wyo. 1974); Appling v. Walker, 2014 WI 96, ¶ 7, 358 Wis. 2d 132, 142, 853 N.W.2d 888, 892 ("The constitution means what its framers and the people approving of it have intended it to mean."); Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000) (providing that courts "are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language").

179 *Merbanco*, ¶ 33, 70 P.3d at 252; *see* Mgmt. Council of the Wyo. Legislature v. Geringer, 953 P.2d 839, 843 (Wyo. 1998).

180 Spreeman v. State, 2012 WY 88, ¶ 10, 278 P.3d 1159, 1162 (Wyo. 2012); Lance Oil & Gas Co. v. Wyo. Dep't of Revenue, 2004 WY 156, ¶ 4, 101 P.3d 899, 902 (Wyo. 2004); *see* Union Pac. Res. Co. v. Dolenc, 2004 WY 36, ¶ 13, 86 P3d 1278, 1291 (Wyo. 2004).

181 Chevron U.S.A., Inc. v. Dep't of Revenue, 2007 WY 43, ¶ 13, 154 P.3d 331, 335 (Wyo. 2007); Pagel v. Franscell, 57 P.3d 1226, 1230 (Wyo. 2002); *Cantrell*, ¶ 6, 133 P.3d at 985.

182 Gordon v. State *ex rel.* Cap. Bldg. Rehab., 2018 WY 32, ¶ 30, 413 P.3d 1093, 1103 (Wyo. 2018) (quoting Saunders v. Hornecker, 2015 WY 34, ¶ 19, 344 P.3d 771, 777 (Wyo. 2015)).

stops and there is no room left for interpretation once it is determined the language is plain and unambiguous.[183] Only if the language is ambiguous is it appropriate to proceed to the next step of applying general rules of interpretation.[184] These rules may include consideration of "the mischief the provision was intended to cure, the historical setting surrounding its enactment, the public policy of the [provision], and other surrounding facts and circumstances."[185]

B. The phrase "health care decisions" is unambiguous

Article I, § 38(a) provides: "Each competent adult shall have the right to make his or her own health care decisions."[186] The phrase at issue is "health care decisions." The phrase is intentionally undefined;[187] given its place in the Declaration of Rights, the drafters determined definitions were inappropriate.[188] In the absence of clear provisions to the contrary, the plain and ordinary meaning of words control.[189] The plain and ordinary meaning is often derived from dictionary definitions.[190] To ascertain the drafters' and voters' intent, dictionary definitions from the time of

---

183 Powers v. State, 2014 WY 15, ¶ 35, 318 P.3d 300, 313 (Wyo. 2014); Rasmussen v. Baker, 50 P. 819, 821 (Wyo. 1897).

184 *Powers*, ¶ 8, 318 P.3d at 304 ("The object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced." (quotations and citations omitted)); *In re* Estate of Johnson, 2010 WY 63, ¶ 8, 231 P.3d 873, 878 (Wyo. 2010).

185 Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2, 2006 WY 57, ¶ 6, 133 P.3d 983, 095 (Wyo. 2006).

186 WYO. CONST. art. I, § 38(a).

187 *See* WYO. CONST. art. I, § 38(a). Notably, the original bill defined some words but "health care decisions" was not one of them. *See* S.J. 0002, 61st Leg., Gen. Sess. (Wyo. 2011).

188 *See Senate Floor Debate*, *supra* note 60 ("I believe if we are going to move forward on this attempt to amend the Wyoming Constitution, we should do so with a small, elegant clause . . . it might not be perfect, but we if we're going to move forward with this, I believe we should be working from that standpoint where we are not offending the elegance of our Constitution, we're trying to raise what we consider the important rights . . . but we're not doing it in a way that ends up fundamentally degrading the quality of our Constitution."); *Id.* ("Definitions are not appropriate – keep it as simple as you can."); Tarr, *supra* note 58, 1182 (stating many state constitutions articulate general principles rather than "statutory material.").

189 Sam v. State, 2017 WY 98, ¶ 14, 401 P.3d 834, 844 (Wyo. 2017); Adekale v. State, 2015 WY 30, ¶ 12, 344 P.3d 761, 765 (Wyo. 2015); Keser v. State, 706 P.2d 263, 266 (Wyo. 1985); Dorr v. Wyo. Bd. of Certified Pub. Acct., 21 P.3d 735, 743 (Wyo. 2001).

190 Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 542 (Wyo. 1988) ("In the absence of a statutory definition, this Court infers that the legislature intended no special meaning for the word, but instead, intended that it be given its ordinary meaning—its common dictionary meaning."); *In re* Estate of Meyer, 2016 WY 6, ¶ 34, 367 P.3d 629, 640 (Wyo. 2016); Gordon v. State *ex rel.* Cap. Bldg. Rehab., 2018 WY 32, ¶ 30, 413 P.3d 1093, 1103 (Wyo. 2018) (referring to the Century Dictionary).

enactment and ratification should be used.[191] When a dictionary definition does not exist for a particular phrase, it is appropriate to combine individual dictionary definitions of each word in the phrase.[192]

The Amendment was drafted in 2011 and ratified in 2012.[193] Since Merriam Webster's Dictionary does not define the phrase "health care decisions," separate definitions for "health," "health care," and "decisions" are informative and "commonly used terms."[194] In 2011, "health" was defined as "the general condition of the body."[195] "Health care" was defined as "efforts made to maintain or restore health especially by trained and licensed professionals."[196] And "decision" was defined as "a determination arrived at after consideration."[197] Thus, at the time § 38(a)

191 *Gordon*, 2018 WY 32, ¶ 31 ("To determine what the drafters intended, we attempt to understand the meaning of the words at the time the constitution was ratified.") (referring to the Century Dictionary from 1889 to determine the meaning of a provision "at the time our constitution was ratified"); *see* Krenning v. Heart Mtn. Irrigation Dist., 2009 WY 11, ¶ 12, 200 P.3d 774, 779 (Wyo. 2009) (using the 5th edition Black's Law Dictionary from 1979 to interpret a term not defined by the Wyoming Governmental Claims Act, which was enacted in 1979).

192 *See* Troyer v. State Dep't of Health & Soc. Servs., 722 P.2d 158, 161 (Wyo. 1986) (combining the ordinary dictionary definitions of the words health, care, and provider to determine the ordinary definition of "health care provider"); White v. Univ. of Wyo., 954 P.2d 983, 986 (Wyo. 1998).

193 *See* S.J. No. 66-2, Gen. Sess. at 1 (Wyo. 2011) https://wyoleg.gov/2011/SenateDigest.pdf [https://perma.cc/MLS2-ETU4]; S.J. 0002, 61st Leg., 2011 Gen. Sess. (Wyo. 2011).

194 *See Johnson II* Order Granting TRO, *supra* note 20, ¶ 32.

195 *Health*, MERRIAM-WEBSTER, https://web.archive.org/web/20110511094339/https://www.merriam-webster.com/dictionary/health (last visited Dec. 13, 2023) (showing archive from May 2011); *Health*, MERRIAM-WEBSTER, https://web.archive.org/web/20121108171520/https://www.merriam-webster.com/dictionary/health (last visited Dec. 13, 2023) (showing archive from Nov. 8, 2012); *Health*, MERRIAM-WEBSTER, https://web.archive.org/web/20121109214843/https://www.merriam-webster.com/dictionary/health (last visited Dec. 13, 2023) (showing archive from Nov. 9, 2012). The General Election took place on November 6, 2012.

196 *Health Care*, MERRIAM-WEBSTER, https://web.archive.org/web/20100219073140/https://www.merriam-webster.com/dictionary/healthcare (last visited Dec. 13, 2023) (showing archive from Feb. 19, 2010); *Health Care*, MERRIAM-WEBSTER, https://web.archive.org/web/20100409025253/https://www.merriam-webster.com/dictionary/healthcare (last visited Dec. 13, 2023) (showing archive from Apr. 9, 2010). This definition was similar in 2013. Winter v. Indus. Claim Appeals Off., 321 P.3d 609, 612–13 (Colo. Ct. App. 2013) (quoting *Health Care*, MERRIAM–WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary (last visited July 25, 2013)). It was the same in March 2016. *Health Care*, MERRIAM–WEBSTER, https://web.archive.org/web/20160318023238/https://www.merriam-webster.com/dictionary/healthcare (last visited Dec. 13, 2023) (showing archive from Mar. 18, 2016).

197 *Decision*, MERRIAM–WEBSTER, https://web.archive.org/web/20120121002755/http://www.merriam-webster.com/dictionary/decision (last visited Dec. 13, 2023) (showing archive from Jan. 21, 2012); *Decision*, MERRIAM–WEBSTER, https://web.archive.org/web/20111020105653/http://www.merriam-webster.com/

was drafted and ratified, the plain and ordinary meaning of "health care decisions" was a determination arrived at after consideration to maintain or restore the general condition of the body by trained and licensed professionals.

Reasonable persons can agree on this meaning with consistency and predictability. Neither party in *Johnson I* and *Johnson II* argued the phrase is unambiguous in briefing regarding the TROs and preliminary injunctions.[198] Both Burman and Pestinger and the district court conclude the phrase is unambiguous.[199] And in 2020, the Wyoming Supreme Court found the phrase "health care decision" is plain and unambiguous when interpreting the WHCDA.[200] According to the Wyoming Supreme Court, a "health care decision" is a determination pertaining "to the principal's physical or mental condition."[201] This definition is consistent with the plain and ordinary meaning derived from dictionary definitions.[202]

C. Abortion and Medical Aid in Dying are Health Care Decisions

Under the plain and unambiguous language of § 38(a), all competent adults have the right to make their own decisions regarding "what health care services they receive from medical professionals to restore and maintain their health."[203] Burman and Pestinger conclude that medical aid in dying is a health care service one could receive from a medical

---

dictionary/decision (last visited Dec. 13, 2023) (showing archive from Oct. 20, 2011). This is substantially similar to the definition of "decisions" from the 2014 edition of Black's Law Dictionary. *Decisions*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[A] conclusion or resolution reached after consideration").

198 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 35 ("The Court notes that neither party appears to contend that the language employed by [Article I, § 38] is ambiguous.").

199 Burman & Pestinger, *supra* note 18, at 9–10; *Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 31 ("Under the ordinary and plain meaning of the words 'health care' and 'decision' the Court could find that the decision to have or not have an abortion procedure is unambiguously a health care decision."); *id.* ¶ 29 ("The Court could find that the constitutional amendment adopted by the voters of Wyoming under [Article I, § 38] unambiguously provides competent Wyoming citizens with the right to make their own health care decisions. The Court has analyzed the words used throughout [Article I, § 38] in accordance with the plain and ordinary meaning. That analysis lends itself to a finding that a decision to have an abortion is a health care decision."); *Johnson II* Order Granting TRO, *supra* note 20, ¶ 34 ("The Court finds no ambiguity with the words utilized in [Article I, § 38(a)].").

200 Miller v. Life Care Ctrs. of Am., Inc., 2020 WY 155, ¶ 25, 478 P.3d 164, 171 (Wyo. 2020).

201 *Id.* ¶ 27, 478 P.3d at 172.

202 *See infra* Part V.B.

203 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 34 (determining that the phrase "health care decisions" in § 38(a) is plain and unambiguous, and the plain and ordinary meaning "analysis lends itself to a finding that a decision to have an abortion is a health care decisions"); *see supra* Part V.B.

professional to restore and maintain one's health.[204] They therefore conclude that the decision to request medical aid in dying is a "health care decision" protected by and afforded to citizens under § 38(a).[205] The *Johnson* plaintiffs similarly contend that the decision to have an abortion is a health care decision as that term is used in § 38(a).[206] The state defendants argue abortion is not health care.[207] Under the standard for preliminary injunctions, the *Johnson I* court found "[r]easonable persons could consistently and predictably agree that an abortion is a procedure, usually provided by a medical professional, that impacts a woman's physical, mental, or emotional well-being."[208]

1. Statutes do not determine the scope of health care decisions protected under § 38(a)

In *Johnson I* and *Johnson II*, the district court correctly resorted to dictionary definitions of "health care" and "decision" to determine whether the phrase "health care decisions" is unambiguous.[209] While

---

204 Burman & Pestinger, *supra* note 18, at 10.

205 *Id.*

206 *See Johnson II* Order Granting TRO, *supra* note 20, ¶ 38.

207 *Id.* ¶ 38.

208 *Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 31.

209 *Id.* ¶ 30; *Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 32–33. In *Johnson I* and *II*, the district court relied on Black's Law Dictionary's 2019 definition of "health care," which is "[c]ollectively, the services provided, usually by medical professionals, to maintain and restore health." *Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 30 (quoting *Health Care*, BLACK'S LAW DICTIONARY (11th ed. 2019)); Order Granting Motion for Temporary Restraining Order, *Johnson II*, *supra* note 78, ¶ 33 (quoting *Health Care*, BLACK'S LAW DICTIONARY (11th ed. 2019)). The district court relied on the Merriam-Webster's Dictionary definition of "decision" from 2020, which is "a determination arrived at after consideration." *Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 30 (quoting *Decision*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020)); *Johnson II* Order Granting TRO, *supra* note 20, ¶ 33 (quoting *Decision*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020)). The district court's use of modern dictionary definitions, while technically incorrect, *see* Gordon v. State *ex rel.* Cap. Bldg. Rehab., 2018 WY 32, ¶ 31, 413 P.3d 1093, 1103 (Wyo. 2018), is immaterial since the definitions used are substantially and substantively similar to the 2011 definitions. *Compare Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 31, *and Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 32–33, *with supra* notes 195–97 and accompanying text.

In *Johnson II*, the district court also defined the words "shall" and "right." *See Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 32–33. The district court relied in Wyoming Supreme Court precedent to define "shall" as "mandatory" and "intimates an absence of discretion." *Id.* ¶ 33 (quoting *In re* MN, 2007 WY 189, ¶ 5, 171 P.3d 1077, 1080 (Wyo. 2007)). It defined "right" as "the power or privilege to which one is justly entitled" with an undated Merriam-Webster's Dictionary. *Id.* ¶ 33. Since the words "right" and "shall" are immaterial to the determination of whether an abortion is a "health care decision" under § 38(a), the district court's inclusion of these definitions was unnecessary. In fact, after defining those words at the beginning of the analysis, the court never referred to them or relied upon them again in its analysis. *See id.*

Burman and Pestinger use a dictionary to define "assisted suicide" and "suicide," they improperly rely on the WHCDA to define "health care" and "health care decisions."[210] This reliance was premature because any use of extrinsic aids that go beyond the language is appropriate only if the language is ambiguous.[211] Such is not the case here.[212]

Burman and Pestinger argue in the alternative that, even if the provision is ambiguous, rules of construction require a finding that medical aid in dying is a form of "health care" contemplated by § 38(a).[213] Since the WHCDA preceded § 38, Burman and Pestinger argue the Legislature was presumed to act with knowledge of its definitions and, since the Legislature did not indicate the phrases should be construed differently, they should

---

[210] Burman & Pestinger, *supra* note 18, at 10. "Assisted suicide" is defined as "[t]he intentional act of providing a person with the medical means or medical knowledge to commit suicide." *Id.* (quoting *Assisted Suicide*, BLACK'S LAW DICTIONARY (10th ed. 2014)). "Suicide" is defined as "[t]he act of taking one's own life." *Id.* (quoting *Suicide*, BLACK'S LAW DICTIONARY) (10th ed. 2014)). Based on these definitions, Burman and Pestinger conclude that requesting medical aid in dying is unambiguously a health care decision. *Id.* at 10. This portion of their analysis places the proverbial cart before the horse. The proper analysis must first determine whether the phrase "health care decisions" is clear and unambiguous, not whether the alleged health care decision at issue (*i.e.*, medical aid in dying or abortion) is unambiguously a health care decision. *See Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 34, 38 (defining "health care decisions" before determining whether an abortion is a health care decision).

The district court also found these definitions were "instructive and persuasive." *Johnson I* Order Granting Preliminary Injunction, *supra* note 23, ¶ 30. The WHCDA defines "health care" as "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition[.]" WYO. STAT. ANN. § 35-22-402(a)(viii). The WHCDA defines "health care decision" as "a decision made by an individual . . . regarding the individual's health care[.]" WYO. STAT. ANN. § 35-22-402(ix)(A)–(C) (2007). The definition of "health care decision" includes the "[s]election and discharge of health care providers and institutions;" the "[a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate;" and "[d]irections to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care." The statute also authorizes a person's agent, guardian, or surrogate, to make such decisions. WYO. STAT. ANN. § 35-22-402(ix) (2007). For more discussion on the possible sources for making health-care decisions under the Wyoming Health Care Decisions Act, please *see* Robin Sessions Cooley, *Substitute Decision Makers Under the Wyoming Health Care Decisions Act*, WYO. LAW., Oct. 2013, at 28.

[211] Bohling v. State, 2017 WY 7, ¶ 18, 388 P.3d 502, 506 (Wyo. 2017) ("If we determine that the language of a statute is ambiguous, only then will we proceed to the next step; that is, the application of general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature.").

[212] *See infra* Part V.B. In fact, Burman and Pestinger argue that the phrase is unambiguous while continuing to rely on the Health Care Decisions Act. Burman & Pestinger, *supra* note 18, at 10 ("The statute is unambiguous. Choosing [physician-assisted suicide] is a health care decision.").

[213] *See* Burman & Pestinger, *supra* note 18, at 10–12.

be construed identically.[214] The WHCDA defines "health care" as "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition[.]"[215] Burman and Pestinger apply the doctrine of *ejusdem generis* to this definition.[216] *Ejusdem generis* provides "where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned."[217] In the WHCDA's definition of "health care," Burman and Pestinger contend the words "maintain" and "diagnose" "are both ends of health care, and therefore members of that general class."[218]

Thus, if medical aid in dying achieves an end of health care, it would be encompassed in the WHCDA's definition of "health care" since it would "maintain, diagnose, *or otherwise affect* an individual's physical or mental condition[,]" according to Burman and Pestinger. [219] Reasonable persons would likely agree that medical aid in dying would otherwise affect an individual's physical or mental condition. Importantly, however, Burman and Pestinger's reasoning fails because the WHCDA expressly declares it does *not* authorize medical aid in dying.[220] If § 38 is interpreted by reference to the WHCDA, it necessarily follows that § 38 does not provide Wyomingites with a constitutional right to medical aid in dying.

The state defendants in *Johnson II* also rely on statutory definitions to determine whether the decision to have an abortion is encompassed under § 38(a).[221] Specifically, the state defendants rely on the legislative finding in the LHRA with explicit reference to § 38 that "abortion as defined in this

---

214 *Id.* at 9; *see* Wetering v. Eisele, 682 P.2d 1055, 1061 (Wyo. 1984) (stating that, when the legislature acts, "it is presumed to have done so with full knowledge of the existing state of law" regarding the subject matter of the legislative act).

215 WYO. STAT. ANN. § 35-22-402(a)(viii).

216 Burman & Pestinger, *supra* note 18, at 10–12.

217 *Id.* at 10 (internal alterations omitted) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 199 (2012)). An example of *ejusdem generis* is as follows: "[T]he phrase horses, cattle, sheep, pigs, goats, or any other farm animals—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms . . . ." Burman & Pestinger, *supra* note 18, at 10 (quoting *Ejusdemn Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014)). Burman and Pestinger also argue medical aid in dying will not prematurely terminate life, and that recognizing a right to medical aid in dying will benefit Wyoming residents and increase trust between patients and providers. *See id.* at 6–8. These arguments are outside the scope of this Article.

218 Burman & Pestinger, *supra* note 18, at 11.

219 *Id.* at 11 (quoting WYO. STAT. ANN. § 35-22-402(a)(viii)).

220 WYO. STAT. ANN. § 35-22-414(c) (2005) ("This act does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state."). Burman and Pestinger acknowledge this provision of the Health Care Decisions Act in their analysis, but use it to support their argument that Wyoming does not have a policy prohibiting physician-assisted suicide. Burman & Pestinger, *supra* note 18, at 2.

221 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 38.

act is not health care."[222] Like Burman and Pestinger, the state defendants' reliance on this legislative finding is misplaced. Even if reference to the LHRA is appropriate, the Act contradicts the state defendants' argument in this regard.[223] While the LHRA declares, on the one hand, that abortion is not health care under § 38, it also declares the state "has authority to determine reasonable and necessary restrictions to abortion, including its prohibition" under § 38(c).[224] "By resting its authority to regulate abortion under [Article I, § 38(c)], the Legislature appears to acknowledge that an abortion is the type of 'health care decision' under [Article I, § 38(a)] that it has authority to regulate."[225]

But perhaps more importantly, Burman and Pestinger's and the state defendants' reliance on statutory definitions and declarations to support their arguments is inappropriate. "Statutes are construed to accord with constitutions, not vice versa."[226] Preexisting statutes and common law may help inform a constitutional interpretation analysis, but "they are not the embodiment of, nor are they incorporated within, the Constitution."[227] A statute cannot and "does not define the scope of constitutional rights."[228] To conclude otherwise would elevate a statute to the same level as a constitutional provision.[229] For this reason, matters of constitutional interpretation are left to the courts, "not according to what the Legislature may declare it to mean, as a matter of statutory definition."[230]

---

222 *Id.* ¶ 38.

223 *See id.* ¶ 39.

224 *Id.* ¶ 42 (internal citations omitted) (citing WYO. STAT. ANN. § 35-6-121(a)(iv)).

225 *Id.*

226 City of Fernely v. State Dep't of Tax, 366 P.3d 699, 706 (Nev. 2016).

227 State v. Lancaster, 519 P.3d 1176, 1182 (Idaho 2022) (quoting State v. Clark, 446 P.3d 451, 455 (Idaho 2019).

228 JL v. N.M. Dep't of Health, 168 F. Supp. 3d 1365, 1374 (D. N.M. 2016); *see also* Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 591 n.2 (10th Cir. 1999).

229 State v. Lancaster, 519 P.3d 1176, 1182 (Idaho 2022).

230 Powell v. Hocker, 516 S.W.3d 488, 494 (Tex. Ct. Crim. App. 2017); Mead Gruver, *Judge Halts Wyoming Abortion Ban Days After It Took Effect*, ASSOCIATED PRESS (Mar. 22, 2023 6:00 PM) https://apnews.com/article/abortion-ban-wyoming-1688775972407a02b2431a69abdb4670 ("The state cannot legislate away a constitutional right. It's not clear whether abortion is health care. The court has to decide that." (quoting Judge Owens's oral ruling)). This principle was at least implicitly recognized by the Legislature in 2011 when it passed the resolution to amend the constitution. Indeed, at one point, the Senate adopted an amendment limiting the right of health care access to that defined by the legislature. WYO. STATE LEGISLATURE, S.J. NO. 0002 HEALTH CARE FREEDOM (Feb. 15, 2011), https://wyoleg.gov/Legislation/2011/SJ0002 (Digest); https://wyoleg.gov/2011/Amends/SJ0002SW001.htm [https://perma.cc/8YB6-VC2G] (Schiffer Committee as a Whole Amendment). That language was eventually omitted and replaced with right to make health care decisions. *Id.*; S.J. 0002, amend. S3001, 61st Leg., 2011 Gen. Sess. (Wyo. 2011) https://wyoleg.gov/2011/Amends/SJ0002S3001.htm [https://perma.cc/H35S-WAY2] (SJ0002S30001) (Perkins amendment, 3rd reading); *but see Senate Floor Debate*, *supra* note

2. The state defendants' "legally available" argument would support a finding that abortion is encompassed in § 38(a)

In *Johnson II*, the state defendants correctly argued, and the court properly agreed, that "the right to make health care decisions under [§ 38(a)] is not unfettered."[231] Indeed, under § 38(c), the legislature may place "reasonable and necessary restrictions on the right[]" to make health care decisions "to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution."[232] However, the state defendants incorrectly argue the right to make health care decisions under § 38(a) is limited to health care decisions that are legally available.[233] This argument fails for three reasons.

First, at the time of ratification, there was a federally protected constitutional right to abortion prior to viability of the fetus,[234] and medical aid in dying was illegal or otherwise unavailable in all but two states.[235] If interpretation of § 38(a) turned on what health care decisions were legal at the time of enactment, as they must, then the state defendants' argument would fail because the ratifiers would have understood "health care decisions" to include abortion.[236]

Second, the Legislature considered limiting § 38(a)'s language in this fashion by reserving the people's "right to make health care decisions regarding lawful health care services."[237] This language was not

60 (stating the "as defined by the legislature" provision, which was later deleted, was to prevent the courts from "do[ing] things we don't expect them to with it"). Other jurisdictions are in accord. *E.g.*, Council of Orgs. & Others for Educ. about Parochiaid, Inc. v. Engler, 566 N.W.2d 208, 215 n.10 (Mich. 1997) (courts "must independently determine the meaning of constitutional terms" even if they are statutorily defined).

231 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 45.

232 WYO. CONST. art. I, § 38(c).

233 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 48. The state defendants use the analogy of medical marijuana to suggest that, under any other interpretation, a Wyomingite could use medicinal marijuana despite Wyoming law criminalizing the use of marijuana. *Id.* The district court rejected the state defendants' argument and found the analogy misplaced and incongruous. *Id.* ¶ 49. The court reasoned medical marijuana is but one of many ways to treat a health condition, whereas abortion is the only way to terminate a pregnancy. *Id.*

234 Roe v. Wade, 401 U.S. 179 (1973), *overruled by* Dobbs v. Jackson, 142 S. Ct. 2228 (2022).

235 At the time of enactment, only Oregon and Washington recognized a right to medical aid in dying. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-.897 (2011); Washington Death with Dignity Act, WASH. REV. CODE §§ 70.245.010-.904 (2011).

236 Farmers Auto. Inter-Ins. Exch. v. MacDonald, 140 P.2d 905, 913 (Wyo. 1943); Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs, 2014 WY 82, ¶ 18, 329 P.3d 936, 944 (Wyo. 2014).

237 S.J. 0002, amend. SS001, 61st Leg., 2011 Gen. Sess. (Wyo. 2011), https://wyoleg.gov/Legislation/2011/SJ0002 [https://perma.cc/HK3Q-6RYZ].

incorporated into the final version ratified by the voters.[238] Therefore, the state defendants' argument fails from a legislative history perspective.

Third, but perhaps most importantly, the state defendants' interpretation—if adopted—would diminish the very nature of a constitutional right. "Constitutional provisions stand on their own and are unaffected by statutes, even those dealing with the same subject matter."[239] If the health care decisions available under § 38(a) changed with the ebbs and flows of other laws, the constitutional right would no longer be "superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it."[240]

Abortion is, ironically, a prime example of this. Assuming, for argument's sake, that § 38(a) predated *Roe*, Wyomingites would have had the *state* constitutional right to decide whether to have an abortion from 1977 until July 26, 2022.[241] But, beginning on July 27, 2022, Wyomingites would be stripped of their constitutional right to make that health care decision for themselves simply because the legislature said so.[242] The principle of constitutional supremacy prevents the legislature from statutorily creating or erasing constitutional rights and privileges, and therefore prevents this from being the reality.[243]

3. Whether the Constitution explicitly references specific health care decisions is immaterial to the analysis

The state defendants argue Wyomingites do not have a constitutional right to abortion since the word "abortion" appears nowhere in the Constitution.[244] That the word "abortion" isn't explicitly contained in the Constitution is not determinative of whether the right is encompassed

---

238 *See* WYO. CONST. art. I, § 38(a).

239 City of Pike Road v. City of Montgomery, 202 So.3d 644, 654–55 (Ala. 2015) ("Thus, in considering how to determine a municipality's population for purposes of § 225, this Court rightly did not look to the Alabama Code, but it did look to other constitutional provisions").

240 City of Fernely v. State Dep't of Tax, 366 P.3d 699, 706 (Nev. 2016).

241 WYO. STAT. ANN. § 35-6-102(b) (as amended by H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022); H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022); *Johnson I*, 2022 WL 3009719, at *2; *Johnson II* Order Granting TRO, *supra* note 20, ¶ 10.

242 WYO. STAT. ANN. § 35-6-102(b) (as amended by H.B. 0092, 66th Leg., 2022 Budget Sess. (Wyo. 2022)).

243 City of Fernely v. State Dep't of Tax, 366 P.3d 699, 706 (Nev. 2016); Mission Housing Develop. Co. v. City & Cnty. of San Francisco, 69 Cal. Rptr. 2d 185, 201 (Cal. Ct. App. 1997) ("[T]he Legislature may not change the meaning of a provision in the constitution by legislation").

244 *Johnson I* Response to Motion for TRO, *supra* note 150, at 3–4.

under § 38(a).[245] First, if an abortion is a "health care decision," § 38(a) confers the right to decide whether to have one.[246] Second, § 38 is a constitutional amendment that reflects "the latest expression of the will of the people."[247] Therefore, § 38 "cannot be limited or controlled by previous existing provisions of the Constitution."[248] And since the right to make health care decisions is a fundamental right enshrined in the Declaration of Rights, it must be broadly construed.[249]

D. Since the phrase is unambiguous, the historical context pertaining to the ACA has no bearing on the analysis.

Even though the state defendants do not contend the phrase is ambiguous, they "set forth extensive argument regarding the historical circumstances leading to the adoption of" § 38(a).[250] Specifically, the state defendants argue § 38 "is perhaps best described as a 'message' amendment, expressing the state's displeasure with the controversial federal [ACA]."[251] And since § 38 was Wyoming's response to the ACA, it should not be construed to confer a right to abortion, according to the state defendants.[252] Because the phrase is unambiguous, this argument was properly rejected by the district court.[253]

The guiding consideration in any interpretive exercise is the drafters' and voters' intent, and "intent must be found in the instrument itself."[254] If the language is unambiguous, "there is no room left for construction."[255]

---

245 *Cf.* Zancanelli v. Central Coal & Coke Co., 173 P. 981, 991 (Wyo. 1918).

246 *See* WYO. CONST. art. I, § 38(a).

247 *Zancanelli*, 173 P. at 991.

248 *Id.*

249 *See* Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1258 (Wyo. 1995); Tarr, *supra* note 58, at 1182 (stating many state constitutions articulate general principles rather than "statutory material."); *Senate Floor Debate*, *supra* note 60.

250 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 35.

251 *Johnson I* Response to Motion for TRO, *supra* note 150, at 6 (quoting KEITER, *supra* note 6, at 110).

252 *Id.*

253 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 23; *id.* ¶ 36 ("Since the Court finds no ambiguity with the words utilized in article 1, section 38(a) there is no room left for the Court to dive into the historical circumstances leading to adoption of the [§ 38]. The Court is not allowed to second guess the intent that is plainly found on its face."); *id.* ¶ 35 ("The Defendants provide no argument or case law identifying why this Court is permitted to consider this argument in light of its finding that the provisions of [Article I, § 38] are unambiguous"); Chicago & Nw. R.R. Co. v. Hall, 26 P.2d 1071, 1074 (Wyo. 1933) ("[I]n case of doubt, the conditions and circumstances existing at the time of the Constitution and the debates in the constitutional convention may be resorted to for elucidation").

254 Rasmussen v. Baker, 50 P. 819, 821 (Wyo. 1897).

255 *Johnson II* Order Granting TRO, *supra* note 20, ¶ 23 (quoting *Rasmussen*, 50 P. at 821).

Courts "are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language."[256]

E. Even if the historical context is considered, the right to make health care decisions under § 38(a) is separate and distinct from the anti-individual mandate provision in § 38(b)

Despite unambiguity, the Wyoming Supreme Court has, in some cases, "recognized the benefit of looking to a statute's legislative history, however sparse that might be, to confirm the legislative intent reflected in the statute's plain language."[257] Even if the historical context is considered here, the fact that § 38 was Wyoming's response to the ACA does not compel a finding that § 38(a) does not confer a right to decide whether to have an abortion or to request medical aid in dying.

It seems beyond peradventure, and perhaps even undisputed, that § 38(b)—which protects a person's right to pay "and a health care provider [to] accept, direct payment for health care without imposition of penalties or fines for doing so"—is designed and intended to obstruct the ACA's individual mandate.[258] The Resolution was initially introduced as a slight variation of the Guide's model legislation to combat the ACA,[259] and at least three senators explicitly referred to the ACA during floor debates regarding the resolution.[260]

First, the resolution's prime sponsor explained it preserves the right to pay directly for medical care, which was necessary because that right had been threatened by national legislation.[261] The national legislation

---

256 *Johnson II* Order Granting TRO, *supra* note 20, ¶¶ 23–24 (quoting *Rasmussen v. Baker*, 50 P. 819, 821 (Wyo. 1897). The Amendment appeared on the ballot as Constitutional Amendment A with the following language:

> "The adoption of this amendment will provide that the right to make health care decisions is reserved to the citizens of the state of Wyoming. It permits any person to pay and any health care provider to receive direct payment for services. The amendment permits the legislature to place reasonable and necessary restrictions on health care consistent with the purposes of the Wyoming Constitution and provides that this state shall act to preserve these rights from undue governmental infringement.

WYO. ELECTIONS DIV., *supra* note 63, at 2.

257 Barney v. BAC Home Loans Serv., L.P., 2013 WY 54, ¶ 12, 300 P.3d 852, 856 (Wyo. 2013).

258 WYO. CONST. art. I, § 38(b); *see* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014).

259 *See supra* Parts III.A–B.

260 *See infra* notes 261–63 and accompanying text.

261 *Senate Floor Debate*, *supra* note 60. *Compare id.* (referencing national legislation that's "over 1,000 pages long"), *with* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012) ("The [ACA's] 10 titles stretch over 900 pages and contain hundreds of provisions.").

referenced is, of course, the ACA. Another senator stated: "If you want to be part of the [ACA], do so. If you don't want to, it's your choice. It's yours. That's what this amendment does."[262] A third senator, in deciding whether certain language should be used, urged his fellow senators to look at Arizona's "similar legislation."[263] As previously discussed, Arizona also passed a constitutional amendment in response to the ACA.[264] However, the Wyoming Supreme Court has found that statements such as these are an unsafe guide for "the subject of the construction of any particular word or provision of the constitution."[265] Indeed, relying on these statements for purposes of construction necessarily imputes the individual intentions of each senator to the voters at large.[266] Although that may be true, it is equally as possible that only a few voters learned or referred to the remarks.[267]

Second, Wyoming's responsive constitutional amendment is different than other obstructionist legislation in one important way: § 38(a). Arizona's constitutional amendment did not include a provision like § 38(a)'s right to make health care decisions; instead, Arizona's focused entirely on the purchase of health insurance, the payment for health care services, and the prohibition of penalties.[268] Wyoming's Legislature amended the resolution to include language granting competent, adult citizens the right to make their own health care decisions. This language was not part of the Guide's model language, and it was not adopted by any of the other fifteen states who passed obstructionist legislation. Thus, it is

262 *Id.*

263 *Id.* ("This isn't a novel idea. And this language is much closer to what has been done in other states as we have just previously adopted. I urge you to look at. . . Arizona's language.").

264 *See supra* notes 69–72 and accompanying text.

265 Powers v. State, 2014 WY 15, ¶ 39, 318 P.3d 300, 314 (Wyo. 2014) (quoting Rasmussen v. Baker, 50 P. 819, 824).

266 *See id.*

267 *Id.* Additionally, "[a]s a general proposition, reference to the debates for interpretation of constitutional language is appropriate only if we find the provision at issue is ambiguous." *Id.* ¶ 30, 318 P.3d at 314.

268 *See* ARIZ. CONST. art. XXVII, § 2(A)–(B), *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014). ("To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person employer or health care provider to participate in any health care system. 2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services. B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rules."). Arizona's amendment also defined "penalties or fines" as "any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee with similar effect established by law or rule by a government established, created or controlled agency that is used to punish or discourage the exercise of rights protected under this section." *Id.* art. XXVII, § 2(D).

reasonable to conclude that, at some point, the resolution became more than a "message amendment" designed to express discontent with the ACA.[269]

To accept the state defendants' argument that the entirety of Article I, § 38 was only a response to the ACA would be to ignore the different language in § 38(a) and § 38(b).[270] This conclusion would conflict with the well-established principle that provisions should not be interpreted in a way that renders any portion meaningless.[271] Moreover, both § 38(c) and § 38(d) refer to multiple rights afforded under Article I, § 38.[272] Section 38(c) allows the legislature to "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."[273] Section 38(d) requires the State to "act to preserve *these rights* from undue governmental infringement."[274] The only interpretation of § 38(c) and (d) that gives effect to every word is that the right conferred under § 38(a) is separate and distinct from the right conferred under § 38(b).

VI. CONCLUSION

Article I, § 38(a) of Wyoming's Constitution confers every competent adult with "the right to make his or her own health care decisions."[275] This provision is unambiguous because reasonable persons can agree on the meaning of "health care decisions" with consistency and predictability.[276]

[269] The amendment's final title is also informative. In its original form, the resolution was titled "Health care freedom." *See supra* notes 51–56 and accompanying text. The title was eventually changed to and ultimately adopted as "Right of health care access." *Id.* When it came to combatting the ACA, Wyoming was primarily concerned with the ACA's individual mandate. *See supra* Parts II–III.A; *See also Senate Floor Debate*, *supra* note 60 (discussing "the mandates" that "many [Wyomingites] find very repugnant"). The individual mandated affected health insurance coverage, not access to health care. *See supra* notes 2, 34–35 and accompanying text. It is therefore reasonable to interpret the change in title to "right of health care access" to indicate a legislative change in focus away from health insurance to health care more generally, including health care procedures including abortion and medical aid in dying. *See Senate Floor Debate*, *supra* note 60 (stating the focus is on the right to have access to health care, not whether you have health care); *id.* (discussing the difference between the right to choose whether to buy health insurance and the right to health care access).

[270] *Johnson II* Order Granting TRO, *supra* note 20, ¶ 37.

[271] Hopeful v. Etchepare, LLC, 2023 WY 33A, ¶ 43, 528 P.3d 414, 427 (Wyo. 2023); Camden Cnty. v. Sweatt, 883 S.E.2d 827, 837 (Ga. 2023) ("This canon of statutory construction applies with at least equal force in the constitutional context." (internal quotations omitted)).

[272] *See* WYO. CONST. art. I, § 38(c), (d).

[273] WYO. CONST. art. I, § 38(c) (emphasis added).

[274] WYO. CONST. art. I, § 38(d) (emphasis added).

[275] WYO. CONST. art. I, § 38(a).

[276] *See supra* Part V.B.

In fact, Burman and Pestinger, the *Johnson* plaintiffs, and the district court all conclude the phrase is unambiguous, and the state defendants don't advance any argument to the contrary.[277]

Since the language is unambiguous, well-established rules of constitutional interpretation require each provision's plain and ordinary meaning to be given effect.[278] With no room left for construction, any reference to or consideration of the historical context surrounding § 38's enactment and ratification becomes both unnecessary and improper.[279] But even if the historical context is considered, it clarifies that the right to pay directly for health care services under § 38(b) is the only provision designed to obstruct the ACA's individual mandate.[280] This right is separate and distinct from the right to make health care decisions under § 38(a), which means that § 38, as a whole, was designed to do more than obstruct the ACA's individual mandate. Thus, any suggestion that the historical context surrounding § 38(b) inherently nullifies the right conferred under § 38(a) runs afoul of well-established rules of constitutional interpretation.[281]

Exactly what health care decisions Wyomingites have a constitutional right to make under § 38(a) has yet to be decided by any court in any context. However, at the time of publication, summary judgment briefing in *Johnson II* is ripe for the district court's consideration. As a matter of first impression, it's likely the district court in *Johnson II* (and, if the matter is appealed, the Wyoming Supreme Court) will begin its merits-based analysis by considering whether the right to make a specific health care decision (*i.e.*, abortion) exists under § 38(a) according to rules of constitutional interpretation. And, as a matter of first impression, this threshold consideration is necessary.

But since the decision to have an abortion or to request medical aid in dying are both health care decisions, § 38(a) confers Wyomingites with the constitutional right to make those decisions.[282] The more appropriate and, admittedly, the more difficult question is whether any limitation on or prohibition of the right to make certain health care decisions is reasonable and necessary under § 38(c).[283] This is the proper focus of any analysis concerned with a specific health care decision in relation to Article I, § 38, regardless of the specific health care decision at issue. So, while *Johnson II* will likely result in judicial interpretation of § 38(a), it will likely also serve

277 *Id.*
278 *See supra* Part V.A.
279 *Id.*
280 *See supra* Part V.D.
281 *See supra* notes 254–74 and accompanying text.
282 *See supra* Part V.C.
283 WYO. CONST. art. I, § 38(c).

as a catalyst for subsequent legislation focused on § 38(c).[284] And if history repeats itself, as it often does, that legislation is likely to result in subsequent litigation over what may or may not be an unambiguous yet unintended consequence of the same.

[284] *See supra* Parts III.A–B, IV.B.4.