

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT

STATE OF WYOMING, COUNTY OF JOHNSON

Crosby Taylor, et al.,)	
)	
Petitioners.)	
)	
vs.)	Case No. CV-2021-0009
)	
Governor Mark Gordon, et al.,)	
)	
Respondents.)	
)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respondents, Governor Mark Gordon; Wyoming Department of Health Director Michael Ceballos; Wyoming State Health Officer Alexia Harrist, M.D.; and the Wyoming Department of Health, through their undersigned attorneys, submit the following memorandum in support of their motion to dismiss the Petition for Declaratory Injunctions and Writ of Mandamus under Rules 12(b)(1) and 12(b)(6) of the Wyoming Rules of Civil Procedure.

The petitioners in this matter are identified as Crosby Taylor, Tara Skagen, Harold Bjork, Melody Nielsen, Jessica McComb, Billie Eckhardt, Conservative Corner, Love America Laramie, Connor Fairbarn, Janelle Willert, and “others similarly situated.” However, because of discrepancies between the petition and summons, it is unclear whether all of those named above are actual petitioners. The captions of the petition and the summons are not identical. *Compare* (Pet., p. 1) *with* (Summons., p. 1).

Billie Eckhardt is named in the petition, but not in the summons. *See* W.R.C.P. 10(a) (requiring the title of a complaint to name all parties). Janelle Willert and Connor Fairbarn are named in the summons, but not in the petition. *See* W.R.C.P. 4(a) (requiring a summons to name

the parties). In addition, the petition does not identify Janelle Willert or Connor Fairbarn or provide any specific allegations concerning them. (Pet., pp. 3-5). Accordingly, this memorandum will only address the named and identified petitioners in the petition – Janelle Willert and Connor Fairbarn will not be addressed. Last, although Billie Eckhardt was not listed in the summons, this memorandum will address her allegations because she was identified in the petition.

INTRODUCTION/BACKGROUND

The petition is essentially a catalogue of general grievances and overall dissatisfaction with how the respondents have handled aspects of the COVID-19 pandemic. Based upon their unhappiness and dissatisfaction, petitioners ask this Court to issue various “declaratory injunctions” related to certain actions and orders taken by respondents. (Pet., pp. 15-16). Petitioners ask the Court to void Governor Gordon’s executive order and the subsequent statewide and county public health orders. Petitioners also ask the Court to prohibit: 1) the respondents and all facilities that use the RT-PCR test from using it as means to determine whether an individual has COVID-19; 2) the respondents from labeling, identifying, or including any test result that was determined by the RT-PCR test that has been or run at a rate of thirty-six cycles or higher; and 3) the state respondents from running any and all marketing campaigns including public service announcements that contain no meaningful context, false information, or uses virtue signaling. (Pet., pp. 15-17). Last, the petitioners’ request that the Court “issue a Writ of mandate that all Covid-19 (SARS-CoV-2 virus) diagnoses be made and supported by a testing method that actually isolates the SARS-CoV-1 virus.” (Pet., p. 16).

Although not clearly expressed, petitioners’ claims appear to be founded upon principles of declaratory judgment, mandamus, and injunctive relief. Petitioners’ use of the term “declaratory injunction” conflates two legal remedies – declaratory judgment and injunction. In either instance,

the petition does not present a justiciable controversy, and therefore, petitioners do not have standing to bring this action.

This lawsuit is a classic example of the type of case that the justiciability requirement is intended to preclude: a case that raises purely academic matters, brought by persons who have no genuine right or interest at stake and whose unhappiness about the general operation of state government gives them a political axe to grind. Indeed, petitioners intend this to be a public interest lawsuit to air their grievances about how respondents have handled the COVID-19 public health emergency. This is confirmed by the fact that petitioners have also brought this lawsuit on behalf of “others similarly situated.” Petitioners’ fatal flaw is that they have failed to allege any specific facts showing that a judgment in their favor will have an immediate and real effect on them.

Accordingly, the Court must dismiss this action because the petition does not present an actual justiciable controversy. As the Wyoming Supreme Court has explained, it is not the function of the judicial branch to pass judgment on the general performance of other branches of government. *William F. West Ranch, LLC, v. Tyrrell*, 2009 WY 62, ¶ 32, 206 P.3d 722, 733 (Wyo. 2009)

FACTS ALLEGED AND RELIEF REQUESTED

Petitioners make several allegations regarding how respondents have handled the COVID-19 pandemic. Petitioners disagree with the Governor’s decision on March 13, 2020, to issue his executive order (2020-2) declaring a state of emergency and a public health emergency relating to the COVID-19 pandemic. (Pet., pp. 7-10). Petitioners also disagree with the State Health Officer’s decision to issue statewide public health orders and county health officers’ decisions to issue county health orders because they did not serve “any medical purpose as to the declared emergency.” (Pet., pp. 6, 12). Petitioners generally allege that the executive order and public health

orders were issued arbitrarily and without lawful authority and that “[t]hese various arbitrary decisions have resulted in many and related violations of the petitioners’ rights and liberties.” (Pet., p. 7). They also allege that these actions have “caused confusing and chaotic outcomes such as the closing of businesses, limited government service, limited business service, the closing of schools and day care facilities, and the mandatory wearing of face coverings that serve no medical purpose as to the declared emergency[.]” (Pet., p. 7).

Petitioners also disagree with how respondents have identified numbers of COVID-19 cases and deaths “without any meaningful context” and relied on the RT-PCR diagnostic test. (Pet., pp. 10-11). Petitioners are also unhappy because they claim that respondents did not “fully inform the public of the lack of severity of the true nature of the Covid-19 virus” and withheld “critical medical and scientific information . . . [which] has lead [sic] citizens to make health care decisions based upon misleading and/or false information.” (Pet. p. 13). Last, petitioners allege that “they and every citizen has a right to be fully informed as to the all aspects and information regarding and relating to any declared emergency.” (Pet., p. 13).

In addition to the allegations discussed above, the petition contains several affidavits and allegations pertaining to each petitioner. Petitioner Crosby Taylor complains about how he and his wife were treated by the Department of Revenue which is not a named respondent in this case. (Pet., Ex. 1). In the context of a dispute about purchasing liquor for their bar in Kaycee, and a dispute about sales tax delinquencies, Taylor contends that respondents somehow violated his first amendment right. (Pet., Ex. 1). Taylor does not explain how his “freedom of expression rights” were violated. (Pet., Ex. 1).

Petitioner Tara Skagen describes an incident at the Laramie Recreation Center where she was told to wear a face mask. (Pet., Ex. 2). The Laramie Recreation Center is also not a named

respondent. Skagen alleges that the Laramie Recreation Center threatened to take away her gym membership for not wearing a face mask. (Pet., Ex. 2). Skagen contends that “the continuing actions and threats of the manager [of the Recreation Center] and the entire rec center staff are directly affecting the health of my entire family, individually and as a unit.” (Pet., Ex. 2).

Petitioner Harold Bjork alleges that he went to the Rock Springs Recreation Center to meet with several persons to peacefully protest the harassment of someone named Trent Ware, who was harassed by “[Rock Springs] city government personnel at the recreation center.” (Pet., Ex. 3). While there, Bjork alleges that he was harassed by Rock Springs Mayor Tim Kaumo for not wearing a mask before being arrested after telling the mayor to “[f***] off.” (Pet., Ex. 3). Bjork states that he was charged with “[r]iot and breach of peace,” and that he paid “\$160 plus a processing fee of \$20.27.” (Pet., Ex. 3). Bjork’s allegations concern the mayor of Rock Springs, Wyoming and the Chief of Police in Rock Springs, Wyoming, but not any of the named respondents in this case.

Petitioner Jessica McComb contends that “the mask mandate and shut downs have caused measurable physical emotional, social, developmental and cognitive harm to [her] children.” (Pet., Ex. 4). She alleges that “the schools [in Laramie] threaten to exclude, discriminate and force [her son] to comply with masking up without regard to the detriment on his mental and physical health, his individual needs and limitations.” (Pet., Ex. 4).¹ The school is not named as a respondent in this case.

Petitioner Billie Eckhardt resides in Laramie and operates a business named The Bent & Rusty Cotton Company, LLC. (Pet., p. 3). Exhibit 5 to the petition is a summons to appear for

¹ The petition did not include the second page of McComb’s affidavit, therefore, respondents’ arguments with regard to McComb are based only on the first page of her unsigned affidavit.

what Eckhardt contends was a citation “for an alleged violation of the public health order mandating the wearing of masks.” (Pet., p. 3). According to the petition, the charges were dismissed. (Pet., p. 4).

The allegations of Petitioner Melody Nielson, a resident of Cheyenne, present general complaints about the struggles of all Wyoming citizens during the COVID-19 pandemic. (Pet., Ex. 6). She alleges that Governor Gordon and county health officials do not care about her health, or the health of Wyoming citizens. (Pet., Ex. 6). Nielson alleges that respondents have “[committed] malpractice and [are] working daily to violate my right to determine what is best for me or others.” (Pet., Ex. 6). She alleges that since “the declaration of an emergency last March by Governor Gordon, her world has been turned upside down.” (Pet., p. 4).

Petitioner Conservative Corner is a “First Amendment educational and advocacy group that focuses on citizens’ rights and responsibilities.” (Pet., p. 4). Conservative Corner alleges that it has been “difficult to compete with the disinformation via any meaningful context by Respondents Gordon, Wyoming Dept of Health and Laramie county health officer Hartman.” (Pet., p. 5). Conservative Corner also alleges that arbitrary decisions and negligence by the respondents present logistical challenges for holding in person meetings and growing its group which in turn leads to limiting its funding. (Pet., p. 5).

Similarly, petitioner Love America Laramie alleges difficulty in holding in person meetings during the COVID-19 pandemic. (Pet., p. 5). Love America alleges that respondents’ “arbitrary decisions, actions and negligence” have led to Wyoming citizens receiving disinformation from respondents. (Pet., p. 5).

Based on petitioners’ various allegations, they request six claims of relief, each of which requests the Court issue a “declaratory injunction.” (Pet., pp. 15-17). Because Wyoming law does

not recognize “declaratory injunctions,” respondents attempt to rephrase the relief sought according to recognized principles of law. Respondents believe claims one through six are requests for declaratory judgment, however, claims four through six may also be individual requests for general injunctive relief. Petitioners also seek a “writ of mandate,” as part of claim four, which respondents believe to be an application for a writ of mandamus.

ARGUMENT

This Court lacks subject matter jurisdiction over this entire lawsuit because petitioners have not alleged facts to show that a justiciable controversy exists. In addition, petitioners’ writ of mandamus fails because it does not satisfy the formal and substantive pleading requirements for a mandamus action. Finally, to the extent that petitioners bring claims for general injunctive relief, they have not asserted the necessary facts to make a claim for injunctive relief. Accordingly, the petitioners’ claims fail and this lawsuit must be dismissed.

A. Legal Standard

Motions to dismiss under Rules 12(b)(1) and 12(b)(6) are reviewed similarly: a court “accept[s] the facts alleged in the complaint or petition as true and view[s] them in the light most favorable to the non-moving party[.]” *Guy v. Lampert*, 2015 WY 148, ¶¶ 12-13, 21, 362 P.3d 331, 335, 339 (Wyo. 2015).

A motion to dismiss under Rule 12(b)(1) for want of jurisdiction “focus[es] on the allegations contained in the complaint and liberally construe[s] them in the light most favorable to the plaintiff.” *Allred v. Bebout*, 2018 WY 8, ¶ 29, 409 P.3d 260, 268 (Wyo. 2018). Even under a liberal construction, a plaintiff cannot omit essential facts required to support his claim for relief. “Liberal construction of the pleadings does not ‘excuse omission of that which is material and necessary in order to entitle [one to] relief.’” *Guy*, ¶ 12, 362 P.3d at 335 (quoting *William F. West Ranch, LLC v. Tyrrell*, 2009 WY 62, ¶ 9, 206 P.3d 722, 726 (Wyo. 2009) (alteration in original)).

Dismissal is therefore required when, even viewed in favor of the non-movant, “those facts dictate judgment for the [movant] as a matter of law,” *Guy*, ¶ 13, 362 P.3d at 335 (citations omitted).

Under Rule 12(b)(6), a pleading is subject to dismissal if it fails to “plead the operative facts involved in the litigation so as to give fair notice of the claim to the defendant.” *Johnson v. Aetna Cas. & Sur. Co. of Hartford, Conn.*, 608 P.2d 1299, 1302 (Wyo. 1980). Although “a drastic remedy to be granted sparingly[,]” a motion to dismiss is “the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to relief.” *Feltner v. Casey Family Program*, 902 P.2d 206, 208 (Wyo. 1995) (quoting *Mummery v. Polk*, 770 P.2d 241, 243 (Wyo. 1989)).

B. This Court lacks subject matter jurisdiction over this action because petitioners have not alleged facts to show that a justiciable controversy exists.

Even though petitioners are asking for “declaratory injunctions,” it appears they may be attempting to seek relief under the Uniform Declaratory Judgments Act. This Court should dismiss petitioners’ action with prejudice because the petition does not assert any set of facts that would entitle them to the relief requested under a theory of declaratory judgment. Petitioners cannot satisfy the requirements necessary for the declaratory judgment claims and no decision rendered by this Court would have an immediate and real effect on them. *West Ranch*, ¶ 30, 206 P.3d at 733. Petitioners have not alleged how the requested relief would mitigate the damage they claim or prevent it in the future, and it is not this Court’s function or duty to make such assumptions. *Id.*

The Uniform Declaratory Judgments Act describes the types of rights that courts may declare and who may seek such a declaration:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by the Wyoming constitution or by a statute, municipal ordinance, contract or franchise, may have any question of construction or validity arising under the instrument determined and obtain a declaration of rights, status or other legal relations.

Wyo. Stat. Ann. § 1-37-103.

For this Court to have subject matter jurisdiction for purposes of a declaratory judgment, the petitioners must have a right to be declared that involves one of the specific subjects identified in Wyo. Stat. Ann. § 1-37-103, and the petitioners must have a cognizable interest in that subject. *Int'l Ass'n of Firefighters Local Union No. 279 v. City of Cheyenne*, 2013 WY 157, ¶ 20, 316 P.3d 1162, 1169 (Wyo. 2013). The “interest” requirement in § 1-37-103 means that a justiciable controversy must exist in order for a court to grant relief. *Int'l Ass'n of Firefighters*, ¶ 21, 316 P.3d at 1169.

Established law in Wyoming states that dismissal is appropriate if, on the face of a complaint, no justiciable controversy is present. *Anderson v. Wyoming Dev. Co.*, 60 Wyo. 417, 466-67, 154 P.2d 318, 337 (1944). The relationship between “justiciability” and the Uniform Declaratory Judgments Act invokes a four part test relied upon by the Wyoming Supreme Court in deciding if a party presents a justiciable controversy sufficient to maintain a declaratory judgment action. A matter lacking any of these four elements “becomes an exercise in academics and is not properly before the courts for solution.” *Brimmer*, 521 P.2d at 578 (quoting *Sorenson v. City of Bellingham*, 496 P.2d 512, 517 (Wash. 1972)). To demonstrate a justiciable controversy, petitioners must show that each of the following four *Brimmer* elements for justiciability is met:

1. The parties must have “existing and genuine, as distinguished from theoretical, rights or interests.”
2. The controversy must be “one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.”
3. Judicial determination of the controversy must “have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in

interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them.”

4. “[T]he proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.”

Id., 521 P.2d at 578 (quoting *Sorenson v. City of Bellingham*, 496 P.2d 512, 517 (Wash. 1972)).

- 1. The petition does not present a justiciability controversy because none of the *Brimmer* elements are met in this case; therefore, this Court should dismiss the petition in its entirety.**

Petitioners bear the burden of establishing that the facts alleged in their petition present a justiciable controversy. *Bird v. Rozier*, 948 P.2d 888, 893 (Wyo. 1997). To satisfy this burden, petitioners must show that each of the four justiciability elements is met. *West Ranch*, ¶¶ 26-32, 206 P.3d at 731-33; *see also Dir. Of the Office State Lands and Invs. v. Merbanco*, 2003 WY 73, ¶¶ 19-20, 70 P.3d 241, 248-49 (Wyo. 2003). Petitioners have not alleged facts sufficient to satisfy any of the four elements in the *Brimmer* test.

- a. The facts in the petition do not establish that the first element of the *Brimmer* test is met.**

To satisfy the first element of the *Brimmer* test, petitioners must establish that they have existing and genuine rights and interests at stake. To do so, they must allege facts to show that they have suffered harm to a legally protectable and tangible interest. *See State Bd. of Equalization v. Jackson Hold Ski Corp.*, 737 P.2d 350, 353 (Wyo. 1987) (interest); *West Ranch*, ¶ 22, 206 P.3d at 730 (harm). The facts alleged in the petition show that the first *Brimmer* element is not met because petitioners have no legally protectable and tangible interest at stake and they have suffered no harm to any such interest.

To satisfy the legally protectable and tangible interest requirement, a plaintiff must establish that he has a personal stake in the outcome of the case. *Pedro/Aspen, Ltd., v. Bd of Cnty.*

Comm's for Natrona Cnty., 2004 WY 84, ¶ 8, 94 P.3d 412, 415 (Wyo. 2004). It is not enough to allege that the rights of other persons have been violated. *West Ranch*, ¶¶ 16, 32, 206 P.3d at 728, 733 (citation omitted).

A petitioner challenging the validity of executive action “must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of the action and it is not sufficient that he has merely a general interest common to all members of the public.” *Ex parte Levitt*, 302 U.S. 633, 634 (1937). “[T]he injury must affect the plaintiff in a personal and individual way.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992). To require otherwise would force the judiciary into the role of vindicating the public interest rather than fulfilling its proper role “to decide on the rights of individuals.” *Lujan*, 504 U.S. at 576. Courts are not an appropriate forum “for the ventilation of public grievances.” *Valley Forge Christian Coll. v. Ams. Unified for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

Here, petitioners have not alleged or identified any genuine interests or rights personal to them. Petitioners generally challenge the decisions by the Governor, the State Health Officer, and county health officers by specifically claiming that the executive order and subsequent public health orders were issued without statutory authority. (Pet., pp. 7, 15). Petitioners claim that these actions “resulted in many and repeated violations of [their] rights and liberties[,] (Pet., p. 7) however, conclusory statements fail to establish a tangible right or interest that has been harmed. *Allred v. Bebout*, 2018 WY 8, ¶ 44, 409 P.3d 260, 273 (Wyo. 2018).

In addition, petitioners make several claims on behalf of Wyoming’s citizens. For instance, petitioners claim that “[e]ach Respondent has a duty regarding the distribution of factual and documented information regarding the Covid-19 virus which includes putting factual information into a meaningful context of the actual affect of the virus within Wyoming and to it’s citizens.”

(Pet., p. 5). They also claim that Department of Health “runs and maintains public service announcements to scare citizens into believing that a virus that has only affected a small percentage of Wyoming citizens and a death rate that is all but nil, is worse than the black death.” (Pet., p. 10). Further, petitioners claim that the respondents have a duty to fully inform the citizens of Wyoming regarding all necessary aspects of the declared emergency, including, but not limited to the bases of the testing procedure and by providing meaningful context when reporting numbers of cases and deaths. (Pet., pp. 10, 12-13).

Petitioners have not alleged any genuine personal interest or right which has been harmed (or in immediate danger of being harmed) by respondents’ actions. Petitioners’ claims have no connection to the alleged actions of the respondents. Taylor’s complaints about the Department of Revenue involving unrelated disputes about liquor purchases and sales tax delinquencies do not present a personal stake in the outcome of this case. (Pet., Ex. 1).

Skagen’s description of an incident at the Laramie Recreation Center, where she was told to wear a face mask, does not describe a personal interest or stake in the outcome of this case.

Bjork’s complaint about Rock Springs city government and Rock Springs law enforcement charging him with “[r]iot and breach of peace,” does not amount to a personal stake in this action. (Pet., Ex. 3).

McComb’s contention about the “the mask mandate and shut downs” hurting her children does not make a personal stake in this action. (Pet., Ex. 4). The alleged threats, exclusions, and discriminations McComb endured came from “the schools [in Laramie],” not from the respondents.

Eckhardt’s allegation that she has learned that the county attorney is keeping the door open to refiling the dismissed criminal charges against her does not establish her own personal stake in the outcome of this case.

Nielson’s general complaints about struggles suffered by all Wyoming citizens during the COVID-19 pandemic do not demonstrate a personal stake or interest in the outcome of this case, nor do her feelings that “Governor Gordon and county health officials do not care about her health, or the health of Wyoming citizens.” (Pet., Ex. 6).

Conservative Corner’s difficulty in having meetings during a pandemic does not present a personal interest or stake in the action. The complaint of this advocacy group – that focuses on all citizens’ rights and responsibilities – is merely a general interest common to all members of the public, not a personal interest or stake in the outcome of this case.

Love America presents the same general complaints about how difficult it is to hold in person meetings during a global pandemic. (Pet., p. 5). Love America’s allegations that respondents’ actions have caused all Wyoming citizens to receive false information is not enough to create a personal stake in this action. The group’s mere allegation that the rights of other individuals have been violated does not meet the first *Brimmer* factor. *West Ranch*, ¶¶ 16, 32, 206 P.3d at 728, 733.

Petitioners’ collective assertion – that Wyoming citizens have a right to be fully informed, and that respondents have withheld information from all Wyoming citizens – does not sufficiently establish a personal stake for each petitioner in the outcome of this case, which is required in the first element of the *Brimmer* test.

In addition to the requirement to allege a personal interest at stake in the outcome of this case, the first element of the *Brimmer* test requires the petitioners to allege that the interest has

been harmed or is at risk of harm by the respondents. *West Ranch*, ¶ 22, 206 P.3d at 731. This allegation of fact is measured by a strict standard – a petitioner must allege that the harm to the interest “has occurred or will certainly occur in the future.” *Id.*, ¶ 27, 206 P.3 at 732. Accordingly, it “is very important to focus on what [petitioners] allege and what they do not allege in terms of a tangible interest and the utility of a judicial ruling.” *Id.*, ¶ 24, 206 P.3d at 731. The courts do not have the power to determine anticipated or theoretical disputes. *Id.*, ¶ 29, 206 P.3d at 733.

Here, petitioners have not and cannot allege that they have or will suffer harm to a legally protectable and tangible personal interest because, as explained above, they have not alleged any interest that is cognizable under Wyoming law. If they do not have an interest or personal stake in the outcome of the case, then there is nothing that can be harmed. The facts alleged in the petition do not establish that the first *Brimmer* element is met. They have not alleged any facts that provide them with any greater ability to meet the first element of the *Brimmer* test than would be available to any other Wyoming citizen. Petitioners have not alleged a sufficient personal interest or stake in the outcome of the case sufficient to meet the first element of the *Brimmer* test for justiciability. The petition only contains conclusory statements and allegations that petitioners’ rights and liberties have been violated without identifying what those specific rights or interests are – such allegations are not sufficient to meet the first element.

b. The facts alleged in the petition do not establish that the second element of the *Brimmer* test is met.

The second *Brimmer* element requires plaintiffs to establish that a declaratory judgment will provide an effective remedy to them. Petitioners must allege a link between the alleged constitutional or statutory violation and the remedy they seek to correct the alleged harm suffered. *West Ranch*, 26, 206 P.3d at 732. The facts alleged must show that a decision by the court in their

favor will terminate the controversy between the parties. *Indus. Siting Council of State of Wyo. v. Chi. & Nw. Transp. Co.*, 660 P.2d 776, 780 (Wyo. 1983).

Because the respondents in this case are government officials, petitioners must allege facts to show: (1) the harm petitioners claim they suffered is traceable to the actions of the government respondents; and (2) the relief requested will redress or prevent that harm in the future. *West Ranch*, ¶ 12 n.2, 27-28, 206 P.3d at 727 n.2, 732. “If the plaintiff’s injury is not traceable to the government action, then a court decision on the legality of the action will not effectively terminate the controversy.” *West Ranch*, ¶ 12 n.2, 206 P.3d at 727 n.2. There must be a causal connection between the injury and the conduct complained of; the injury must be fairly traceable to the challenged actions of respondents. *Miller v. Wyoming Dep’t of Health*, 2012 WY 65, ¶ 24, 275 P.3d 1257, 1262 (Wyo. 2012) (quoting *Lujan*, 504 U.S. at 560). Without the requirement that the harm is traceable to something this Court has the ability to remedy, petitioners could theoretically seek relief on how the executive branch generally conducts business, thereby positioning this Court “to assume a position of authority over the governmental acts of another and co-equal department and to become virtually continuing monitors of the wisdom and soundness of [e]xecutive action.” *Lujan*, 504 U.S. at 577; see also *Sky Harbor Air Serv., Inc. v. Cheyenne Reg’l Airport Bd.*, 2016 WY 17, ¶ 27, 368 P.3d 264, 270 (Wyo. 2016) (stating that *Lujan*, 504 U.S. 555, was adopted in *Miller*, ¶ 18, 275 P.3d at 1261).

The petitioners are required to establish redressability because doing so “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Valley Forge Christian Coll.*, 454 U.S. at 472. Requiring

petitioners to establish redressability also assures that this Court does not become “a vehicle for the vindication of the value interests of concerned bystanders.” *Id.* at 473.

“The first two elements of the *Brimmer* analysis are inextricably linked: if a plaintiff fails to allege an interest that has been harmed, a judicial decision cannot remedy a nonexistent harm.” *Vill. Rd. Coal.*, ¶ 16, 298 P.3d at 169. But even if the second *Brimmer* element logically could exist when a plaintiff does not allege a tangible personal interest at stake, he still would have to allege facts to show a remedy that would help him as an individual. Here, in the context of what petitioners have asked for, no order from this Court could remedy any alleged harm. None of petitioners’ allegations establish that the remedies they request will lead to an effective remedy for them. The second element requires petitioners to allege facts to show that the remedy requested, if granted, will have a practical effect on them. *West Ranch*, ¶ 29, 206 P.3d at 733.

Petitioners must “allege sufficient specific facts showing that a judgment in their favor will have an immediate and real effect on them.” *West Ranch*, ¶ 30, 206 P.3d at 733; see also *Bird v. Rozier*, 948 P.2d 888,893 (Wyo. 1997) (holding that giving or refusing the relief request – a declaration that appellees violated a legal duty to abide by the law, enforce the law, or uphold the law – would have no effect upon the rights, status or legal relationship of the parties). Based upon the relief they have requested, petitioners have failed to allege sufficient facts showing that a judgment granting their requested relief will have an immediate and real effect on them and, as a result, the second *Brimmer* element is not met.

c. The facts alleged in the petition do not establish that the third element of the *Brimmer* test is met.

To satisfy the third element of the *Brimmer* test, petitioners must allege facts demonstrating that a declaratory judgment “will have final force and effect upon the rights, status, and legal relationship of the parties.” *Rocky Mountain Oil and Gas Ass’n v. State*, 645 P.2d 1163, 1168

(Wyo. 1982). “A declaratory judgment is a binding adjudication of the rights and status of the litigants”). *Brimmer*, 521 P.2d at 579. The second and third *Brimmer* elements are similar in that they both require petitioners demonstrate redressability. The second requires a showing of practical redressability – that “a judgment in [their] favor will have an immediate and real effect upon [them].” *West Ranch*, ¶ 30, 206 P.3d at 733. The third *Brimmer* element requires a showing of legal redressability – the facts alleged must demonstrate how a judgment from this Court will have a quantifiable impact on their rights or status or their legal relationships with the respondents. *Id.*

Petitioners make no attempt to specify their allegations in a way to meet the third element of the *Brimmer* test. They do not identify any genuine interest specific to any one of them. Petitioners have not alleged how a judgment, based upon the relief requested in this case, will affect their own rights, status, or legal interests. Rather, petitioners essentially complain about past conduct by individuals other than respondents. “Because the court has the discretion to deny declaratory relief where it would not be effective or would be inappropriate, a declaratory judgment is generally not available with respect to allegations of past negligence and damage.” *Bird*, 948 P.2d 888, 893 (citing 22A AMJUR2d *Declaratory Judgments* § 66 (1988)).

If the Court were to rule in petitioners favor and issue the “declaratory injunctions” they seek, there would be no vindication of any legal rights specific to these petitioners. Consequently, their petition does not meet the third *Brimmer* element.

d. The facts alleged in the petition do not establish that the fourth element of the *Brimmer* test is met.

The fourth *Brimmer* element in determining justiciable controversy requires that petitioners establish that the respective interests of the opposing parties are genuinely adverse to one another.

Petitioners' alleged facts must demonstrate that the parties have "diametrically opposed interests with respect to the issues." *Pedro/Aspen*, ¶ 23, 94 P.3d at 419.

The crux of petitioners' claims is a disagreement over the need for the executive order and subsequent public health orders. Most, if not all, of their complaints are about persons or entities not named as respondents. Either way, the nature of their disagreements does not present a genuine dispute between the parties in this case. Here, the allegations in the petition fall short of establishing that the fourth *Brimmer* element is met. This result comes as no surprise because, as explained above, petitioners have no legally protectable and tangible interest at stake in this case. Genuine adversity requires that opposing parties have opposing interests. When one side has no tangible interest or personal stake in the outcome then, by definition, the case cannot be genuinely adverse. Therefore, petitioners' allegations do not meet the fourth *Brimmer* element.

Because petitioners do not meet each element from the *Brimmer* test, this Court lacks jurisdiction to consider the matter.

C. To the extent petitioners seek a writ of mandamus, they do not satisfy formal and substantive pleading standards.

Under claim four, petitioners "move the Court to issue a Writ of mandate that all Covid-19 (SARS-CoV-2 virus) diagnoses be made and supported by a testing method that actually isolates the SARS-CoV-2 virus." (Pet., p. 16). If the petitioners are applying for a writ of mandamus, their application does not satisfy the formal and substantive requirements necessary for an action in mandamus. As a result, they do not present a claim upon which relief can be granted, and therefore dismissal is appropriate under 12(b)(6).

1. Dismissal is appropriate because the petition violates the formal requirements for mandamus.

The petition does not follow the formal requirements for an action in mandamus. The "application for a writ [of mandamus] must be by petition, in the name of the state, on the relation

of the party applying and verified by affidavit.” Wyo. Stat. Ann. § 1-30-103. Although Petitioners filed a petition, it is not in the name of the State, on relation of the parties applying. (Pet., caption). Accordingly, the Court is justified to dismiss this claim on that basis alone. *See Williams v. Sundstrom*, 2016 WY 122, ¶ 14, 385 P.3d 789, 792 (Wyo. 2016).

2. Dismissal is required because the petition violates the substantive requirements for mandamus.

The fatal flaw with the petition is that it does not substantively qualify for mandamus, and is, thus, not an action in mandamus. “Mandamus is a writ issued in the name of the state to an inferior tribunal, corporation, board or person commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station.” Wyo. Stat. Ann. § 1-30-101. There are two key elements to an action in mandamus. First, there must be a legal right in the relator. *LeBeau v. State ex rel. White*, 377 P.2d 302, 303 (Wyo. 1963). Second, the right sought to be enforced must be clear and certain. “The writ does not issue in cases where the right in question is doubtful.” *LeBeau v. State ex rel. White*, 377 P.2d 302, 303 (Wyo. 1963).

The petition satisfies neither of the required elements articulated in *LeBeau*. To determine if there is a legal right vested in the petitioners, their affidavits must assert facts that create entitlement of relief. None of the affidavits attached to the petition raise, address, or invoke a legal right related to claim four, which seeks only to mandate the criteria for COVID-19 diagnosis. None of the petitioners claim to have experienced an improper COVID-19 diagnosis. (Pet., Exs. 1-6). Petitioners allege no facts regarding either a false diagnosis or a failure to diagnose due to improper testing methods. The petition asserts that the “Respondents use and rely upon the results of a clinical tool known as the Real-Time RT-PCR Diagnostic Panel” and subsequently takes issue with the testing. (Pet., pp. 10-11). Counsel for petitioners, however, is not a relator. None of the verified affidavits by petitioners – who would be relators in this case – allege a direct harm caused

by the clinical testing criteria. Nor do petitioners assert any legal right that clinical testing should be administered based on different criteria. Accordingly, petitioners do not establish any legal right for an action in mandamus.

To determine if there is a clear and certain right sought to be enforced, the various legal standards alleged and discussed above must again be considered, in light of a petition for mandamus. The purpose of mandamus is to “command performance of a ministerial duty which is plainly defined and required by law. *State ex rel. Arnold v. Ommen*, 2009 WY 24, ¶ 16, 201 P.3d 1127, 1133 (Wyo. 2009) (internal citations omitted). “Mandamus will not lie unless the duty is absolute, clear, and indisputable. The law must not only authorize the demanded action but require it.” *Id.* “If the lower tribunal has the right to exercise discretion regarding an issue, mandamus is not an appropriate remedy.” *Id.* (internal citations omitted).

Petitioners do not allege an absolute, clear, and indisputable duty in relation to mandamus relief. The petition does not cite or invoke any authority to support the claim “that all Covid-19 (SARS-CoV-2 virus) diagnoses be made and supported by a testing method that actually isolates the SARS-CoV-2 virus.” (Pet., p. 16). Petitioners do not present any claim that the “respondent[s], at the time of the application for mandamus, owe[] a clear duty to perform to the plaintiff[s].” *Williams v. Sundstrom*, 2016 WY 122, ¶ 18, 385 P.3d 789, 793 (Wyo. 2016) (internal citations and quotations omitted). “In determining whether mandamus is appropriate,” this Court should consider “the statutory duties of the governmental entity.” *Williams v. Sundstrom*, 2016 WY 122, ¶ 19, 385 P.3d 789, 794 (Wyo. 2016). Petitioners do not provide any statute that establishes an absolute, clear, and indisputable duty for their requested relief. Therefore, dismissal of the petition for a writ of mandamus is required under Rule 12(b)(6).

D. To the extent petitioners claim injunctive relief in claims four, five, and six, they have not satisfied the pleading requirement for a request for injunction.

Construed most liberally, claims four, five, and six could perhaps be read as claims for injunctive relief, rather than declaratory judgment actions. An injunction is “a command to refrain from a particular act.” Wyo. Stat. Ann. § 1-28-101.

To the extent petitioners request injunctive relief, they do not satisfy the pleading requirements for an injunction. Therefore, claims four through six should also be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

An injunction is an extraordinary remedy. “[I]t never should be granted except in clear cases of irreparable injury and urgent necessity[.]” *Tri-County Elec. Ass’n v. City of Gillette*, 525 P.2d 3, 10 (Wyo. 1974) (internal citations omitted). Although authorized by statute and rule, an action for injunctive relief is by origin a request for equitable relief. *The Tavern, LLC, v. Town of Alpine*, 2017 WY 56, ¶ 36, 395 P.3d 167, 177 (Wyo. 2017). “A court will issue an injunction when the threatened harm is irreparable and there is no adequate remedy at law. An injury is irreparable when it is unique and money as future compensation alone cannot atone.” *Id.*

A claim for injunctive relief is not viable unless it alleges all the necessary facts to establish a right to the injunction. “The extraordinary character of the injunction remedy requires that the complaint clearly set out all the facts necessary to establish such right[.]” *Tri-County Elec.* 525 P.2d at 10. “The complaint must allege a set of facts which, if proven, would provide a proper basis for the intervention of a court of equity.” *Rialto Theatre, Inc., v. Commonwealth Theatres, Inc.*, 714 P.2d 328, 333 (Wyo. 1986) (internal citations omitted). It is insufficient “to merely state by means of conclusion that irreparable injury will ensue if relief is not granted or that there is no adequate remedy at law.” *Id.*, 714 P.2d at 333.

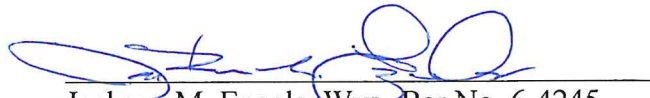
Based on these standards, the petition is wholly deficient in pleading a request for injunctive relief. *See City of Casper v. Holloway*, 2015 WY 93, ¶ 22, 354 P.3d 65, 71 (Wyo. 2015) (holding that the complaint insufficiently pled a request for injunctive relief and would not be considered by the court – sporadically mentioning injunctive relief in the complaint does not support a claim of injunctive relief). The petition does not clearly set out facts necessary to qualify for such a right, if one exists. No clear case of irreparable injury is alleged in regards to respondents’ use of the RT-PCR test, dissemination of such test results, or marketing campaigns about COVID-19. An injunction simply is not the proper remedy for the petitioners’ challenge of matters vested in the sound medical and scientific discretion of the respondents. Therefore, to the extent they are construed as general requests for injunctive relief, claims four through six fail to state a claim upon which relief can be granted, thereby, requiring dismissal under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, respondents respectfully request that this action, in its entirety, be dismissed with prejudice under Rules 12(b)(1) and 12(b)(6) of the Wyoming Rules of Civil Procedure.

DATED this 17th day of March 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of March 2021, the foregoing was served upon the following:

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