

Without going into the details of each law, we can see that there is some overlap so that some laws are made superfluous by others.

After removing those laws, we have left what is commonly called the “trigger law” which passed in 2007, and what is commonly called the “heartbeat ban,” which passed in 2013. Those two laws look like this:

		Prohibited																																				Allowed																																			
Weeks Gestation		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36																																				
Heartbeat Ban 14-02.1-05.1 to 05.2	Most abortions																																																																								
	Rape																																																																								
	Incest																																																																								
	Medical Emergency																																																																								
	Life																																																																								
Ban on abortion 12.1-31-12	Most abortions																																																																								
	Rape																																																																								
	Incest																																																																								
	Medical Emergency																																																																								
	Life																																																																								

According to principles established by the North Dakota Supreme Court, the legislature is presumed to have known about earlier enacted laws and to have intended to replace them where applicable. In other words, the latter enacted controls. In this case, the heartbeat ban controls where applicable.

Applying this principle, we have this:

		Prohibited																																				Allowed																																			
Weeks Gestation		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36																																				
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Medical Emergency																																																																									
Life																																																																									

In short, all abortions are prohibited except for reasons of rape or incest during the first six weeks and for the life of the mother or a medical emergency to prevent substantial physical impairment of a major bodily function throughout pregnancy.

This is what the legislature has already passed and intended to go into effect.

The ultimate effect of these laws when combined and the judicial principles of construction are applied is not easily apparent. Almost immediately after the *Dobbs* decision, it became apparent that legislators, healthcare providers, activists on both

sides, and journalists were confused about what law applied and when. Several legislators and representatives from pro-life organizations met and decided that it would be in everyone's interest to work off one cleaned-up law. People might want to debate what should be the law, but first, let's better state what is the law.

The result is SB 2150, the purpose of which is to better express and implement what the Legislative Assembly has already enacted. It does this by:

- (1) Stating in one statute prohibitions previously enacted in separate statutes;
- (2) Removing obsolete language and language made moot by the scope of other broader statutes;
- (3) Making the language, definitions, and exceptions consistent;
- (4) Clarifying ambiguous language; and
- (5) Except when necessary to accomplish the above, not making any substantive changes to what the Legislative Assembly has already enacted.

Some other points about the bill are worth noting before we review the bill's provisions:

- (1) We examined parts of the Century Code other than the trigger law and the Abortion Control Act that might be impacted and addressed them when appropriate.
- (2) The bill preserves the typical structure of the Century Code by placing direct criminal violations in the Criminal Code and keeping in the Abortion Control Act the requirements for abortions that are legal.
- (3) We do not believe that SB 2150 impacts, one way or the other, the current case before the North Dakota Supreme Court because the changes made in SB 2150 do not impact the issue presented in that case.
- (4) The original version of SB 2150 concerned only amending the state's abortion prohibitions. Subsequently, the Attorney General's office suggested amendments to other abortion-related laws to make them consistent with SB 2150's changes and to clarify other parts of the Abortion Control Act. Here again, none of these changes substantively alter what the legislature has already enacted. Those suggestions were adopted by the Senate.

A walk-through of the bill is included at the end of this testimony. If the committee prefers a summary, SB 2150 can be viewed in three parts: the criminal code section, the Abortion Control Act, and the repealed sections.

The Criminal Code

Section 1 of the bill amends what was known as the "trigger law. SB 2150 makes several important changes to this law. They are:

- The definition of "abortion" is based on the definition used in the Abortion Control Act. That definition was more recently passed, is clearer, and expressly excludes treating ectopic pregnancies.

- A definition of “medical emergency” is added and made an exception to the offense. It is a cleaned-up version of the definition used in the Abortion Control Act. The definition also includes a change requested by the North Dakota Hospital Association and the North Dakota Medical Association.³
- The exceptions are changed from affirmative defenses to direct exceptions. The “trigger ban” used affirmative defenses, in which a defendant would have to assert and then prove that the requirements for the exceptions existed. However, the “heartbeat ban,” which under the principles of construction applies to all abortions after six weeks gestation, uses direct exception language. Because the most recent legislation used exceptions rather than affirmative defenses, and because it makes no sense to use affirmative defenses for abortions occurring during the first six weeks of gestation, but not after, SB 2150 removes the affirmative defenses to direct exceptions for all abortions.
- The exception for abortions in the case of rape or incest is limited to abortions done in the first six weeks of gestation. The heartbeat ban enacted in 2013 does not contain exceptions for rape or incest. Since this is the controlling law and because the purpose of the heartbeat ban was to prohibit abortions after six weeks gestation, the exception exists only for those weeks. This is the existing law, with or without SB 2150.

Abortion Control Act and Physician Disciplinary Actions

The rest of the bill primarily addresses changes to the requirements necessary for those abortions that are still permitted. As it always has been, most of these requirements are in the Abortion Control Act. These provisions primarily affect the Department of Health and Human Services, the courts, and the informed consent requirements. Major changes in this section include:

- At the suggestion of the Attorney General’s office, the preamble to the chapter was revised to indicate that the chapter concerns abortions not otherwise prohibited by law.
- Throughout this section, definitions, phrases, and requirements related to now superfluous laws, such as the ban on abortions for genetic abnormalities, the dilation and evacuation ban, and the twenty-week ban.
- The definitions are made consistent.
- It requires that the materials produced by the Department of Health and Human Services that, in addition to being made available to the public, must be provided to a woman seeking an abortion by the physician or the physician’s assistant twenty-four hours before the abortion now include information about what is prohibited and what is allowed.

- It adds to the abortion data report form that must be submitted to the Department of Health and Human Services for every abortion an indication of whether the abortion was to prevent the death of the mother, because of rape or incest, or necessary due to a medical emergency.
- The requirement that a wife receives consent from her husband before obtaining an abortion is removed. This language was found unconstitutional many years ago and at this time it is not known whether it would be allowed under the *Dobbs* framework. Considering that the only abortions that would now be allowed would be for saving the life of the mother, in a medical emergency, or because of rape or incest, the language was removed.
- In the case of a judicial bypass for a minor, the judge must now enter a finding that the pregnancy was due to rape or incest. Medical emergencies, including those to prevent the death of the minor, are already excluded from the parental consent provisions.
- It added that the physician must include on the abortion compliance report whether the abortion was to prevent the death of the mother, was because of reasons of rape or incest, or was necessary due to a medical emergency.
- It removes subjecting a physician to disciplinary action for violating the heartbeat ban because the heartbeat ban is now removed from the code. Another section of the existing law subjects a physician to disciplinary action for a conviction for any felony. (See Section 43-17-31(1)(b).)

Repealed Sections

These sections were either made moot by the scope of other sections or are incorporated into the revised Section 12.1-31-12.

Section Repealed	Description	Why Repealed
14-02.1-04.1	Prohibition on abortions for sex selection and genetic abnormality	Moot
14-02.1-04.2	Prohibition on “human dismemberment abortion” (dilation and evacuation)	Moot
14-02.1-05.1	Heartbeat Ban	Incorporated into Section 12.1-31-12
14-02.1-05.2	Heartbeat Ban	Incorporated into Section 12.1-31-12
14-02.1-05.3	Post-20 week Ban	Moot

These revisions might not be perfect. We might find other sections or statutes that should be revised. There may exist other parts of the Abortion Control Act not concerning the prohibitions that the committee may consider.

Senate Bill 2150, however, provides a better way than the existing statutes of implementing what the legislature has already enacted and it removes unnecessary and confusing language. It is the conference's hope that if legislators want to change these laws in this session they offer amendments to this bill.

Senate Bill 2150 does not enact new bans on abortions. All the prohibitions in SB 2150 already exist and they would still exist if SB 2150 is not enacted. However, if it does not pass:

- Defendants would have to rely on affirmative defenses for abortions excepted under the law if the abortion occurred within the first six weeks of gestation, but not for abortions occurring after six weeks of gestation;
- Questions could arise as to whether the treatment of ectopic pregnancies or abortions in cases of medical emergencies would be legal during the first six weeks of gestation, but no such questions would arise after six weeks of gestation; and
- Confusion could exist as to which law would be violated when more than one statute encompasses the prohibited abortion.

Ultimately, the question presented by SB 2150 is not about whether a person supports or opposes prohibiting abortion. It is about whether we want a clearer, better statute.

For these reasons, the North Dakota Catholic Conference requests a "Do Pass" recommendation on SB 2150.

¹ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.*, 505 U.S. 833 (1992).

² *Dobbs v. Jackson Women's Health Organization*, 597 U.S. _ (2022).

³ The definition of "medical emergency" in SB 2150 as introduced stated "substantial and irreversible physical impairment of a bodily function . . ." The Senate removed the words "and irreversible" in both places where "medical emergency" is defined.

At the end of each definition, however, there is a clarification that a "condition may not be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function." In both cases, the removal of "and irreversible" was missed in the Senate amendments.

Engrossed Senate Bill 2150 Walk-Through

Page 1 of the bill starts in the Criminal Code by making changes in Section 12.1-31-12, which was known as the “trigger law.” The definition of “abortion” is based on the definition used in the Abortion Control Act. That definition was more recently passed, is clearer, and expressly excludes treating ectopic pregnancies.

On page 2, lines 5 through 12, the bill inserts a definition of “medical emergency” that further down is made an exception to the prohibition. It is a cleaned-up version of the definition used in the Abortion Control Act. The definition also includes a change requested by the North Dakota Hospital Association and the North Dakota Medical Association.¹

The changes on lines 13 through 22 make the definitions consistent with the Abortion Control Act.

The changes on page 2, line 25 change the exceptions from affirmative defenses to direct exceptions. The “trigger ban” used affirmative defenses, in which a defendant would have to assert and then prove that the requirements for the exceptions existed. However, the “heartbeat ban,” which under the principles of construction applies to all abortions after six weeks gestation, uses direct exception language. Because the most recent legislation used exceptions rather than affirmative defenses, and because it makes no sense to use affirmative defenses for abortions occurring during the first six weeks of gestation, but not after, SB 2150 removes the affirmative defenses to direct exceptions for all abortions.

Page 3, line 2, limits the exception for abortions in the case of rape or incest to abortions done in the first six weeks of gestation. The heartbeat ban enacted in 2013 does not contain exceptions for rape or incest. Since this is the controlling law and because the purpose of the heartbeat ban was to prohibit abortions after six weeks gestation, the exception exists only for those weeks. This is the existing law, with or without SB 2150.

On page 3, line 7, the bill adds a medical emergency exception to the prohibition. This exception existed in the heartbeat ban and would now apply to all abortions.

On page 3, lines 11 through 14, the preamble to the Abortion Control Act is revised to indicate that the chapter concerns abortions not otherwise prohibited by law while

¹ The definition of “medical emergency” in SB 2150 as introduced stated “substantial and irreversible physical impairment of a bodily function . . .” The Senate removed the words “and irreversible” in both places where “medical emergency” is defined.

At the end of each definition, however, there is a clarification that a “condition may not be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.” In both cases, the removal of “and irreversible” was missed in the Senate amendments.

retaining the affirmation that the state desires to protect every human life whether unborn or aged, healthy or sick.

The changes on page 3, lines 19 through 27, reflect the improved definition of abortion, which was applied to the criminal code definition.

On page 4 the definition of “Down syndrome” is removed, as is the definition of “genetic abnormality” on page 4. These definitions were used in the ban on abortions for reasons of Down syndrome or genetic abnormality. This ban is now superfluous, so it and the corresponding definitions are removed.

On page 5 language is removed that required a physician or the physician’s agent to orally inform the woman about the possibility of reversing the effects of an abortion inducing drug. Because this requirement exists even if the abortion is not through an abortion inducing drug, this language resulted in a legal challenge. After discussions with the Attorney General’s office, the Senate chose to remove this requirement, recognizing that the notification about the possibility of reversing the effects of the abortion inducing drug is still included in the materials the woman must be provided prior to the abortion

The changes on page 6, lines 7 through 15, reflect the improved and now consistent definition of “medical emergency.” The changes removed language related to now moot provisions of the law, the removal of “and irreversible” requested by the North Dakota Medical Association and the North Dakota Hospital Association, and grammatical changes. As noted in footnote 1, the Senate amendments missed removing “and irreversible” on line 15.

The changes on page 6, lines 19 through 26, removes obsolete language and provide a single definition for gestational age.

The next change is on page 9, lines 6 an 7. This section concerns the materials produced by the Department of Health and Human Services that, in addition to being made available to the public, must be provided to a woman seeking an abortion by the physician or the physician’s assistant twenty-four hours before the abortion. Since most abortions would be prohibited in North Dakota, it makes sense that the materials include information about what is prohibited and what is allowed.

The changes on page 9, lines 16 through 29 add to the abortion data report form that must be submitted to the Department of Health and Human Services for every abortion an indication of whether the abortion was to prevent the death of the mother, because of rape or incest, or necessary due to a medical emergency. The state currently does not collect that data.

On page 11, lines 3 and 4, the bill removes the requirement that a wife receives consent from her husband before obtaining an abortion is removed. This language was found unconstitutional many years ago and at this time it is not known whether it would be allowed under the *Dobbs* framework. Considering that the only abortions that

would now be allowed would be for saving the life of the mother, in a medical emergency, or because of rape or incest, the language was removed.

Keeping with the principle of not substantively changing the existing laws, the parental consent requirement with a judicial bypass is retained. However, because the only abortions for minors that would be subject to the parental consent requirement would be those because of reasons of rape or incest, language is added on page 13 to require the judge to enter a finding that those reasons existed if the judicial bypass is used. Medical emergencies, including those to prevent the death of the minor, are already excluded from the parental consent provisions.

On page 14, lines 22 through 26, the bill removes language made superfluous by the definition of “medical emergency.”

The changes on page 15 clarify that after twelve weeks of pregnancy an abortion may only be done in a hospital and that an abortion after the unborn child has reached viability is allowed only in cases to save the life of the woman.

The changes on page 16, line 30 through page 17, line 9, apply the new definition of gestational age to reporting requirements.

The new language on page 17, lines 23 through 27, adds that the physician must include on the abortion compliance report whether the abortion was to prevent the death of the mother, was because of reasons of rape or incest, or necessary due to a medical emergency.

The changes on page 18 apply the new definition of gestational age and remove language related to a now moot law that is repealed by the bill.

The language on page 21, lines 15 through 17, is removed because it subjected a physician to disciplinary action for violating the heartbeat ban, which is now removed from the code. Another section of the existing law subjects a physician to disciplinary action for a conviction for any felony. (See Section 43-17-31(1)(b).)

Section 11 of the bill repeals sections that were either made moot by the scope of other sections or are incorporated into the revised Section 12.1-31-12.

Section Repealed	Description	Why Repealed
14-02.1-04.1	Prohibition on abortions for sex selection and genetic abnormality	Moot
14-02.1-04.2	Prohibition on “human dismemberment abortion” (dilation and evacuation)	Moot
14-02.1-05.1	Heartbeat Ban	Incorporated into Section 12.1-31-12
14-02.1-05.2	Heartbeat Ban	Incorporated into Section 12.1-31-12
14-02.1-05.3	Post-20 week Ban	Moot

Prohibited Allowed

Weeks Gestation		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	
Post-Viability 14-02.1-04(3)	Most abortions																																					
	Rape																																					
	Incest																																					
	Grave Mental Health																																					
	Medical Emergency																																					
	Life																																					
Heartbeat Ban 14-02.1-05.1 to 05.2	Most abortions																																					
	Rape																																					
	Incest																																					
	Grave Mental Health																																					
	Medical Emergency																																					
	Life																																					
Post-20 weeks 14-02.1-05.3	Most abortions																																					
	Rape																																					
	Incest																																					
	Grave Mental Health																																					
	Medical Emergency																																					
	Life																																					
Dilation and evacuation (D&E) ban 14-02.1-04.2	Most abortions																																					
	Rape																																					
	Incest																																					
	Grave Mental Health																																					
	Medical Emergency																																					
	Life																																					
Ban on abortion 12.1-31-12	Most abortions																																					
	Rape																																					
	Incest																																					
	Grave Mental Health																																					
	Medical Emergency																																					
	Life																																					

Post-Viability

“Heartbeat Ban”

Post-20 Weeks

Dilation and Evacuation

“Trigger Ban”

Prohibited Allowed

Weeks Gestation		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36
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Heartbeat Ban 14-02.1-05.1 to 05.2	Most abortions	Prohibited																																		
	Rape	Prohibited																																		
	Incest	Prohibited																																		
	Grave Mental Health	Prohibited																																		
	Medical Emergency	Allowed																																		
	Life	Allowed																																		

“Heartbeat Ban”

Ban on abortion 12.1-31-12	Most abortions	Prohibited																																		
	Rape	Allowed																																		
	Incest	Allowed																																		
	Grave Mental Health	Prohibited																																		
	Medical Emergency	Prohibited																																		
	Life	Allowed																																		

“Trigger Ban”

Heartbeat Ban and Trigger Ban Combined

	Prohibited						Allowed																															
Weeks Gestation	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36		
Most abortions	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	
Rape	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	
Incest	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	
Medical Emergency	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Life	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed

Under established legal principles, the heartbeat ban controls over the trigger ban wherever applicable.