Testimony prepared for the
House Human Services Committee
February 5, 2025
By: Justine Burnham, North Dakota Resident (Private Citizen)
RE: HB 1488, relating to abortion restriction in North Dakota

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Chair Ruby, and members of the House Appropriations Human Resources Committee, my name is Justine Burnham. I am a resident of North Dakota, and I am one of approximately 377,000 women in North Dakota whose rights to self-determination in healthcare are threatened by this bill. Thank you for the opportunity to testify in opposition to HB 1488.

While some of the proposed amendments in HB 1488 are neutral or positive, this bill presents a serious violation of women's rights in its attempt to establish an abortion approval committee.

To my knowledge, no other portion of the North Dakota Century Code compels any citizen to obtain approval for a healthcare decision from a committee of people who were not chosen by that individual to provide them with care.

In fact, NDCC 23-06.5 says this: "Every competent adult has the right and responsibility to make the decisions relating to the adult's own health care, including the decision to have health care provided, withheld, or withdrawn."

The authority of self-determination in healthcare is not to be outsourced to another person except through a willfully-signed health care directive that can be revoked by an individual at any time. The chapter goes on to say that a person "may not exercise the authority of agent while serving" in the capacity of a "nonrelative of the principal who is an employee of the principal's health care provider."

The proposal of an abortion approval committee presents multiple violations of this chapter of our Century Code. In all other circumstances where the state grants an agent the authority to make healthcare decisions for another adult, due process is required. In most cases, due process involves a competent adult consensually authorizing a healthcare agent to act on their behalf through the execution of a health care directive, which has built-in accountability to ensure that the agent does not overstep their authority or appropriate the rights of the adult that they are acting as an agent for. In more rare cases, due process involves proving that an adult is not competent and therefore needs an agent to make healthcare decisions for them.

HB 1488 seeks to avoid due process by forcibly assigning an agent — in fact, three agents — to make a healthcare decision for a competent adult. And because the agents in question are likely to be non-relative employees of the principal's healthcare provider, this bill will in all likelihood force North Dakota healthcare facilities to break the law.

HB 1488 is also a blatant form of sex-based discrimination in healthcare, because it attempts to wrestle away healthcare rights not for everyone, although that would be wrong too — but for women specifically.

I am also forced to conclude that the establishment of an abortion committee by HB 1488 is a violation of the Constitution of the State of North Dakota.

As I'm sure you are aware, NDCC 12.1-19.1 issues a near total ban on abortion in the state of North Dakota. In September 2024, the Honorable Bruce Romanick issued an order that rendered this statute unenforceable. Specifically, Judge Romanick found that it "violates the Constitution of the State of North Dakota and is void for vagueness and of no effect."

Judge Romanick also affirmed that "pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women** – specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness."

The state is currently in the process of appealing Judge Romanick's order, and our Supreme Court has yet to issue a final ruling on this appeal. But in a majority opinion filed on January 24 of this year, the North Dakota Supreme Court reiterated that "North Dakota's history and traditions, as well as the plain language of its Constitution, establish that the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood." The Court also denied the state's motion to stay Judge Romanick's order voiding chapter 19.1 of our criminal code.

HB 1488 violates the state Constitution by stripping women of their Constitutionally-protected rights without due process. To cite the Supreme Court's recent majority opinion: "Under our state Constitution, no person shall be deprived of life, liberty, or property without due process of law."

Furthermore, the proposed limitation that an abortion is permissible through 15 weeks, and increasingly restricted in subsequent intervals, is arbitrary. This problem has

already been critiqued by North Dakota courts, and widening the window from six weeks to 15 weeks does not solve that problem. There is nothing special about 15 weeks, other than that most abortions occur at or before 13 weeks of gestation. However, most babies are not considered to be viable — that is, able to survive outside the womb — prior to between 22 and 25 weeks. This leads me to believe that the limitations on abortion after 15 weeks cannot be enforced, because they are too arbitrary.

My critiques of HB 1488 do not end there. Its definitions of certain terms lack the precision needed for us to effectively debate and litigate abortion rights and restrictions.

For example, let us look at the definitions of “abortion” and “viable” in HB 1488. Unlike some opponents of this bill, I am not concerned that the change of “unborn child(ren)” to “fetus(es)” is dehumanizing. A fetus and a toddler are both human offspring in different stages of development. One has been born; the other has not. Neither term is dehumanizing, because they both refer to humans in a way that clarifies the developmental stage of the humans in question. Such critiques seem to imply that the definition of an abortion necessitates an assertion of personhood and/or rights, but this is not true. It only requires that we clearly and factually define the procedure, so that we can subsequently and effectively legislate when abortion is and is not permissible in our state.

I do believe that we can achieve more objective, accurate, and precise definitions of “abortion” and “viability” than HB 1488 offers. I believe that our definitions can mitigate unintended consequences resulting from language that is ambiguous, irrelevant, or overly-specific in a context where different applications are needed.

Respectfully, I ask you to consider the following:

1. *"Abortion” means the prescription, provision, and/or use of any medical or surgical treatment that is intended to terminate viable human gestation. If the intent of a medical or surgical treatment is not to terminate viable human gestation, it is not an abortion, even if the same treatment may also be used to perform or induce an abortion.*

2. *“Viable human gestation” means the ongoing development of human offspring inside the uterus. It does not mean:*

    a. *The ongoing development of human offspring outside of the uterus as the result of an ectopic pregnancy or a fertility treatment, including in vitro fertilization (IVF);*

b. *The complete or partial remains of human offspring within the uterus that have ceased developing as the result of a miscarriage, a spontaneous abortion, or a molar pregnancy.*

3. *"Viable fetus" means an unborn human offspring in the fetal stage of development at or after a gestational age of 25 weeks, unless otherwise determined by a medical provider.*

Providing definitions for both "viable human gestation" and "viable fetus" does not require us to limit the term "viable" to one application when it is useful in several.

While I'm not sure that my suggested definition of "viable fetus" will satisfy the court's standard of avoiding an arbitrary time frame, it is more consistent with statistical data on the survival rates of babies. In that regard, it is less arbitrary than the limitations established in HB 1488. It is also less arbitrary in that it allows a medical provider to assess factors other than gestational age which impact the determination of viability, including but not limited to the late discovery of a fatal congenital condition.

My proposed definition of abortion also offers precision in several ways that HB 1488 does not. It differentiates between an abortion procedure and a non-abortion procedure by focusing on the intent or goal of the treatment, rather than the method or type of treatment. It removes duplicative language (such as "drug, medicine, and substance" or "instrument and device"). It removes information that is simply not needed in order for us to define abortion — like how many fetuses are undergoing gestation when the abortion occurs, and whether or not the procedure fails or succeeds.

This definition does not rely on specifying the methods by which an abortion may be performed, so it frees legislators from the need to write laws that account for every current and future method of abortion. It also encourages legislators to avoid banning treatments that help women survive and recover from pregnancy loss, because abortion rights and restrictions can be debated and legislated without concern for the specific method of treatment.

In short, HB 1488 fails to offer a clear and precise definition of abortion, which sets us up for unintended consequences in the subsequent litigation of rights to and restrictions on abortion.

In addition to the many concerns I have about the failures of this bill to comply with legal precedent, I have concerns about the printed materials that DHHS is required to publish. While some of the proposed changes in this section are positive or neutral in

that they simplify the section, additional changes should be made to ensure that this section complies with Constitutionally-protected rights, accessibility guidelines, and common sense. Here are a few concerns that jumped out at me:

- To ensure a consistent ethic across all printed materials, the introductory section should read: “The department of health and human services shall publish the following objective, non-judgemental, and scientifically-accurate materials in an easily-comprehensible format:”

- To ensure that women’s constitutionally-protected rights are upheld, and to ensure that the materials are unbiased and non-coercive, any geographically indexed materials should inform women about where to receive care for pregnancy loss and abortion, as well as pregnancy care, postpartum care, and adoption services.

- The requirements for some of the educational materials regarding gestational development may be self-defeating. A booklet format, for instance, does not always lend itself to easy comprehension — but it’s required for one of the items. And the requirement of color photographs may actually be less comprehensible for someone with severe color blindness. You could educate more effectively if you let DHHS hire graphic designers and copywriters with the competency to create effective communication without arbitrary design requirements.

- You could also further simplify the biology lesson requirements by stating that they must “inform the woman of the phases of gestational development, from the germinal stage to the end of the fetal stage at birth, with a photograph of a fetus at each stage of development.” Personally, I feel that DHHS has the competency to determine which stages to include. Additionally, information on the possibility of survival does not need to be included in this information, because this is entirely subjective to the health and environmental conditions of the mother and her offspring, as well as many other considerations. For the most accurate information specific to her situation, a woman should consult with her medical provider.

Chair Ruby, and members of the House Appropriations Human Resources Committee, North Dakotans have entrusted you with the responsibility and privilege of upholding our rights and our State Constitution. HB 1488 violates the State Constitution, and needs a tremendous amount of work to be functional and refrain from such violations. On those grounds, I urge you to unanimously oppose this bill. Thank you.

The following pages contain copies, for your reference, of the judicial orders and opinions that I referred to in my testimony, as well as a copy of NDCC 23-06.5, which I also referred to.

STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **SOUTH CENTRAL JUDICIAL DISTRICT**

Access Independent Health Services, Inc., d/b/a Red River Women's Clinic, on behalf of itself and its patients; Kathryn L. Eggleston M.D., on behalf of herself and her patients; Ana Tobiasz, M.D. on behalf of herself and her patients; Erica Hofland, M.D., on behalf of herself and her patients; Collette Lessard, M.D. on behalf of herself and her patients,

Plaintiffs,

v.

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota; Kimberlee Jo Hegvik, in her official capacity as the State's Attorney for Cass County; Julie Lawyer, in her official capacity as the State's Attorney for Burleigh County; Amanda Engelstad, in her official capacity as State's Attorney for Stark County; and Haley Wamstad, in her official capacity as the State's Attorney for Grand Forks County,

Defendants.

Case No. 08-2022-CV-01608

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

[¶1] This matter is before the Court on the Defendant, Drew Wrigley's, *Motion for Summary Judgment* seeking dismissal of the Plaintiffs' *Amended Complaint* in this matter. *Docket No. 450* (*State Defendants Motion for Summary Judgment*). The Plaintiffs filed an *Opposition to the State's Motion for Summary Judgment* arguing there are disputed issues of material fact and requesting that the Court deny the Defendant's *Motion*. *Docket No.*

551 (Plaintiffs' Opposition to the State's Motion for Summary Judgment). The Defendant filed a *Reply Brief in Support of Motion for Summary Judgment* opposing the Plaintiffs' arguments. *Docket No. 559 (State Defendant's Reply Brief in Support of Motion for Summary Judgment)*.

[¶2] A hearing was held on the *Motion for Summary Judgment* on July 23, 2024. Both parties presented oral argument to the Court regarding their respective arguments and positions.

BACKGROUND

[¶3] The factual and procedural background of this case have been detailed extensively in prior Court orders and in the North Dakota Supreme Court's decision in *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d (2023). That decision followed a supervisory writ challenging this Court's prior issuance of a preliminary injunction enjoining enforcement of then N.D.C.C. § 12.1-31-12. The *Wrigley v. Romanick* Court left the preliminary injunction in place concluding the North Dakota Constitution "provides a fundamental right to receive an abortion to preserve a pregnant woman's life or health." 2023 ND 50 at ¶¶26-27. The Court stopped short of deciding the precise scope of potential health risks encompassed by their ruling, or whether there are fundamental rights broader in scope than where it is necessary to preserve the woman's life or health. *Id.* at ¶ 20.

[¶4] Following the Court's decision in *Wrigley v. Romanick*, the North Dakota Legislature amended North Dakota's abortion statutes by enacting Senate Bill 2150. Senate Bill 2150 repealed N.D.C.C. § 12.1-31-12 – the statute previously enjoined in this action. Senate Bill 2150 also created a new chapter to N.D.C.C. Title 12.1, which became codified at N.D.C.C. Ch. 12.1-19.1, and eliminated the affirmative defense mechanism

with respect to the criminal charges that could be brought under then existing N.D.C.C. § 12.1-31-12. Senate Bill 2150 converted these affirmative defenses into exceptions from the application of the criminal statute.

[¶5] The law now provides an exception, among other exceptions or exclusions, for "[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). The law also provides an exception for "[a]n abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual abuse of a ward, or incest . . . if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶6] Plaintiffs subsequently filed an *Amended Complaint* requesting that this Court deem the amended abortion ban unconstitutional under the North Dakota Constitution, asserting that the laws are void for vagueness, and that the laws violate North Dakota citizens' various fundamental rights. *Docket No. 151* (*Amended Complaint*).

[¶7] Following the close of discovery, the Defendants now request that the Court enter summary judgment in their favor, and dismiss the Plaintiffs' *Amended Complaint* in whole, arguing there are no disputed issues of material fact, and the Plaintiffs are unable to satisfy the necessary burdens required to establish that N.D.C.C. ch. 12.1-19.1 is unconstitutional. The Plaintiffs resist the *Motion* asserting there are disputed issues of material fact, and the matter should proceed to trial.

[¶8] The North Dakota Supreme Court previously noted this issue as being "an issue of vital concern regarding a matter of important public interest." *Wrigley v. Romanick*, 2023 ND 50, ¶ 11, 988 N.W.2d (2023). Indeed, this Court recognizes that the decision in this

matter may be one of the most important this Court issues during its time on the bench. However, in reaching the decision below, it is also not lost on the Court that, on appeal, this Court's decision is given no deference.

[¶9] The Court mentions this simply to point out that while the Court believes this issue and decision to be of vital importance for the citizens of North Dakota, the Court also recognizes that it is not ultimately this Court's decision to make. The Court is left to craft findings and conclusions on an issue of vital public importance when the longstanding precedent on that issue no longer exists federally, and much of the North Dakota precedent on that issue relied on the federal precedent now upended – with relatively no idea how the appellate court in this state will address the issue. Therefore, the decision below is the Court's best effort to apply the law as written to the issue presented and to ensure that the fundamental rights of North Dakota citizens are protected in the manner our state constitution demands.

[¶10] The United State's Supreme Court has decided to overturn its longstanding prior precedent in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 218 (2022), whereby it overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). In doing so, the United States Supreme Court determined there is no fundamental right to abortive care under the United States Constitution, and the Court essentially obliterated its prior longstanding precedent on abortion rights, leaving those decisions to the States.

[¶11] This Court sees no reason to do the same under North Dakota precedent and the North Dakota Constitution. For the reasons outlined below, the Court concludes that (1) the Amended Abortion Ban set forth in Chapter 12.1-19.1, N.D.C.C., as currently drafted,

is unconstitutionally void for vagueness; and (2) pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women** – specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness enumerated in article [I], section 1 of the North Dakota Constitution.

[¶12] Therefore, the Court concludes the Amended Abortion Ban, codified in Chapter 12.1-19.1, is unconstitutional as it impermissibly infringes on every single one of these fundamental rights.

LAW AND DECISION

1. Summary Judgment Standard

[¶13] The standard for summary judgment is well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . [W]e must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record.

Golden v. SM Energy Co., 2013 ND 17, ¶ 7, 826 N.W.2d 610, 615 (quoting *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754. "Summary judgment, when appropriate, may be rendered against the moving party." N.D.R.Civ.P. 56(c)(3).

[¶14] In this case, the Defendants argue that summary judgment is appropriate, as the issues before the Court are purely legal issues and there are no disputed issues of material fact. The Plaintiffs argue that there are factual disputes to be presented at trial and decided

by the Court.

[¶15] The Court concludes there are no material factual disputes in this case. The issues presented to the Court in this case, and the relief requested, are purely legal issues.. While the Plaintiffs attempt to frame their constitutional challenge as an as-applied challenge supported by speculative facts, it simply is not an as-applied challenge. Plaintiffs have not identified any specific facts that the Court needs to hear at a trial to determine the constitutional challenges to the law in this matter,

[¶16] When the Court inquired of Plaintiffs' counsel at the hearing on the *Motion for Summary Judgment*, what factual disputes needed to be addressed at trial, counsel did not identify factual disputes, but instead indicated that it was important for the Court to hear testimony from witnesses to judge credibility. To the extent there are factual disputes that Plaintiffs feel need to be presented to the Court for the Court to determine the constitutionality of the law in this case – a question of law - those facts have not been clearly identified. It appears to the Court that a trial would simply re-state, through live testimony, the information the parties have already presented in written filings.

[¶17] Therefore, the Court concludes this matter is appropriate for resolution on a pending summary judgment motion and the filings submitted by the parties.

2. Standing

[¶18] The State Defendants first argue that Plaintiffs Access Independent Health Services, Inc. and Dr. Kathryn Eggleston lack standing in this matter because neither can allege a redressable injury caused by the statute since they no longer practice and/or operate in North Dakota.

[¶19] "A party is entitled to have a court decide the merits of a dispute only after

demonstrating he has standing to litigate the issues placed before the court." *State v. Tibor*, 373 N.W.2d 877, 879 (N.D. 1985) (citing *State v. Carpenter*, 301 N.W.2d 106 (N.D. 1980)). However, so long as one plaintiff has standing, a court may proceed as if all plaintiffs raising the same issues and requesting the same relief have standing. *See, e.g., N.D. Legis. Assembl. V. Burgum*, 2018 ND 189, ¶ 38, 916 N.W.2d 83 ("Because the issues raised and the relief requested by the Governor and the Attorney General are identical, we need not resolve whether the Attorney General has standing in his own right to bring the cross petition.").

[¶20] In this case the State challenges only Dr. Eggleston's and the Clinic's standing. However, the State does not argue that those two Plaintiffs raise different arguments or seek different relief from the other Plaintiffs. The issues raised and the relief requested by all of the Plaintiffs are identical. Since the "issues raised and the relief requested" by the North Dakota physicians is identical to that of Dr. Eggleston and the Clinic, the Court "need not resolve" whether two out of the five plaintiffs have standing in their "own right." *See Burgum*, 2018 ND 189 at ¶ 38.

3. Due Process/Void for Vagueness

[¶21] Plaintiffs argue that N.D.C.C. ch. 12.1-19.1 is void for vagueness in violation of the "North Dakota Constitution's guarantee that a person will not be deprived of their fundamental rights without due process of law, as guaranteed by N.D.Const., art. I, § 12." *Docket No. 151* (*Amended Complaint*) at ¶ 70. Plaintiffs generally argue the Amended Abortion Ban does not provide physicians with adequate notice of what the law allows and forbids, and physicians do not know against which standard their conduct will be tested and their liability determined. *See Docket No. 551* (*Plaintiffs' Opposition to the State's*

Motion for Summary Judgment) at pp.9-22.

[¶22] "A law is void for vagueness if it lacks ascertainable standards of guilt, such that it either forbids, or requires 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "Vague laws offend due process because they violate the two essential values of fair warning and nondiscriminatory enforcement:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222 (1972). [Footnotes omitted.]

State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1985).

[¶23] "A law is not unconstitutionally vague if: (1) the law creates minimum guidelines for the reasonable police officer, judge, or jury charged with enforcing the law, and (2) the law provides a reasonable person with adequate and fair warning of the prohibited conduct." *State v. Ness*, 2009 ND 182, ¶ 6, 774 N.W.2d 254.

[¶24] In this case, Section 12.1-19.1-02 of the North Dakota Century Code establishes that "[i]t is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion." N.D.C.C. § 12.1-19.1-02. Section 12.1-19.1-03, N.D.C.C., provides for several exceptions to the general ban on abortions, including "[a]n abortion deemed necessary based on reasonable medical judgment which

was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶25] The Plaintiffs argue that this exception fails to provide physicians with adequate notice of what the law allows and forbids because it combines both an objective "reasonable medical judgment" standard, with a subjective "which was intended to prevent death or a serious health risk" standard.

[¶26] The concern the Court has in this case is not with the "reasonable medical judgment" standard currently required by the exception. That standard is not new, nor is it unique to the abortion context and is a common term in medical malpractice actions. The Court's concern stems from the dual standard of both subjective and objective elements currently required in the exception. As currently written, a North Dakota physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held criminally liable if, after the fact, other physicians deem that the abortion was not necessary or was not a reasonable medical judgment.

[¶27] The Defendants cite extensively to *State v. Zurawski*, 2024 WL 2787913, 67 Tex. Sup. Ct. J. 843 (Texas, 2024), to argue that a similarly-worded statute in Texas has been upheld as constitutional on very similar arguments. The Defendants heavy reliance on this case is misplaced.

[¶28] First, the *Zurawski* court was not asked to determine if the Texas statute was unconstitutionally void for vagueness, and the decision itself did "not address, and in turn does not foreclose, such a [vagueness] challenge" in Texas, much less in North Dakota. *Id.* at *47. Texas also has not recognized a fundamental right to life-saving or health preserving abortions under its state constitution, whereas North Dakota has. *See Wrigley v.*

Romanick, 2023 ND 50, at ¶ 40. And perhaps most importantly, the Texas statute's medical exception has significant differences from North Dakota's. The Texas statute at issue in *Zurawski* employs a purely objective standard, while the plain language of the North Dakota exception depends in part on what the physician subjectively "intended." N.D.C.C. § 12.1-19.1-03(1).

[¶29] The Court finds the *Zurawski* decision, which is not binding authority on this Court, distinguishable in nearly every critical respect. Nothing in the Texas Supreme Court's decision interpreting a different law, in a different state, that employs different language "provides an adequate and fair warning of the prohibited conduct" to North Dakota citizens under North Dakota law. That is the job of the North Dakota Legislature, not the Texas Supreme Court.

[¶30] With both subjective and objective elements, the North Dakota medical exception, as currently written, simply does not allow a physician to know against which standard his conduct will be tested and his liability determined. Due process is violated when physicians cannot know the standard under which their conduct will ultimately be judged. On its face, before even considering potential as-applied challenges, the law is confusing and vague. As written, it can have a profound chilling effect on the willingness of physicians to perform abortions, even where the North Dakota Supreme Court has already said there is a fundamental right to do so to preserve a woman's life or health.

[¶31] The statute also includes an exception for rape or abuse, and specifically does not apply to "[a]n abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest . . . if the probable gestational age of the unborn child is six weeks or less."

N.D.C.C. § 12.1-19.1-03(2).

[¶32] This provision does not make clear what information a physician must require or receive to determine if this exception applies and permits a legal abortion. It allows for termination of a pregnancy that based on reasonable medical judgment resulted from a crime. Physicians have no way of reliably determining, with reasonable medical judgment or otherwise, whether or not gross sexual imposition, sexual abuse of a ward, or incest occurred, other than what a patient or others report to them. Patients can be untruthful in what they report to their doctors, and from this Court's own experience in a vast number of criminal cases, there are oftentimes no physical or medical signs or injuries to support allegations of rape or abuse. There are also a number of victims who become pregnant as a result of rape or abuse and do not report it as such, to their physician or otherwise.

[¶33] The determination of whether a pregnancy resulted from rape or abuse is fraught with uncertainty and highly susceptible to being subsequently disputed by others. Indeed, jurors often come to differing conclusions when these cases are charged out in a criminal court. Physicians are not law enforcement officers, investigators, judges, or jurors. They have no way of reliably determining, again with reasonable medical judgment or otherwise, if an individual's pregnancy was the result of a criminal act. Put simply, such a determination is a legal judgment, not a medical one.

[¶34] As currently written, physicians are compelled to guess the law's meaning and application. This lack of clarity in the law – forcing physicians to make a medical judgment regarding the factual circumstances of how a patient became pregnant, with no way of reliably or consistently making that determination medically, and charging them with a felony if they get it wrong – simply cannot and does not comport with the

requirements of due process.

[¶35] The Court concludes the law is impermissibly vague on its face, and as currently written it threatens to inhibit the exercise of constitutionally protected rights for both North Dakota physicians and North Dakota patients.

4. Fundamental Rights

[¶36] Article 1, Section 1 of the North Dakota Constitution provides:

> **Section 1.** All individuals are by nature equally free and independent and have certain **inalienable rights**, among which are those of enjoying and defending **life** and **liberty**; acquiring, possessing and protecting **property** and reputation; pursuing and obtaining **safety** and **happiness**; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 1 (emphasis added).

[¶37] Article 1, Section 25 of the North Dakota Constitution also provides:

> **Section 25.** To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role throughout the criminal and juvenile justice systems, and to ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than the protections afforded to criminal defendants and delinquent children, all victims shall be entitled to the following rights, beginning at the time of their victimization:
>
> a. The right to be treated with fairness and respect for the victim's dignity.
> b. The right to be free from intimidation, harassment, and abuse.
> c. The right to be reasonably protected from the accused and any person acting on behalf of the accused.
> . . .
> f. The right to privacy. . . .

N.D.Const. art. I, § 25(1). "The granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims." *Id.* at § 25(3).

[¶38] Courts use the following framework for interpreting constitutional provisions:

> In interpreting constitutional provisions, we apply general principles of statutory construction. *Thompson v. Jaeger,* 2010 ND 174, ¶ 7, 788 N.W.2d 586. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision. *City of Bismarck v. Fettig,* 1999 ND 193, ¶ 8, 601 N.W.2d 247. The intent and purpose of constitutional provisions are to be determined, if possible, from the language itself. *Thompson,* at ¶ 7. In construing constitutional provisions, we ascribe to the words the meaning the framers understood the provisions to have when adopted. *Kadrmas v. Dickinson Pub. Schs.,* 402 N.W.2d 897, 899 (N.D.1987). We may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions. *See State v. Orr,* 375 N.W.2d 171, 177–78 (N.D.1985) (interpreting right to counsel provision of state constitution in view of statutes in effect when constitution adopted); *City of Bismarck v. Altevogt,* 353 N.W.2d 760, 764–65 (N.D.1984) (interpreting right to jury trial under state constitution in view of territorial statutes defining right to jury trial).

MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 25, 855 N.W.2d 31, 41. "This Court has recognized the due process language in N.D. Const. art. I, § 12 protects and insures the use and enjoyment of the rights declared by N.D. Const. art. I, § 1." *Id.* at ¶ 26 (citing *Cromwell*, 72 N.D. at 574-75, 9 N.W.2d at 919) (internal quotations omitted).

[¶39] "[T]he North Dakota Constitution must be read in the light of history." *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974). However, the Court has also stated that the Constitution is "a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted." *State v. Norton*, 255 N.W. 787, 792 (N.D. 1934). "It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested." *Id.*

[¶40] This Court will not spend a significant amount of time addressing the history and laws surrounding abortion, women's rights, and women's health in North Dakota at the time the Constitution was drafted and enacted in 1889. Indeed, this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the

laws at that time, likely would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that "individuals" did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests. It quite simply was not the "tradition" of the time, and therefore was not reflected in the laws or in the state constitution.

[¶41] The inalienable rights guaranteed to North Dakota citizens under article 1, section 1 of the North Dakota Constitution did not even include women until 1984 when the language of the state constitution itself was amended from "men" to "individuals." If the reader finds this insignificant, consider it stated another way: women were not explicitly included in the North Dakota Constitution's enumerated protections until only approximately 40 years ago, during this Court's lifetime.

[¶42] The Court also recognizes and notes that in 1889 medical knowledge was not as advanced as it is today. The framers of our state constitution may not have recognized mental health as an important component of health for men or for women. Again, it quite simply was not the tradition and understanding of the time. The fact that mental health, and other medical conditions, were not recognized in the same manner and context in 1889 does not mean those conditions cannot and should not be recognized today, and in the light of the more-advanced medical knowledge we have today.

[¶43] The Court simply cannot conclude that because North Dakota laws, North Dakota history, and North Dakota traditions in and around 1889 would have, and in fact did, deprive women of significant liberty interests and interests regarding their health, that the

same view must be taken today. This does not mean that history and tradition do not matter, but if we can learn anything from examining the history and prior traditions surrounding women's rights, women's health, and abortion in North Dakota, the Court hopes that we would learn this: that there was a time when we got it wrong and when women did not have a voice. This does not need to continue for all time, and the sentiments of the past, alone, need not rule the present for all time.

[¶44] "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Such issues "involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Id.* at 853. The United States Supreme Court previously explained how reasonable individuals have different opinions and views on these matters:

> One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

Casey, 505 U.S. 833 at 853.

[¶45] Included within the realm of liberty is "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 851 "Our precedents have respected the private realm of family life which the state cannot enter."

Id. (internal quotations omitted). "These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

[¶46] The Court then recognized:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. 833, at 852.

[¶47] The North Dakota Supreme Court has said "the language in N.D.Const. art I, § 1, embodies the essence of 'self-evident truths,' and the term 'liberty' includes 'in general, the opportunity to do those things which are ordinarily done by free men [and now also women].'" *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197 at ¶ 27 (quoting *Cromwell*, 72 N.D. at 573-74). "'Liberty' as used in the Constitution embraces the free use by all citizens of their powers and faculties subject only to the restraints necessary to secure the common welfare." *State v. Cromwell*, 72 N.W. 565, 9 N.W.2d 914 (N.D. 1943). The North Dakota Supreme Court has previously held that individuals have both a federal and state constitutional liberty interest in refusing unwanted medical treatment, and that "a person's interest in personal autonomy and self-determination . . . is a fundamentally commanding one. . . ." *State ex rel. Schuetzle*, 537 N.W.2d at 362 n. 2.

[¶48] The North Dakota Supreme Court has also previously explained the constitutional right to pursue happiness as:

> This latter expression (the pursuit of happiness) is one of a general nature, and the right thus secured is not capable of specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of 'liberty'. The happiness of men [and now also women] may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home. The search for happiness is the mainspring of human activity. And a guarantied constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars thus mentioned, except in so far as may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most indefinite, is also one of the most comprehensive to be found in the constitutions.

State v. Cromwell, 72 N.D. 565, 574, 9 N.W.2d 914, 918–19 (1943) (quoting *Blacks Constitutional Law*, section 145.

[¶49] Although not stated explicitly, implicit in the right to personal autonomy- liberty- and implicit in the right to happiness, is a woman's right and responsibility to decide what her pregnancy demands of her in the context of her life and in the context of her health. Prior to viability, a woman must retain the ultimate control over her own destiny, her own body, and ultimately the path of her life. A woman's choice of whether or not to carry a pregnancy to term shapes the very nature and future course of her life, on nearly every possible level. The Court finds that such a choice, at least pre-viability, must belong to the individual woman and not to the government. The inalienable rights to life, liberty, and happiness demand it.

[¶50] And make no mistake: if the government is permitted near-unlimited power to tell women when they are prohibited from having an abortion, the government also has the same near-unlimited power to tell women when they *must* have an abortion. The Court recognizes that the laws at issue in this case do not go there. However, in determining whether certain laws infringe on North Dakotan's liberty interest in procreative autonomy, the Court is ever mindful in recognizing that the government can and often will use its power both ways. In other words, if the government can force a woman to carry a pregnancy to term where it would not otherwise be the woman's choice, it is not farfetched to assume the government can then also force a woman to have an abortion where it would not otherwise be the woman's choice.

[¶51] This Court holds that such unlimited governmental overreach, both ways, is restricted by the liberty interest guaranteed to all North Dakota citizens in article 1, section 1 of the North Dakota Constitution. Such governmental overreach is also restricted by the fundamental constitutional right to pursue and obtain safety and happiness.

[¶52] All North Dakota citizens, including women, have the right to make fundamental, appropriate, and informed medical decisions in consultation with a physician and to receive their chosen medical care among comparable alternatives. Such a choice is a fundamental one, central to personal autonomy and self-determination. Those choices belong to the individual, not the government. That is the essence of what liberty and happiness require.

[¶53] The Court concludes that article 1, section 1 of the North Dakota Constitution guarantees each individual, including women, the fundamental right to make medical judgments affecting his or her bodily integrity, health, and autonomy, in consultation with

a chosen health care provider free from government interference. This section necessarily and more specifically protects a woman's right to procreative autonomy – including to seek and obtain a pre-viability abortion.

5. Strict Scrutiny Analysis

[¶54] "A statute which restricts a fundamental right is subject to strict scrutiny standard of review, which will only be justified if it furthers a compelling government interest and is narrowly tailored to serve that interest." *Wrigley v. Romanick*, 2023 ND 50 at ¶ 28. "The State has a compelling interest in protecting women's health and protecting unborn human life, as these interests are at least of the same importance as compelling interests previously identified by this Court." *Id.* at ¶ 29. "Nevertheless, the State must still show [the law] is necessary to achieve the compelling state interests." *Id.* at ¶ 30. "While we note the legislature can regulate abortion, it must do so in a manner that is narrowly tailored to achieve the compelling interest." *Id.*

[¶55] Having concluded that there is a fundamental liberty interest for a woman to seek and obtain a pre-viability abortion, this Court must consider whether the Amended Abortion Ban is narrowly tailored to achieving the State's expressed compelling interests.

[¶56] The compelling interests identified by the State are protecting women's health and protecting unborn human life. On its face, the Amended Abortion Ban unnecessarily restricts a woman's right to procreative autonomy. The law currently allows a woman to obtain an abortion to preserve her life or health under a standard that the Court has already determined is facially vague and unclear. Additionally, even assuming the law is clear, it takes away a woman's right to choose and access abortion even pre-viability, other than in the very limited (and currently vague) exceptions identified by the law.

[¶57] The State has not identified a compelling government interest prior to viability, and certainly has not identified a compelling interest that outweighs a woman's fundamental right to pre-viability procreative autonomy. As currently drafted, unless a limited exception to the law applies, the State would force a woman to carry a pregnancy to term regardless of the circumstances and regardless of the harm it would cause to her, her family, her unborn child, and the course of her life. The law takes away her liberty and deprives her of the right to pursue and obtain safety and happiness.

[¶58] Unborn human life, pre-viability, is not a sufficient justification to interfere with a woman's fundamental rights. Criminalizing pre-viability abortions is not necessary to promote the State's interests in women's health and protecting unborn human life. The law simply is not narrowly tailored to achieving compelling government interests.

[¶59] The State has also not identified how Section 12.1-19.1-03(2), the exception for cases of rape or abuse, is narrowly tailored to achieving the promotion of women's health and the protection of unborn human life. The exception in cases of rape, incest, or sexual abuse currently only allows for an abortion after a doctor using "reasonable medical judgment" determines that such abuse occurred, regardless of what actually happened to the pregnant woman or girl. Even then, the exception only allows for an abortion "if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶60] This is not in any way narrowly tailored to achieving the state's compelling interests. For women and girls who have been raped or sexually abused, they often do not tell anyone – sometimes for years - including their physician, even if they find out that the abuse resulted in a pregnancy. The exception as currently drafted certainly does not

achieve the compelling interest of promoting women's health, but instead completely disregards it.

[¶61] It is also unclear to the Court why the Legislature chose six weeks or less as the cutoff for this exception. Unborn human life is no different at six weeks gestational age or less as the result of sexual abuse, incest, or rape than unborn human life at six weeks gestational age or less as the result of consensual sexual activity. The State is silent as to why unborn human life is less important in the context of rape, incest or abuse, than it is otherwise. In choosing six weeks, however, it appears to the Court that the State concedes that at least at the stage of six weeks or less gestational age, a woman's interests outweigh the interest of unborn human life. This arbitrary determination (six weeks gestational age or less) in the limited context provided (pregnancy resulting from rape, incest, or sexual abuse of a ward) is not narrowly tailored to achieve the State's purported interests.

[¶62] Again, the State has not even identified what compelling interest the State has, pre-viability, in forcing a woman or a girl to carry a pregnancy to term when that pregnancy was the result of rape, incest, or sexual abuse. Victims of crimes have comprehensive constitutional rights under N.D.Const. art I, section 25, including a right to privacy. The State certainly has not identified how the exception is narrowly tailored to achieving its interests by only allowing abortion in such circumstances until six weeks or less gestational age, and only when a health care provider determines based on reasonable medical judgment that the pregnancy resulted from rape, sexual abuse of a ward, or incest. Prior to viability, unborn human life is not a sufficient justification to interfere with crime victim's rights to liberty and privacy in cases of rape, incest, and sexual abuse.

[¶63] Regarding women's life and health, the law also currently provides a definition for

"serious health risk" that explicitly excludes a woman's mental health. The statute defines a serious health risk as:

> [A] condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitated an abortion to prevent substantial physical impairment of a major bodily function, not including and psychological or emotional condition. The term may not be based on a claim or diagnosis that the woman will engage in conduct that will result in her death or in substantial physical impairment of a major bodily function.

N.D.C.C. § 12.1-19.1-01.

[¶64] The Court concludes that this provision impermissibly limits a physician's discretion to determine whether an abortion is necessary to preserve the woman's health because it limits the physician's consideration to only physical health conditions. It also impermissibly infringes on a woman's fundamental right to a life-saving and health-preserving abortion. As the United States Supreme Court has previously explained:

> [M]edical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All of these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operated for the benefit, not the disadvantage of the pregnant woman.

Doe v. Bolton, 410 U.S. 179, 192 (1973).

[¶65] Again, the State has not identified what compelling interest it has in forcing a woman to carry a pregnancy to term when it would be detrimental to her mental health and well-being, particularly pre-viability. The State has also not identified what compelling interest it has in prohibiting physicians from considering a woman's mental health as a part of her overall health and well-being in the context of abortion.

[¶66] The law currently infringes on a physician's ability to even provide a reasonable medical judgment and good medical care to a pregnant woman by excluding a significant

part of the woman's health - psychological and emotional conditions. It is not narrowly tailored to achieving the State's purported interests. Before viability, unborn human life is not a sufficient justification to interfere with a woman's fundamental right to happiness, to preservation of her own mental health and well-being, and to life-saving and health-preserving medical care.

[¶67] The abortion statutes at issue in this case infringe on a woman's fundamental right to procreative autonomy, and are not narrowly tailored to promote women's health or to protect unborn human life. The law as currently drafted takes away a woman's liberty and her right to pursue and obtain safety and happiness. The law also impermissibly infringes on the constitutional rights for victims of crimes. Therefore Chapter 12.1-19.1, N.D.C.C. is unconstitutional.

CONCLUSION

[¶68] For the foregoing reasons, the Court concludes that (1) the Amended Abortion Ban set forth in Chapter 12.1-19.1, N.D.C.C., as currently drafted, is unconstitutionally void for vagueness; and (2) pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women** – specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness enumerated in article [I], section 1 of the North Dakota Constitution.

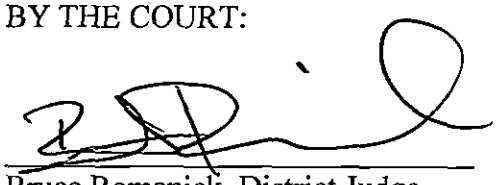
[¶69] The Court concludes Chapter 12.1-19.1, N.D.C.C., violates the Constitution of the State of North Dakota and is void for vagueness and of no effect.

[¶70] Plaintiffs shall prepare and file a proposed judgment consistent with this Order within 14 days of the date of this Order.

IT IS SO ORDERED.

Dated this 12 day of September, 2024.

BY THE COURT:



Bruce Romanick, District Judge
South Central Judicial District

20240291 - Filed 01-24-2025
NORTH DAKOTA SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2025 ND 26

Access Independent Health Services, Inc., d/b/a Red River Women's Clinic, on behalf of itself and its patients; Kathryn L. Eggleston M.D., on behalf of herself and her patients; Ana Tobiasz, M.D. on behalf of herself and her patients; Erica Hofland, M.D., on behalf of herself and her patients; Collette Lessard, M.D. on behalf of herself and her patients, Plaintiffs and Appellees

v.

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota; Defendant and Appellant

and

Kimberlee Jo Hegvik, in her official capacity as the State's Attorney for Cass County; Julie Lawyer, in her official capacity as the State's Attorney for Burleigh County; Amanda Engelstad, in her official capacity as State's Attorney for Stark County; and Haley Wamstad, in her official capacity as the State's Attorney for Grand Forks County, Defendants and Appellees

No. 20240291

Motion for stay pending appeal from an order of the District Court of Burleigh County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.

MOTION DENIED.

Order of the Court by Crothers, Justice, in which Justice McEvers and District Judge Narum joined. Justice Tufte and Chief Justice Jensen each filed a dissenting opinion.

Meetra Mehdizadeh (argued), Astrid Ackerman (on brief), Marc Hearron (on brief), Zhuya Beatrix Lu (on brief), Jess Braverman (on brief), Caroline Elvig (on brief), Robert Niles-Weed (on brief), Melissa P. Rutman (on brief), Naz D. Akyol (on brief), Lauren A. Kelly (on brief), Liz R. Grefrath (on brief), New York, NY, and Christina A. Sambor (appeared), Bismarck, ND, for plaintiffs and appellees.

Daniel Gaustad, Philip J. Axt, and Courtney R. Titus, Joseph Quinn, Marcus C. Skonieczny, Assistant Attorneys General, Bismarck, ND, for defendant and appellant.

Access Independent Health Services, Inc.,
d/b/a Red River Women's Clinic v. Wrigley
No. 20240291

Crothers, Justice.

[¶1] The State of North Dakota moves this Court under N.D.R.App.P. 8 and 27 for an order staying pending appeal the district court's judgment declaring N.D.C.C. ch. 12.1-19.1 unconstitutional. We deny the motion.

I

[¶2] The State's motion to stay follows the district court's entry of summary judgment for plaintiffs in their constitutional challenge to the most recent version of North Dakota's abortion regulation statutes, N.D.C.C. ch. 12.1-19.1. The North Dakota Legislature enacted N.D.C.C. ch. 12.1-19.1 after this Court denied a writ seeking to vacate the district court's preliminary injunction of an earlier abortion regulation. The previous regulation criminalized all abortions, even those performed to preserve a woman's life or health. It provided an affirmative defense to a physician who performed a life or health preserving abortion if the physician could prove by a preponderance of the evidence the abortion was necessary to save the woman's life. *See* N.D.C.C. §§ 12.1-31-12(2), (3)(a), repealed by 2023 N.D. Sess. Laws ch. 122, § 11. We denied the State's request for a writ after interpreting our Constitution and holding "a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health." *Wrigley v. Romanick*, 2023 ND 50, ¶ 27, 988 N.W.2d 231. Because the law restricted this fundamental right, we decided our strict scrutiny standard applied. *Id.* ¶ 28. We determined the previous regulation was unlikely to satisfy the applicable test. *Id*. ¶ 40.

[¶3] Following *Wrigley I*, the Legislature passed Senate Bill 2150, which repealed N.D.C.C. § 12.1-31-12(2) and enacted N.D.C.C. ch. 12.1-19.1, the constitutionality of which is at issue in this case. *See* 2023 N.D. Sess. Laws ch. 122, § 1. Under N.D.C.C. ch. 12.1-19.1, abortion is a class C felony. The statute defines abortion as:

> "[T]he act of using, selling, or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one or more unborn children in a multifetal pregnancy, with knowledge the termination by those means will with reasonable likelihood cause the death of the unborn child. The use, sale, prescription, or means is not an abortion if done with the intent to:
>
> a. Remove a dead unborn child caused by spontaneous abortion;
> b. Treat a woman for an ectopic pregnancy; or
> c. Treat a woman for a molar pregnancy."

N.D.C.C. § 12.1-19.1-01(1). The Legislature also converted the affirmative defenses under the previous law into exceptions. Section 12.1-19.1-03 provides:

> "This chapter does not apply to:
>
> 1. An abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female.
>
> 2. An abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20, if the probable gestational age of the unborn child is six weeks or less.
>
> 3. An individual assisting in performing an abortion if the individual was acting within the scope of that individual's regulated profession, was under the direction of or at the direction of a physician, and did not know the physician was performing an abortion in violation of this chapter."

[¶4] Plaintiffs, Access Independent Health Services, Inc., d/b/a Red River Women's Clinic and the individual physicians, on behalf of themselves and their patients, subsequently filed an amended complaint with two claims. The first alleges the law violates the physicians' right to due process under N.D. Const. art. I, § 12 because it is unconstitutionally vague. The second claim alleges the

law violates pregnant women's right to life and health preserving care under N.D. Const. art. I, §§ 1, 12. After the plaintiffs filed their amended complaint, state's attorneys in Burleigh, Cass, Grand Forks, and Stark counties filed a stipulation agreeing that if the district court entered an order finding N.D.C.C. ch. 12.1-19.1 unconstitutional, they would not enforce it "unless and until said order is vacated or overturned."

[¶5] Following the close of discovery, the State moved the district court for summary judgment, seeking to have RRWC's amended complaint dismissed with prejudice. RRWC opposed the motion, arguing there were unresolved issues of fact and that the case should proceed to trial. The court granted summary judgment in favor of RRWC, concluding that:

> "(1) the Amended Abortion Ban set forth in Chapter 12.1-19.1, N.D.C.C., as currently drafted, is unconstitutionally void for vagueness; and (2) pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women**—specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness enumerated in article [I], section 1 of the North Dakota Constitution."

(Emphasis in original.)

[¶6] The State moved the district court to stay its order enjoining enforcement of N.D.C.C. ch. 12.1-19.1 pending appeal. After the district court denied the State's motion, the State filed the present appeal and an expedited motion to stay, which is presently before the Court.

II

[¶7] We start by recognizing this action involves a challenge under the North Dakota Constitution to a portion of the North Dakota Century Code. This case exclusively arises under state law, and therefore we must decide these issues primarily under our established state precedent. We must be mindful that our state Constitution is different in nature than the federal constitution. Thomas

Cooley, the prominent late nineteenth century American legal scholar, addressed our constitutional convention on July 17, 1889. S*ee Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota*, 65-67 (1889). His treatise described the difference between the United States Constitution and a state constitution:

> "It is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the constitutions of the States as regards the power which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation. . . . That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication."

Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union,* 173 (2d ed. 1871).

III

[¶8] Before turning in Part IV to our established framework for deciding whether to grant a stay, we first address issues the State raises that it admits are novel to North Dakota law.

[¶9] The State argues the single judge ruling on a novel and complex issue is an independent ground for the stay. According to its briefing, "the State suggests that because this case involves a statute having been declared unconstitutional by a single district court judge, based on a newly identified constitutional right, and involving difficult and novel legal questions, that by itself is a sufficient reason to grant a stay pending appeal." We take each portion of this argument in turn.

A

[¶10] The State argues a stay pending appeal is appropriate when, as here, a single judge declares a statute unconstitutional. Somewhat ironically, the State relies on the writing of a single United States Supreme Court justice in *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, J., in chambers). However, *Bowen* did not articulate the standard the United States Supreme Court applies when addressing a motion to stay a decision pending final disposition on appeal. Rather, the *Bowen* opinion is from Justice Rehnquist, writing on his own behalf as a circuit justice and explaining why he granted a stay of a single federal district court judge's determination that a statute was unconstitutional. In that writing Justice Rehnquist expressed his view that a stay was warranted due to "[t]he presumption of constitutionality which attaches to every Act of Congress" and "that the statute remain in effect pending such review." *Id.* at 1304; *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) (Again writing as a circuit justice and granting a stay "pending the timely filing of a jurisdictional statement and the disposition of the same by this Court.").

[¶11] Contrary to the State's suggestion, as an adjudicative body the United States Supreme Court does not grant stays based on how many judges issued the underlying decision. Rather, the United States Supreme Court applies a framework similar to ours when deciding whether to grant a stay. *See Ohio v. EPA*, 603 U.S. 279, 291 (2024) (setting out a four-factor test relating to likelihood of success and harm).

[¶12] Putting federal law aside, our jurisprudence does not support the creation of a presumption that district court rulings are incorrect. We have uniformly held that "[f]indings of the trial court are presumptively correct." *See, e.g., Great Plains Royalty Corp. v. Earl Schwartz Co.*, 2021 ND 62, ¶ 10, 958 N.W.2d 128 (quoting *McCarvel v. Perhus*, 2020 ND 267, ¶ 9, 952 N.W.2d 86). And we use a de novo standard when reviewing a district court's application of law. *See, e.g., State v. Hilgers*, 2004 ND 160, ¶ 25, 685 N.W.2d 109 ("Whether the district court's refusal to issue a subpoena violates the Sixth Amendment is a question of law, and our standard of review for a claimed violation of a constitutional right is *de novo*."). We also have regularly recognized that a party is required to comply with a district court order even if the party believes it was erroneously entered. *Holkesvig v. Welte*, 2012 ND 14, ¶ 6, 809 N.W.2d 323; *State v. Sevigny*, 2006 ND 211, ¶ 37, 722 N.W.2d 515; *Flattum-Riemers v. Flattum-Riemers*, 1999 ND 146, ¶ 11, 598 N.W.2d 499. We decline the invitation to deviate from our established law on the regularity of district court decisions.

B

[¶13] The State argues we should issue a stay because the district court's order decided "new and unexplored" legal issues. The State relies on a 1972 federal district court decision from Hawaii that was never appealed. *See Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14, 16 (D. Haw. 1972). The State concedes we have not adopted this factor, but it notes we cited the *Stop H-3* decision while articulating stay factors in *Cass County Electric Coop., Inc. v. Wold Properties, Inc.*, 253 N.W.2d 323, 326-27 (N.D. 1977). In that case, we simply noted *Stop H-3* was cited by a party, and we described *Stop H-3* as articulating a factor relating to substantial harm to the public. *Id.* Moreover, the case dealt with whether to set aside a district court's stay, which we declined to do, explaining "an opinion of the trial court on such an issue ordinarily will not be set aside unless the trial court is found to have abused its discretion." *Id.* at 327. The upshot of the State's argument is that any decision that recognizes a previously unobserved constitutional right should warrant a stay. We reject the request to adopt such a tenuous connection between the proposition advanced by the State and our precedent.

IV

[¶14] We turn to our established framework for deciding whether to grant a stay pending appeal, which a party may request under N.D.R.App.P. 8(a)(2). Under our jurisprudence, we apply the following test:

> "We consider four criteria when deciding whether to grant an application for a stay: 1) a strong showing that the appellant is likely to succeed on appeal; 2) that unless the stay is granted, the appellant will suffer irreparable injury; 3) that no substantial harm will come to any party by reason of the issuance of the stay; and 4) that granting the stay will do no harm to the public interest."

Cass Cnty. Joint Water Res. Dist. v. Aaland, 2020 ND 196, ¶ 4, 948 N.W.2d 829 (citing *Bergstrom v. Bergstrom*, 271 N.W.2d 546, 549 (N.D. 1978)). The moving party has the burden to show that these four criteria are satisfied and weigh in favor of granting a stay. *Aaland,* ¶ 7; *Bergstrom*, at 554-55.

A

[¶15] To satisfy the first factor, the State must demonstrate a likelihood of success on both the plaintiffs' claims. In other words, to succeed on appeal, the State must show: (1) the district court erred when it decided the law was unconstitutionally vague in violation of the physicians' due process rights; and (2) the court erred when it decided the law violated the fundamental rights of pregnant women. Under our principles of constitutional avoidance, if the State is unsuccessful on either one of these claims, we will not address the other. *See Overbo v. Overbo*, 2024 ND 233, ¶ 7, --- N.W.3d --- ("The separation of powers created by our state and federal constitutions requires courts to exercise judicial restraint and constitutional avoidance."). If the State does not succeed on both questions, the result will be a decision declaring the law unconstitutional.

1

[¶16] It is unlikely the State will succeed in showing this law is not unconstitutionally vague. Under our state Constitution, no person shall be deprived of life, liberty, or property without due process of law. N.D. Const.

art. I, § 12. Vague laws are unconstitutional because they do not give fair warning and allow for discriminatory enforcement. *City of Fargo v. Roehrich*, 2021 ND 145, ¶ 6, 963 N.W.2d 248. "Vague laws may trap the innocent because they fail to provide adequate warning of what conduct is prohibited, and they may result in arbitrary and discriminatory application because a vague law delegates basic policy matters to those who apply the law, allowing the law to be applied on an ad hoc and subjective basis." *State v. Holbach*, 2009 ND 37, ¶ 24, 763 N.W.2d 761.

[¶17] To survive a void for vagueness challenge, laws require a degree of specificity:

> "A law is not unconstitutionally vague if: (1) the law creates minimum guidelines for the reasonable police officer, judge, or jury charged with enforcing the law, and (2) the law provides a reasonable person with adequate and fair warning of the prohibited conduct. A law is not unconstitutionally vague if the challenged language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for fair administration of the law."

State v. Moses, 2022 ND 208, ¶ 17, 982 N.W.2d 321 (cleaned up). The required degree of specificity necessarily depends on the scope of the law and the conduct at issue. *Olson v. City of West Fargo*, 305 N.W.2d 821, 829 (N.D. 1981); *see also Texas Dep't of Ins. v. Stonewater Roofing, Ltd. Co.*, 696 S.W.3d 646, 660 (Tex. 2024) (stating the degree of vagueness that will be tolerated "depends in part on the nature of the enactment"); *Bartlow v. Costigan*, 13 N.E.3d 1216, 1225 (Ill. 2014) (stating the "test for determining vagueness varies with the nature and context of the legislative enactment"). We agree with the Colorado Supreme Court when it explained:

> "[T]he strictness of the vagueness test depends on whether the challenged law threatens to inhibit the exercise of constitutionally protected rights. When such constitutionally protected behavior may be inhibited, a greater degree of specificity is required than when a law does not implicate constitutionally protected liberties."

Robertson v. City & Cnty. of Denver, 874 P.2d 325, 334 (Colo. 1994) (en banc) (citations omitted). The severity of a law's punishment also affects the degree of specificity required. Less specificity is constitutionally permitted when a statute imposes civil penalties, *Stonewater Roofing*, at 661, while more specificity is required when a statute imposes criminal penalties, *Bartlow*, at 1225.

[¶18] Through the enactments challenged here, it is indisputable the State is imposing restrictions on paramount aspects of its citizens' lives. *See State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995) (describing individual autonomy in medical decisions as a "fundamentally commanding" interest with "well-established legal and philosophical underpinnings"). Even putting patient autonomy aside, the plaintiffs' right to engage in their lawful profession—practicing medicine—also is significant. *See* N.D. Const. art. I, § 7 ("Every citizen of this state shall be free to obtain employment wherever possible . . . ."); *see also State v. Cromwell*, 9 N.W.2d 914, 918-19 (N.D. 1943) (describing the constitutional nature of "the right to follow one's individual preference in the choice of an occupation and the application of his energies"). Moreover, the conduct at issue encompasses more than simple commerce. Physicians are expected to apply their knowledge of medicine in a manner that will protect the health and lives of their patients. *See* N.D. Const. art. I, § 1 (declaring the right to defend life inalienable). Given the undisputable gravity of the conduct these statutes regulate, the specificity required by our Constitution is high.

[¶19] The criminal consequences a physician may suffer if he or she fails to conform his conduct to the law also are severe. *See* N.D.C.C. § 12.1-19.1-02 (stating violation of the law is punishable as a class C felony). If the plaintiffs violate the statute, they may be fined $10,000 and imprisoned for five years. N.D.C.C. § 12.1-32-01(4). Along with the obvious hardships that accompany a conviction and sentencing for the commission of a felony, the plaintiffs face the prospect of losing democratic rights. *See* N.D. Const. art. II, § 2 (felons prohibited from voting); N.D.C.C. § 12.1-33-01 (felons prohibited from running for or holding public office). They also face the prospect of losing their medical license, a certification they presumably obtained with much effort and expense. *See* N.D.C.C. § 43-17-31(1)(c); N.D.C.C. § 12.1-33-02.1 ("A person may be denied a

license, permit, certificate, or registration because of prior conviction of an offense if it is determined that such person has not been sufficiently rehabilitated, or that the offense has a direct bearing upon a person's ability to serve the public in the specific occupation, trade, or profession."). Their general reputation in the community also may suffer. *See State ex rel. Olson v. Langer*, 256 N.W. 377, 387 (N.D. 1934) ("[I]nfamy is a punishment as well as stigma on character."). The harsh punishment the plaintiffs face if they fail to conform their medical practice to the requirements of the law makes the degree of specificity required here very high.

[¶20] On preliminary review, it appears this law does not meet the high level of specificity our Constitution demands. The law uses terms that are by nature general and ambiguous, such as "reasonable," "prudent," and "knowledgeable." We acknowledge generalized language itself does not make a law unconstitutionally vague. *City of Belfield v. Kilkenny*, 2007 ND 44, ¶ 19, 729 N.W.2d 120. However, the difference in complexity between a law prohibiting conduct like "unreasonable noise" and one requiring a physician to use "reasonable medical judgment" cannot be denied. Nor can we ignore the fact that doctors may be required to make their medical judgments quickly, without the benefit of hindsight, and in the face of potentially grave if not deadly consequences for their patients. The law itself contemplates an abortion may be necessary care in difficult situations. N.D.C.C. § 12.1-19.1-03(1). Along with its general language, the law uses complex terms like "serious health risk" and "substantial physical impairment," yet the law provides no definition or guidance as to what these terms are supposed to mean. All of this is to say nothing about the main rationale for the district court's decision, which was that the law used "both subjective and objective elements" and "simply does not allow a physician to know against which standard his conduct will be tested and his liability determined." As a result, on our preliminary review we are not convinced the State is likely to succeed on this issue.

[¶21] The State contends it will succeed on the merits of this case based on the voluminous evidentiary record, which we have yet to thoroughly review. The State asserts the "undisputed evidence" shows the "Plaintiffs themselves understood the statute applied to the conduct they engage in." Although the State's motion for stay does not suggest the plaintiffs have brought an impermissible facial challenge, Justice Tufte aptly observes there is a difference between as-applied and facial constitutional challenges. Tufte, J., dissent, ¶ 58. However, if that is to be an issue, unlike our colleague, we are not convinced the plaintiffs lack standing to bring their claim.

[¶22] Our jurisprudence has recognized litigants may bring third-party facial vagueness challenges in the context of First Amendment rights. We have explained a litigant "must almost always demonstrate that the statute in question is vague as applied to his own conduct, without regard to its potentially vague application in other circumstances." *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985). In other words, "a party challenging the constitutionality of a statute must assert that the statute violates his constitutional rights, and not the rights of a third party." *Holbach*, 2009 ND 37, ¶ 25. This general prohibition applies unless "weighty countervailing policies" exist to justify third-party standing. *State v. Anderson*, 427 N.W.2d 316, 319 n. 1 (N.D. 1988) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). Third-party standing may exist when there is a "close relationship" between the rights of a litigant and third party, or when non-parties "stand to lose" by the outcome of a lawsuit but cannot preserve their rights, or when constitutionally protected speech is infringed. *Whitecalfe v. N.D. Dep't of Transp.*, 2007 ND 32, ¶ 18, 727 N.W.2d 779.

[¶23] When a litigant's claim is based on his or her own due process rights, we have decided whether a law is facially void for vagueness regardless of whether the claim implicates rights under the First Amendment to the United States Constitution. *See, e.g., Moses*, 2022 ND 208, ¶ 17 (possession of firearms by felons); *State v. Kordonowy*, 2015 ND 197, ¶ 19, 867 N.W.2d 690 (refusal to submit to chemical testing); *Simons v. Dep't of Human Servs.*, 2011 ND 190, ¶ 31, 803

N.W.2d 587 (child abuse); *State v. Brown*, 2009 ND 150, ¶ 35, 771 N.W.2d 267 (dog barking ordinance); *City of Fargo v. Salsman*, 2009 ND 15, ¶ 23, 760 N.W.2d 123 (nuisance); *City of Minot v. Boger*, 2008 ND 7, ¶ 7, 744 N.W.2d 277 (zoning ordinance); *Kilkenny*, 2007 ND 44, ¶ 28 (dog barking ordinance); *State v. Beyer*, 441 N.W.2d 919, 921-22 (N.D. 1989) (muffler requirement); *State v. Johnson*, 417 N.W.2d 365, 368-69 (N.D. 1987) (possessing explosives); *State v. Motsko*, 261 N.W.2d 860, 865 (N.D. 1977) (kidnapping); *State v. Hagge*, 211 N.W.2d 395, 398 (N.D. 1973) (negligent driving).

[¶24] We have rejected void for vagueness claims when the law is not constitutionally uncertain as applied to a challenger's own conduct. For example, in *State v. Tibor*, 373 N.W.2d at 879, a man challenged a gross sexual imposition law as being unconstitutionally vague. We reasoned the man could not advance "hypothetically unconstitutionally vague applications" based on conduct other than his own. *Id* at 881. We decided the man lacked standing because he had not demonstrated the law "is impermissibly vague as applied to him." *Id.* In *State v. Holbach*, 2009 ND 37, a man brought a vagueness challenge to a law criminalizing stalking. We noted he did not claim the law was vague as applied to his own conduct. *Id.* ¶ 22. We explained that, outside the First Amendment context, litigants cannot rely on "potentially vague application in other circumstances." *Id.* ¶ 25. We rejected his claim because "a reasonable person would know [his] conduct was prohibited by the statute." *Id.* ¶ 26. In *State v. Ness*, 2009 ND 182, 774 N.W.2d 254, a man was convicted for failing to tag a deer. He had transported the deer from the field and was butchering it when he was cited for violation of a hunting proclamation. *Id*. ¶ 9. He argued the proclamation's use of the word "immediately" was unconstitutionally vague. *Id.* We decided he lacked standing to bring such a challenge because, under the circumstances of his case, "a reasonable person would know" his conduct violated the law. *Id.* In *Interest of D.D.*, 2018 ND 201, 916 N.W.2d 765, a person who had been civilly committed challenged laws restricting the possession of firearms. He claimed the law was vague as to "what type of possession is required by the committed individual." *Id.* ¶ 15. We decided he lacked standing to argue whether the laws were "vague in other applications" because the law was not vague "as to his conduct." *Id*.

[¶25] The common thread in all these cases is that litigants generally lack standing to claim vagueness based on hypothetical third-party conduct. To that extent, we do not diverge from Justice Tufte's position that litigants generally cannot "challenge a statute as facially vague without a factual record to show that the statute is also vague as to that person's conduct." Tufte, J., dissent, ¶ 56. However, we do not agree there is no factual record in this case to support the plaintiffs' challenge. Based on the evidence submitted by the parties during discovery, the State contends no genuine issues of material fact exist and the district court should have granted summary judgment to the State as a matter of law.

[¶26] It appears largely undisputed that plaintiffs in this case practice medicine in North Dakota and provide the type of medical care implicated by the law. Our general prohibition on vagueness claims based on hypothetical third-party conduct therefore is not applicable here. The plaintiffs are asserting their own due process rights based on their own conduct. They claim the law impedes their ability to provide their patients care by subjecting them to "arbitrary or discriminatory prosecution." We see no reason why the plaintiffs cannot raise arguments about the law's adverse effect on their conduct. Their arguments are relevant to the nature of the injury they claim to have suffered or will suffer under terms of the law they challenge.

[¶27] The fact that the plaintiffs sued to challenge the law before the State charged them with a crime does not mean they lack standing. To have standing, a plaintiff must suffer a threatened or actual injury. *State v. Carpenter*, 301 N.W.2d 106, 107 (N.D. 1980). "When a person is subject to a criminal prosecution, or is faced with its imminent prospect, that person has clearly established the standing requirements to oppose the prosecution by asserting his relevant constitutional rights." *Id.*

[¶28] We have addressed pre-enforcement facial vagueness claims to other laws. For example, in *Olson v. City of West Fargo*, 305 N.W.2d at 822, bar owners brought a void for vagueness challenge to a "cabaret ordinance" that prohibited certain dancing in establishments where liquor is served. They faced suspension

or revocation of their liquor licenses if they failed to comply with the ordinance. *Id.* This Court expressly decided the ordinance "is not an unconstitutional infringement on free speech or expression." *Id.* at 827. The Court then addressed the plaintiffs' due process facial vagueness challenge and decided the language in the law was not unconstitutionally vague. *Id.* at 828-29. Another example is *Best Products Co. v. Spaeth*, 461 N.W.2d 91 (N.D. 1990), where shopkeepers brought a pre-enforcement due process void for vagueness challenge to a law requiring them to close on Sundays. This Court decided the vagueness claim on its merits and upheld the law, deciding the statute's language was "understandable to judges, juries, shopkeepers, and police officers." *Id.* at 100.

[¶29] The law currently before us criminalizes aspects of reproductive healthcare—conduct much weightier than dancing in bars or selling products and services on Sunday. In the context of state regulation of abortion since *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), other states have addressed due process void for vagueness challenges on the merits. *See, e.g.*, *Planned Parenthood Great Northwest v. State*, 522 P.3d 1132, 1200-09 (Idaho 2023); *Oklahoma Call for Reproductive Justice v. Drummond*, 526 P.3d 1123, 1131-32 (Okla. 2023). Under the guidance of our precedent, consistent with our sister states, we believe the plaintiffs' due process void for vagueness claim is subject to consideration on appeal.

B

[¶30] The plaintiffs' second claim implicates third-party interests, namely whether the statute violates pregnant women's rights. The State argues it is likely to succeed on this issue because the district court did not correctly interpret our Constitution in light of its history and tradition, and thus did not give effect to the intent and purpose of the people adopting the constitutional provisions at issue.

[¶31] History may be examined to decide whether a right is fundamental under our Constitution. *See Wrigley I*, 2023 ND 50, ¶ 17 ("We may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions.") (quoting *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197,

¶ 25, 855 N.W.2d 31). However, that is not our starting point. We need not resort to the historical record when the Constitution's language is clear. *See Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586 ("The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself.") (quoting *State ex rel. Heitkamp v. Hagerty*, 1998 ND 122, ¶ 13, 580 N.W.2d 139). Based on our history and tradition, we have already decided a pregnant woman in North Dakota "has a fundamental right to obtain an abortion to preserve her life or her health." *Wrigley I*, ¶ 40.

[¶32] In *Wrigley I* we explained:

> "North Dakota's history and traditions, as well as the plain language of its Constitution, establish that the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood. After review of North Dakota's history and traditions, and the plain language of article I, section 1 of the North Dakota Constitution, it is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health."

2023 ND 50, ¶ 27. "In sum, the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." *Id.* ¶ 33.

[¶33] Having already addressed our history and tradition on this topic, we need not consult the historical record here. Whether this particular statute accords with general historical understandings on the topic of reproductive care is not part of our inquiry. To be clear, the State may restrict the exercise of a fundamental right, but when the State does so it "bears the burden of proving that such deprivation is narrowly tailored to a compelling state interest." *Hoff v. Berg*, 1999 ND 115, ¶ 9, 595 N.W.2d 285 (quoting *Petition of Santoro*, 578 N.W.2d 369, 374 (Minn. Ct. App. 1998)). While our estimation of the petitioner's likelihood of success on the merits in *Wrigley I* was preliminary, our interpretation of the North Dakota Constitution was not tentative. Our decision

interpreted the Constitution, and our interpretation was the baseline for evaluating the petitioner's likelihood of success on the merits of the issues. Our holding in *Wrigley I* similarly provides the baseline for our analysis here, which is strict scrutiny.

[¶34] Under strict scrutiny review, we are not convinced at this juncture that the challenged law falls within constitutional bounds. "'We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right . . . .'" *Haney v. N.D. Workers Comp. Bur.*, 518 N.W.2d 195, 197 (N.D. 1994) (quoting *Gange v. Clerk of Burleigh Cnty. Dist. Ct.*, 429 N.W.2d 429, 433 (N.D. 1988)). "The idea of strict scrutiny acknowledges that political choices burdening fundamental rights must be subjected to close analysis in order to preserve substantive values of equality and liberty." *Hoff*, 1999 ND 115, ¶ 16 (cleaned up) (quoting Laurence H. Tribe, *American Constitutional Law*, § 16-6, p. 1451 (2d ed. 1988)). A statute will not satisfy strict scrutiny "'unless it is shown that the statute promotes a compelling governmental interest . . . .'" *Gange*, at 433 (quoting *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D. 1977)). The statute also must be "narrowly tailored" to serve that interest. *Hoff*, ¶ 9. The burden is on the State to show both a compelling interest and narrow tailoring. *Id.*; *see also Hoffner v. Johnson*, 2003 ND 79, ¶ 41, 660 N.W.2d 909 (Maring, J., dissenting) ("Under our strict scrutiny standard of review, the burden is on the state to articulate a 'compelling governmental interest' that justifies the classification.").

[¶35] Although not established by our precedent, other state courts have concluded that statutes subject to strict scrutiny are presumed *unconstitutional*. *See, e.g., Hodes & Nauser v. Stanek*, 551 P.3d 62, 74 (Kan. 2024) (stating "the government's action is presumed unconstitutional, and the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it."); *BABE VOTE v. McGrane*, 546 P.3d 694, 708 (Idaho 2024) ("Strict scrutiny presumes legislation is unconstitutional unless the government can prove otherwise by establishing it is necessary to further a compelling interest."); *Norman v. State*, 215 So.3d 18, 36 (Fla. 2017) ("The law is presumptively unconstitutional."); *Magda v. Ohio Elections Comm'n*, 58 N.E.3d

1188, 1198 (Ohio Ct. App. 2016) (stating a law subject to strict scrutiny is "presumptively invalid").

[¶36] The law challenged in this lawsuit criminalizes abortions performed to treat psychological disorders that will cause a woman to engage "in conduct that will result in her death" or conduct that will result in "substantial physical impairment of a major bodily function." N.D.C.C. § 12.1-19.1-01(5). Under every other circumstance, the law allows abortions performed to save a woman from serious injury and death. N.D.C.C. § 12.1-19-03(1). The law's exception for injury and death caused by psychological maladies appears arbitrary. If the State's goal is to prevent unnecessary abortions and protect maternal health, this law does not appear narrowly tailored to achieve that aim within constitutional bounds. Therefore, the law is unlikely to survive strict scrutiny review because it criminalizes abortions necessary to prevent a woman from harming or killing herself.

C

[¶37] We turn to the other factors for deciding whether to grant a stay. The second, third and fourth factors considered when deciding whether to grant a stay pending appeal are whether the appellant will suffer an irreparable injury; whether a stay will cause any party substantial harm; and whether a stay will harm the public interest. *Aaland*, 2020 ND 196, ¶ 4.

[¶38] The State claims irreparable harm will occur if the law is not permitted to be enforced pending appeal of the district court's judgment. The plaintiffs respond by claiming they and pregnant women will be irreparably injured if the State's motion to stay the district court's judgment is granted. As we stated in *Wrigley I*, "[t]he death of unborn children and the potential death or injury of a pregnant woman are both tragic." 2023 ND 50, ¶ 35. We weigh these factors—whether there will be irreparable harm if the stay is not granted or if it is granted—neutral in considering whether to grant the State's request for a stay.

[¶39] The State argues a stay would serve the public interest because (1) upholding duly enacted statutes generally serves the public interest; (2) a stay

would offset the "raw judicial power" exercised by the district court; and (3) a stay would maintain the status quo. For the reasons we articulate below, we remain unconvinced that delayed enforcement caused by these judicial proceedings harm the public interest.

[¶40] Judicial review is part of our constitutional form of government. "The judiciary's proper function and duty is to say what the law is and what the Constitution means." *Grisham v. Van Soelen*, 539 P.3d 272, 285 (N.M. 2023) (cleaned up); *see also Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 458 (Wisc. 2005) ("In short, neither our respect for the legislature nor the presumption of constitutionality allows for absolute judicial acquiescence to the legislature's statutory enactments. The court has emphasized that since *Marbury v. Madison*, it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). When courts are called on to decide whether a statute falls within the Constitution's outer boundaries, that exercise is neither the raw exercise of judicial power nor what some pundits and politicians suggest is a court "legislating from the bench." Rather, properly restrained judicial review of a statute is merely the fulfillment of our constitutional duty as a co-equal branch of the government.

[¶41] It also appears the law will not be enforced until we issue a final decision. The state's attorneys responsible for enforcing the law in Burleigh, Cass, Grand Forks, and Stark counties, where most of North Dakota's hospitals are located, stipulated in the district court to not enforce the law during the pendency of this lawsuit. These state's attorneys specifically agreed that, "[s]hould this [District] Court or a higher Court enter an order blocking enforcement of N.D.C.C. Chapter 12.1-19.1, or finding N.D.C.C. Chapter 12.1-19.1 violates the Constitution of the State of North Dakota, State's Attorney Defendants agree not to enforce N.D.C.C. Chapter 12.1-19.1, unless and until said order is vacated or overturned." In view of this stipulation, and because granting a stay will have little to no effect, we are not convinced the State has shown denial of a stay will

cause the public harm—much less irreparable or substantial harm. We weigh this factor against granting a stay.

[¶42] We decided this statute's predecessor was not the status quo. *Wrigley I*, 2023 ND 50, ¶ 38. That predecessor statute was repealed and N.D.C.C. ch. 12.1-19.1 was enacted. Shortly thereafter the plaintiffs amended their complaint to challenge N.D.C.C. ch. 12.1-19.1. This new law has never existed in an uncontested state, and we have located nothing in the record indicating the law has ever been enforced. Therefore, a stay of the district court's order declaring N.D.C.C. ch. 12.1-19.1 unconstitutional will not preserve the status quo.

V

[¶43] The motion for a stay pending appeal is denied.

[¶44] Daniel J. Crothers
Lisa Fair McEvers
Daniel D. Narum, D.J.

[¶45] The Honorable Daniel D. Narum, D.J., sitting in place of Bahr, J., disqualified.

Tufte, Justice, dissenting.

[¶46] I respectfully dissent.

I

[¶47] Resolution of this motion for stay pending appeal requires our preliminary consideration of an issue on which we have little precedent to guide us in interpreting the expansive terms of N.D. Const. art. I, § 1. The majority opinion in *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d 231, has been cited as if it provides a holding on the ultimate merits question, including by the district court and the parties in their briefs requesting and opposing a stay. In *Wrigley*, this Court considered likely success on the merits in the context of a preliminary injunction. *Id.* ¶¶ 13, 39. Here, we decide the State's motion for a stay pending

appeal, again addressing not the ultimate question on the merits but only the *likelihood* of success on the merits.

[¶48] The first factor for granting a stay is similar to the first factor for granting an injunction. *See Cass Cnty. Joint Water Res. Dist. v. Aaland*, 2020 ND 196, ¶ 4, 948 N.W.2d 829 ("a strong showing that the appellant is likely to succeed on appeal"); *Wrigley*, 2023 ND 50, ¶ 12 ("substantial probability of succeeding on the merits"). But the required probability of success on the merits is lower for a stay than for an injunction. *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (explaining that a request for an injunction "'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts'" (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers))); *Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044–45 (8th Cir. 2020) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)) (explaining that party seeking injunction "does not need to 'prove a greater than fifty per cent likelihood that it will prevail on the merits'"). Both forms of relief are intended to preserve the status quo pending final resolution of the merits at trial or on appeal. *Wrigley*, 2023 ND 50, ¶ 38; N.D.R.Civ.P. 62(l). And in both instances, a court's decision on a preliminary injunction or stay does not bind it in later decisions. *F-M Asphalt, Inc. v. N.D. State Hwy. Dep't*, 384 N.W.2d 663, 665 (N.D. 1986) (applying *Dataphase* factors and explaining that conclusion on likely success factor "does not reflect any view on the final disposition of this matter"); *see Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017) (determinations made in order granting stay pending appeal "are for that purpose and do not bind the merits panel").

[¶49] Just as injunctions are decided before trial on the merits, we decide a stay pending appeal on the basis of limited briefing and a shorter timeline. Because the only issue before us now is likely success on the merits, we make no controlling precedent on the ultimate merits question. *City of Bismarck v. McCormick*, 2012 ND 53, ¶ 14, 813 N.W.2d 599 ("A prior opinion is only stare decisis on points decided therein; any expression of opinion on a question not

necessary for decision is merely dictum, and is not, in any way, controlling upon later decisions."). All five members of the Court in *Wrigley* expressed agreement there was a likelihood the Court would conclude on the merits that a statute lacking an exception for the life of the mother or "when necessary to prevent severe, life altering damage" was inconsistent with article I, section 1. *Wrigley*, 2023 ND 50, ¶¶ 31–33, *id.* ¶¶ 42–44 (Tufte, J., concurring). But we did not decide the merits in *Wrigley*, and we do not decide the merits on this motion for a stay.

[¶50] The discussion below reflects my preliminary analysis of the issues on the basis of the record below and the briefing on the motion for stay. Any conclusions by the Court or any individual justice are of course subject to reconsideration in light of new arguments and authority in the parties' appellate briefing and at oral argument.

II

A

[¶51] A simple majority of this Court lacks the power to declare a legislative enactment unconstitutional—the Court may do so only if "at least four of the members of the court so decide." N.D. Const. art. VI, § 4. If agreed to by four members of the Court, such a declaration is indefinite—it has no fixed end date and is potentially permanent—but it may not be permanent because courts of last resort occasionally reconsider constitutional decisions. *See Roe v. Wade*, 410 U.S. 113 (1973), *and Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). This Court's denial of a stay results in the statute being unenforceable during the pendency of the appeal.[1] Our ultimate decision on this appeal has no date

[1] The statute would be temporarily unenforceable, but not repealed. *See* Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 935–36 (2018) ("[C]ourts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute. The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute—though only

certain. The oral argument on the merits is months away. A decision in a weighty constitutional case may take several months after argument. For example, this Court did not decide a 2013 abortion case until thirteen months after the case was submitted to the Court. *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, 855 N.W.2d 31 (argued Dec. 11, 2013; mandate issued Jan. 13, 2015).

[¶52] By declining to grant a stay, this Court leaves in place the district court's judgment, resulting in suspension of enforcement of the challenged statutes as if they were void for a period of at least several months. But courts don't turn statutes on and off or erase them from code books. This Court's power to preclude enforcement of a statute requires a declaration that it is in conflict with the constitution or was enacted in violation of required constitutional procedure. *Bd. of Trs. of N.D. Pub. Emps. Ret. Sys. v. N.D. Legis. Assembly*, 2023 ND 185, 996 N.W.2d 873; *Tooz v. State*, 76 N.D. 599, 38 N.W.2d 285, 290–92 (N.D. 1949). Denying a stay here has the effect of suspending enforcement of the statute until an uncertain future date when this Court renders final judgment on the merits. It is not clear whether a simple majority of three members of this Court has that power.

B

[¶53] Likelihood of success on the merits logically must factor into the vote required to achieve success. *See Hollingsworth v. Perry*, 558 U.S. 183, 190–91 (2010)

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while the court's injunction remains in effect. But the statute continues to exist, even after a court opines that it violates the Constitution, and it remains a law until it is repealed by the legislature that enacted it.") If this Court issues a decision on the merits in which fewer than four members of the Court agree with the facial challenge, that would repudiate the district court's decision and again permit enforcement of N.D.C.C. ch. 12.1-19.1 in state courts. There is no obvious reason why enforcement after such a decision could not reach conduct that occurred during the pendency of the appeal. *See generally* Mitchell, *supra* at 938 ("All the injunction does is prevent the named defendants from *enforcing* that law while the court's injunction remains in place. That does not confer immunity or preemptive pardons on those who violate the statute. And it does not prevent the enjoined officials from enforcing the law against those who violated it if the injunction happens to be dissolved on appeal or after trial."). The risk that some may misunderstand the district court's order as striking down the challenged statutes and functionally repealing them counsels in favor of this Court granting a stay. By failing to grant the stay pending appeal, the Court invites action in reliance on the mistaken assumption that the statutes have been invalidated. No statute may be declared invalid until four members of this Court have reached that conclusion.

(distinguishing likely success at certiorari stage, requiring four votes, from likely success on a petition for a writ, requiring a majority). Where two justices conclude the State is likely to succeed on the merits and the enactment will not be declared unconstitutional, a vote of three justices to temporarily maintain a district court's judgment enjoining enforcement of the legislation is a confident prediction that one of the two justices will change positions. But this prediction is against the odds: assuming each member of the Court is equally likely to change positions, the odds are 3:2 that a justice changing positions will be one of the three rather than one of the two. At this preliminary stage we appear to have a good-faith disagreement, and any one of us may update our views upon full briefing and argument. In my view, this situation calls for a courtesy vote. In the U.S. Supreme Court, it has been a common practice for a justice to vote for a stay that the justice disagrees with as a courtesy to other justices holding an opposing view. *See, e.g.*, *Arthur v. Dunn*, 580 U.S. 977 (2016) (Roberts, C.J.) (providing a fifth vote to grant a stay in a capital case "as a courtesy" to four justices who had voted for a stay); *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 579 U.S. 961 (2016) (Breyer, J., concurring) (providing fifth vote for a stay of district court order "as a courtesy" pending a decision on petition for certiorari).

III

[¶54] The district court concluded N.D.C.C. ch. 12.1-19.1 is void for vagueness. A threshold issue that the district court did not directly address is whether the Red River Women's Clinic (RRWC) is permitted to bring a vagueness challenge to N.D.C.C. ch. 12.1-19.1. RRWC brought a facial challenge to N.D.C.C. ch. 12.1-19.1, and the court concluded "the law is impermissibly vague on its face[.]" The court described the claim as an as-applied challenge based on speculative facts and cancelled the trial.

[¶55] We have limited void-for-vagueness challenges not implicating First Amendment rights to as-applied challenges. *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985) ("To have standing to raise a vagueness challenge, a litigant must almost always demonstrate that the statute in question is vague as applied to his

own conduct, without regard to its potentially vague application in other circumstances."). This Court has held:

> The parties must have standing to litigate the issues before a court may decide the merits of a dispute. Generally a party challenging the constitutionality of a statute must assert that the statute violates his constitutional rights, and not the rights of a third party. When a party is challenging a criminal statute arguing it is vague and provides a lack of notice, unless the statute threatens First Amendment interests the challenge may be overcome when a reasonable person would know that their conduct is at risk; therefore the statute must be reviewed as it applies to the particular facts in the case. To have standing to raise a vagueness challenge, a litigant must almost always demonstrate that the statute in question is vague as applied to his own conduct, without regard to its potentially vague application in other circumstances. However, a party may challenge a statute arguing it is unconstitutionally vague if the statute regulates or prescribes [*sic*] speech protected by the First Amendment.

State v. Holbach, 2009 ND 37, ¶ 25, 763 N.W.2d 761 (cleaned up); *accord State v. Anderson*, 427 N.W.2d 316, 319 n.1 (N.D. 1988) (citing First Amendment cases as exceptions to the proposition that a litigant has standing to challenge a statute only as to his own conduct, unless there are "weighty countervailing policies" to justify third-party standing). The parties have not cited authority or cogently argued that a vagueness challenge under the due process clause of N.D. Const. art. I, § 12 is subject to different analysis than a vagueness challenge under the Fourteenth Amendment.

[¶56] Our decisions are consistent: only if a statute implicates First Amendment rights may a person challenge a statute as facially vague without a factual record to show that the statute is also vague as applied to that person's conduct. Subject to that narrow exception, our decisions resolving facial vagueness challenges uniformly reflect a factual record of the challenger's conduct that led to enforcement of the challenged statute. *See, e.g., State v. Moses*, 2022 ND 208, ¶ 17, 982 N.W.2d 321; *Simons v. State, Dep't of Hum. Servs.*, 2011 ND 190, ¶ 29–32, 803 N.W.2d 587; *Best Prods. Co. v. Spaeth*, 461 N.W.2d 91, 100 (N.D. 1990) ("Because

this statute is not vague in all its applications and because challengers are not themselves being prosecuted for allegedly vague applications of the law, Challengers' argument fails."). The State is likely to succeed on its appeal of the district court's conclusion that N.D.C.C. ch. 12.1-19.1 is facially void for vagueness.

IV

[¶57] The district court's fundamental rights analysis contains several legal errors that significantly undermine its likelihood of being affirmed on appeal by the required constitutional supermajority.

A

[¶58] The district court misapplied the law for facial challenges. The court correctly rejected the RRWC's framing of their challenge as an "as-applied challenge supported by speculative facts." It properly concluded this is a facial challenge that does not depend on any adjudicative facts for resolution. The court then misapplied our law for facial challenges. We recently summarized our jurisprudence on constitutional challenges:

> Challenges to the constitutionality of a statute may be "facial" challenges or "as-applied" challenges. A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute unconstitutional is to treat it as if it never were enacted. An "as-applied" challenge, on the other hand, is a claim that the constitution was violated by the application of a statute in a particular case. Generally, a party may only challenge the constitutionality of a statute as applied to that party.
>
> When both an as-applied challenge and a facial challenge are raised, we generally first consider the narrower as-applied challenge. As a general rule a court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule

> of constitutional law broader than is required by the precise facts to which it is to be applied.

City of Fargo v. State, 2024 ND 236, ¶¶ 11–12 (cleaned up).

[¶59] This is a facial challenge to a criminal statute, N.D.C.C. ch. 12.1-19.1. RRWC raises a claim the legislation is unconstitutionally vague (a type of due process claim) and a claim the legislation violates their rights under N.D. Const. art. I, §§ 1 and 12. No claim is raised under the First Amendment to the U.S. Constitution, and yet RRWC relies on overbreadth and "chilling effect"—doctrines that we have not applied outside the First Amendment. RRWC cited no cases outside the First Amendment context in which we have applied overbreadth doctrine or relied on a chilling effect to find a statute facially invalid. In its brief in support of its motion for summary judgment, the State asserted RRWC's claims were overbreadth claims. The amended complaint refers five times to "chilling" constitutionally protected activity. "An overbreadth challenge is unusual." *United States v. Hansen*, 599 U.S. 762, 769 (2023). Overbreadth doctrine is justified because "it provides breathing room for free expression" from laws that "may deter or 'chill'" free speech. *Id.* at 769–70 (cleaned up). RRWC relies on doctrine we have never before applied outside the First Amendment, without any cogent argument that the doctrine's rationale applies in this context. The district court's reasoning that the law "can have a profound chilling effect on the willingness of physicians to perform abortions" applies the logic of overbreadth doctrine beyond its free speech rationale to hypothetical scenarios and thus likely misapplies the law. "The adjudication of the constitutionality of a statute when there is only merely a potential for impairment of constitutional rights would result in an advisory opinion." *State v. Anderson*, 2022 ND 144, ¶ 11, 977 N.W.2d 736.

B

[¶60] The district court misapplied settled rules of constitutional interpretation. Since 1889 this Court has consistently sought to determine the original public meaning when interpreting the meaning of our state constitution. *See generally* Jerod E. Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95

N.D. L. Rev. 417 (2020). As a matter of interpretive principle and in recognition of this Court's limited role in a system of separated powers under the rule of law, we must accept that a statute or constitutional provision has an identifiable meaning at the time of its enactment and it must continue to carry that same meaning—to articulate the same legal rule or standard—until it is properly amended. *Id.* at 428–38. The facts to which a rule applies may change, but the meaning of rules enacted into law does not. The leading jurist and scholar of state constitutions at the time our constitution was written and adopted explained it this way:

> A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 67 (5th ed. 1883). To a non-lawyer, a change in the Court's understanding or interpretation, based on different arguments or circumstances that highlight previously unappreciated nuances, may seem like a change in the law. But properly understood, when the Court interprets a text, it declares the meaning of that text at all times. *State v. McGinnis*, 2022 ND 46, ¶ 14, 971 N.W.2d 380; *Garcia v. State*, 2017 ND 263, ¶ 21, 903 N.W.2d 503. If it were otherwise, and the Court purported to change an enacted text through interpretation, then it would usurp the role of the Legislative Assembly or of the People to exercise legislative power.

[¶61] The district court contended that "there was a time when we got it wrong" and "the sentiments of the past, alone, need not rule the present for all time." The court relied extensively on *State v. Cromwell,* 72 N.D. 565, 9 N.W.2d 914 (1943), to support its fundamental rights analysis under N.D. Const. art. I, § 1, premised on the pursuit of happiness. *Cromwell* was a criminal case involving a conviction for practicing photography without a license. *Id.* at 915. In declaring

the occupational licensing statute unconstitutional, the Court said the right to pursue happiness guaranteed in section 1 is "one of the most comprehensive to be found in the constitutions." *Id.* at 919 (quoting Black, *Constitutional Law*, § 145). Discussing the nature of the liberty and pursuit of happiness rights described in section 1, the Court went well beyond the licensing statute at issue in the case, stating the rights "must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home." *Id.* at 918–19. This sweeping dictum is inspiring, but it provides little assistance to this Court in identifying a conflict between the challenged statute and the state constitution.

[¶62] The district court also quotes what may be the most anti-canonical statement in any case involving the North Dakota Constitution:

> The Constitution is a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted. It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested.

State v. Norton, 64 N.D. 675, 255 N.W. 787, 792 (1934). Reading the *Norton* opinion as a whole, it is hard to miss that the Court in *Norton* was attempting to interpret the North Dakota Constitution according to its original meaning *at* the time the provision at issue was enacted—not as a "living, breathing" document, the meaning of which changes with changing social views or medical advances. Quoting *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769 (N.D. 1904), the Court interpreted the right to a jury trial to include all elements "as they were known to and understood by the framers of the Constitution and the people who adopted it." *Norton*, 255 N.W. at 788. Citing *Power v. Williams*, 53 N.D. 54, 205 N.W. 9 (1925), the Court stated that "we reviewed the scope of this right as it existed at the time of the adoption of the State Constitution," seeking the conception "which the Constitutional Convention of this state had in mind." *Id.* at 788–89. The Court considered prior legislative and judicial interpretations to

have "persuasive force" despite not squarely confronting the constitutional question. *Id.* at 790. To interpret the scope of a right which must "remain inviolate," the Court has to consider not what it means now (when the Court applies the provision), but in the past tense: "Trial by jury *meant* a unanimous decision of twelve persons of the same class as the defendant." *Id.* at 791 (emphasis added). It was not the Court's constitutional interpretation that was adapted to the times, but legislation: "Legislation must of necessity take into consideration the change in conditions and, in applying the established principles to these changes, must make changes in the application from time to time." *Id.* Interpretation of the constitution sought the meaning of "the people of that day." *Id*.

[¶63] The *Norton* Court emphasized again and again its aim was to determine the constitution's meaning according to what it meant to the people at the time the provision was adopted. The paragraph containing the passage quoted by the district court makes the point multiple times:

> We do not believe *the constitutional convention, or the people, when they adopted the Constitution*, thought of the jury in any other sense than a jury of the peers and that the real meaning and purpose would have been exemplified as well had the constitutional provision said "the jury in civil cases, in courts not of record, may consist of less than twelve, as may be prescribed by law," leaving out the word "men." *What the convention had in mind, and what the people had in mind,* was a jury of twelve electors and the convenience and economy of a lesser number of jurors in the courts of justice of the peace and other courts not of record. *We interpret the word "men" in the thought of the convention and of the people of the day* as meaning those persons who possessed the qualifications of jurors *at that time*, with no thought of sex. The Constitution is a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted. It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested.

Id. at 792 (emphasis added).

[¶64] This Court has never applied the "living, breathing" constitution dictum, not in *Norton*, and not since. The district court erred when it misapplied this Court's longstanding and consistent interpretive principles.

C

[¶65] We interpret the provisions asserted by RRWC according to the ordinary meaning of those provisions as understood by the enacting public. *Sorum v. State*, 2020 ND 175, ¶¶ 19–20, 947 N.W.2d 382. Interpreted according to this uniform standard, the historical evidence shows these provisions were not understood to encompass a fundamental right to abortion. Under our longstanding principles of interpretation, RRWC must establish that the ordinary meaning of our constitution includes a fundamental right to an abortion that conflicts with this exercise of the state's otherwise "broad and comprehensive" police power to "promote the public health, morals, and safety." *State v. Riggin*, 2021 ND 87, ¶ 14, 959 N.W.2d 855.

[¶66] In their amended complaint, RRWC cites only N.D. Const. art. I, §§ 1 and 12, as the basis for right to life and safety claims for relief. In section 1, the terms "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness" are broad enough on their face to support RRWC's constitutional claim. But because "enjoying . . . liberty" and "pursuing . . . happiness" are broad enough to implicate a vast array of laws, we must consider the relevant history and context to interpret these provisions and determine what limits they impose on the State's otherwise broad and comprehensive police power. If RRWC's claim is correct, then any statutes regulating abortion were impliedly repealed either in 1889 when the constitution was adopted or in 1984 when section 1 was amended. *State v. Strom*, 2019 ND 9, ¶ 8, 921 N.W.2d 660. To determine whether the ordinary meaning of this provision in 1889 or in 1984 would have encompassed a right to abortion, we may also consider other evidence of how the people who made these words part of our fundamental law would have understood the words they enacted. *Newman v. Hjelle*, 133 N.W.2d 549, 555–57 (N.D. 1965) (considering newspaper advertisements, publicity pamphlets, and statutes in effect as evidence of how the framers and the people

who adopted a provision understood it). We have previously considered state and territorial statutes as relevant context for understanding the meaning of section 1. *Wrigley*, 2023 ND 50, ¶¶ 23–24; *MKB Mgmt.*, 2014 ND 197, ¶¶ 36–37. That discussion remains relevant when we reach the question on the merits.

1

[¶67] The dispute here is primarily one of legislative fact, not adjudicative fact. Adjudicative facts are the specific facts about what happened in a particular case—the *who*, *what*, *when*, *where*, and *why* that relate to the immediate parties in the dispute. *Little v. Traynor*, 1997 ND 128, ¶ 12, 565 N.W.2d 766. Such facts are unique to the case at hand and are typically proven through witness testimony, documents, and other evidence presented at trial. *Id.* Legislative facts, on the other hand, are general facts that help the court determine the content and application of law and policy. *Id.* Trial and appellate courts may establish legislative facts through expert testimony, academic research, or other secondary sources without resorting to judicial notice. *Edison v. Edison*, 2023 ND 141, ¶ 34, 994 N.W.2d 151; Explanatory Note to N.D.R.Ev. 201 ("Judicial notice of legislative facts, facts that aid the court in the interpretation and application of law and policy, is not governed by this or any other rule of evidence.").

[¶68] The State supported its summary judgment motion with a declaration attaching various expert reports and deposition transcripts, including those of Dr. Karissa Haugeberg, a historian who offered evidence in support of legislative facts relating to abortion at or around statehood. Her research included historical North Dakota newspapers; The Journal-Lancet, the medical journal of record for Minnesota, North Dakota, and South Dakota until 1968; and peer reviewed book monographs and scholarly articles about the history of North Dakota, maternal mortality, and the histories of birth control and abortion. Although experts may help courts determine historical legislative facts, the court may do its own review of historical references and other secondary sources to shed light on the meaning of terms. *See McCormick*, 2012 ND 53, ¶ 12; *Newman*, 133 N.W.2d at 555–57; *see also D.C. v. Heller*, 554 U.S. 570 (2008) (interpreting constitutional terms where

both the majority and dissent considered a variety of historical sources to provide relevant evidence of meaning in context).

2

[¶69] Newspapers from the period just before the vote to approve the state constitution and published in the territory that became North Dakota on November 2, 1889, regularly reported on criminal prosecutions for abortion and consistently referred to abortion as a crime. Under the heading *The World of Criminals*, the Emmons County Record reported on August 2, 1889, about a "Joseph Howell, charged with causing the death of his paramour, Malinda Hall, by abortion." On July 19, 1899, the Griggs County Courier reported the death of a "school girl aged sixteen . . . from the effects of an abortion," along with the arrest of two people implicated in the crime. *See also* Wahpeton Times, July 18, 1889 (reporting same events). In the June 27, 1889 edition, the Wahpeton Times reported the arrest of a man charged in relation to a death "from the effects of attempted abortion." The Bismarck Tribune edition of May 17, 1889, reported news of the missing Dr. Cronin, describing the confession of another man providing details of "a woman killed by abortion, perhaps performed by Dr. Cronin." Further reinforcing the consistent association of abortion with criminality, on April 25, 1889, the Wahpeton Times reported on Canadian legislation, stating that "the bill includes murder, counterfeiting, forgery, larceny, embezzlement, obtaining money on false pretenses, rape, abduction, burglary, arson, piracy, abortion, breach of trust, and any offense construed as felony by Canadian laws." The March 15, 1889 Oakes Republican reported news of a physician arrested on the basis of a "death bed statement" that he had performed a criminal abortion on the decedent.

[¶70] Although many reports of abortion close in time to the adoption of the constitution involved criminal charges following the death of the pregnant woman, the public discussion of abortion was not limited to abortions that caused death of the pregnant woman. In January 1885, newspapers across the territory reported the arrest of Dr. Bradley and Sarah Highland, defendants in an abortion case in Lisbon. *See, e.g.*, Bismarck Weekly Tribune, Jan. 23, 1885, at 1;

The Wahpeton Times, Jan. 29, 1885, at 2; Jamestown Weekly Alert, Jan. 29, 1885, at 2; The Pioneer Express, Jan. 30, 1885, at 1 (Pembina). Bradley was accused of committing abortion on Highland. Both failed to post bond and were committed to the Cass County Jail. The Jamestown newspaper reported in detail under the heading *Crime Against Humanity* about court proceedings relating to abortion charges against Dr. DePuy. Jamestown Weekly Alert, Aug. 8, 1884, at 4. The woman on whom the abortion was performed testified extensively and wrote in a letter about her desperate circumstances of being young, unmarried, and betrayed by the man who had promised to marry her. Jamestown Weekly Alert, Aug. 15, 1884, at 4. Another report described an Iowa case in which "[t]he crime was revealed by chance while the girl was testifying" in another matter. The Hope Pioneer, Apr. 25, 1884, at 2. Finally, the Bismarck Weekly Tribune reported on the arrest of a Denver abortionist and pending arrest warrants for "three married couples" charged with being patrons of the abortionist Madame Astle. Bismarck Weekly Tribune, Sep. 4, 1891, at 2.

[¶71] The reported cases are consistent with the news accounts. In *State v. Longstreth*, 19 N.D. 268, 121 N.W. 1114 (N.D. 1909), the Court addressed Dr. Longstreth's appeal from a conviction for abortion. The Court was divided on whether sufficient evidence was presented to prove the abortion was not necessary to preserve the life of the woman. *Id.* at 1119. The prosecution had presented testimony from the woman that she had become pregnant by Dr. Longstreth and he had employed drugs and a medical instrument on her to induce abortion without ever telling her that an abortion was necessary to preserve her life. *Id.* at 1118. The majority noted, but did not resolve, a division of authority on the proof required to establish whether the abortion was necessary to save the woman's life: "Under a statute which makes it an element of the offense that the abortion was not necessary, some courts hold that, though this want of necessity must be averred in the indictment, it need not be proved; but the burden is on the defendant to show a necessity." *Id.* at 1118 (quoting Bishop, Commentaries on the Law of Statutory Crimes § 762 (3d ed. 1901)).

[¶72] Whether the State is likely to succeed on appeal depends on whether the "plain, ordinary, and commonly understood meaning" of N.D. Const. art. I, § 1,

includes a right to abortion broad enough to conflict with N.D.C.C. ch. 12.1-19.1. *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586. The territorial laws in effect in 1889, the frequent newspaper references to criminal prosecution for abortion, and the multiple references to death by suicide of a doctor accused of committing abortion all indicate the ordinary meaning of section 1 was not understood to limit regulation of abortion. *See, e.g.*, Oakes Republican, Mar. 15, 1889 (reporting arrest of physician for abortion who then "died very suddenly under circumstances indicating suicide"); Griggs Courier, Dec. 21, 1888 (reporting arrest "on the charge of procuring an abortion" of Dr. G. Williams, who was found dead the next day "having taken arsenic"). There is no indication of public debate about decriminalizing abortion or guaranteeing a right to abortion leading up to adoption of the 1889 constitution. All known evidence of the original meaning is that the people of North Dakota in 1889 did not understand section 1 to raise a conflict with the existing restrictions on abortion.

3

[¶73] The *Wrigley* majority and RRWC cited the 1914 edition of The Journal-Lancet as providing some support for a right to abortion to preserve life or health. *Wrigley*, 2023 ND 50, ¶ 25. The material was published 25 years after the 1889 constitution was adopted, so it is of limited value in assisting in the interpretation of language enacted much earlier. Even with that caveat, read as a whole, the 1914 medical journal fails to support the broad health-preserving right asserted by RRWC. Moreover, upon review of related medical journals from the 1880s through the 1910s, it becomes clear that the medical consensus during that period, which spans the adoption of the 1889 constitution, was that inducing an abortion was a last resort to be tried only if all other measures had failed, the mother was all but certain to die if the pregnancy continued, and more than one physician was consulted. To be clear, I do not believe the people of North Dakota intended to codify prevailing medical practices in the broad natural rights declaration of art. I, § 1. But the medical journals as a whole significantly undercut RRWC's argument that the original meaning of the provision was understood by the enacting public to embody a right to abortion broad enough to conflict with N.D.C.C. ch. 12.1-19.1. As discussed below, the

medical literature is consistent with a narrower right to preserve the life of a pregnant woman when she would be in grave danger by continuing the pregnancy.

[¶74] In 1880, William Potter, M.D., wrote for the American Journal of Obstetrics about the artificial induction of abortion. William Warren Potter, M.D., *On Rectal Alimentation and the Induction of Abortion for the Relief of the Obstinate Vomiting of Pregnancy* (1880). Dr. Potter disagreed with another doctor who had recently written that artificial abortion for relief of gravid nausea could be eliminated entirely, "even as a last resort." *Id.* at 13. Potter contended it would be unwise to completely banish abortion in these cases "even though it can only be justified as a measure of last resort." *Id.* He concluded, "in cases which have resisted the employment of all milder expedients, and life still seems threatened, the induction of abortion for the relief of the excessive, obstinate, and uncontrollable vomiting of pregnancy, becomes an alternative measure justifiable, alike, by medicine and morals." *Id.* at 16.

[¶75] Similarly, in 1891, E.S. McKee, M.D., wrote for the American Journal of Obstetrics:

> The indications for the induction of abortion are well presented by Parvin. He finds it sometimes necessary in diseases of the kidneys, though prophylactic measures will generally suffice. The same is true of chronic heart disease [a]nd diseases of the respiratory organs. Chorea is an indication in cases where the life of the mother is jeopardized and other remedies fail. Eclampsia is infrequently an indication. Cancer of the rectum is occasionally so, as is also mammary cancer and severe cases of rheumatism.

E.S. McKee, M.D., Abortion, at 5 (1891).

[¶76] In the 1889 Journal of the Minnesota State Medical Society, James H. Dunn, M.D., reported several cases, including one patient who "had been treated for pernicious vomiting of pregnancy, and abortion at last advised." Transactions of the Minnesota State Medical Society, at 80 (1889). In 1890, the Journal reported: "No woman who has disease of the kidneys should be allowed to become

pregnant, and if she does her physician would be *almost* justified in producing an early abortion, for the chances would be very much against her carrying a child to full term without having puerperal convulsions." Transactions of the Minnesota State Medical Society, at 12 (1890) (emphasis added). In 1891, the Journal reported: "The question here naturally arises, is it justifiable to produce an abortion artific[i]ally, in the early months, or for that matter, at any time during the pregnancy of a woman known to be syphilitic? This must be answered in the negative, for, small as the chances are for a healthy offspring, they should be taken." Transactions of the Minnesota State Medical Society, at 147 (1891).

[¶77] In 1906, the Journal described abortion as having three classifications:

> Abortion falls under three heads:
> 1. Accidental, when caused by a fall, or a blow, or a specific disease of the mother or ovum.
> 2. Lawful, when the physical condition of the mother is such that gestation would seriously threaten her life; for example, a badly deformed pelvis, the last stage of chronic alubuminuria [sic], or the last stage of tubercular consumption.
> 3. Criminal, when the object sought is the death of the vitalized ovum, thus preventing its growth to maturity.
> [. . .]
> I wish to make more emphatic by repetition that an abortion is only justified when pregnancy or childbirth seriously threatens the life of the mother.

Transactions of the Minnesota State Medical Society, at 443, 446 (1906).

[¶78] The passage from the 1914 Journal quoted in *Wrigley* comes from an *editorial* entitled *Criminal Abortions*. The Journal-Lancet, The Journal of the Minnesota State Medical Association and Official Organ of the North Dakota and South Dakota State Medical Associations, at 82, 665 (1914). Read in context, the reference to the "mentally unfit who might become deranged" is not an endorsement of abortion to treat or to preserve the mental health of a pregnant woman. *Id.* at 82. The editorial strongly advocates that abortionists "be stamped out" and "honest and conscientious doctors absolutely decline to perform abortions unless from humanitarian reasons." *Id.*

[¶79] The closer in time a reference is to the date of enactment, the more assistance it may provide in understanding the meaning of the words and phrases in the proper context. On my review of the district court record and of additional news and medical references of the same type relied on by RRWC's expert, the original public meaning of art. I, § 1, did not encompass a right to abortion when not medically necessary to avoid a serious threat to the mother's life or physical health.

4

[¶80] The district court recognized that the original meaning of N.D. Const. art. I, § 1 was not understood by the enacting public in 1889 as including a right to abortion. The court stated it "can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case." As a result, the court reasoned that the 1984 amendment to art. I, § 1, expanded the rights of women relevant to the issues here.

[¶81] RRWC argues this amendment, which changed the word "men" to "individuals," "clarif[ies] that these rights extend equally to people of all genders" and thus inferentially supports its argument that section 1 guarantees a right to terminate a pregnancy. This argument fails for several reasons.

[¶82] First, this single-word change was not a freestanding amendment but instead was included in an initiative intended to expressly protect the right to bear arms. 1985 N.D. Sess. Laws ch. 702. This context raises an obvious question: Why would the people amend section 1 to add the right "to keep and bear arms for the defense of their person, family, property, and the state" when section 1 already protected the "inalienable right[] . . . of enjoying and defending life and liberty"? The right to defend life and liberty implies the right to keep and bear the tools necessary for that task. The desire for explicit protection of arms suggests the people understood that these broad phrases by themselves may not be specific enough to guarantee particular rights. By comparison, inferring a right to abortion from the broad provisions "enjoying and defending life and

liberty" and "pursuing and obtaining safety and happiness," would require a far more attenuated interpretive leap.

[¶83] Second, the amendment of "men" to "individuals" was a non-substantive modernization of language because the provision already included both men and women. It was once customary to use masculine pronouns as gender-neutral inclusive terms. *See Norton*, 255 N.W. at 792 (rejecting argument that "men" was meant in a sex-specific sense rather than "in a generic sense"); Bryan A. Garner, *The Redbook, A Manual on Legal Style* 204 (4th ed. 2018). Evolving standards of formal English usage have prompted legislative drafters to use more neutral and inclusive language to avoid the archaic gender-neutral masculine. The only evident substantive purpose of the 1984 amendment was to expressly guarantee a right to bear arms.

[¶84] Contemporary evidence confirms this understanding. The 1984 amendment originated from a petition effort launched in January 1984 by the North Dakota Shooting Sports Association. *Effort launched*, Bismarck Tribune, Jan. 15, 1984, at 4B. The Association, an affiliate of the National Rifle Association, sought to add an individual right to keep and bear arms, "just setting in concrete the principles people already feel they have." *Arms petition gains signatures*, Bismarck Tribune, Mar. 12, 1984, at 11.

[¶85] Opposition to the measure was limited, primarily arguing that the amendment was "merely an ornament, and a flawed one" that added nothing to the Second Amendment. *Measure No. 3—No*, Minot Daily News, Oct. 26, 1984, at 4. The ballot language focused exclusively on arms rights: "Provides for the right to keep and bear arms for lawful purposes. [. . .] A 'yes' vote means you approve the constitutional measure concerning the right to keep and bear arms. A 'no' vote means you reject the constitutional measure concerning the right to keep and bear arms." Minot Daily News, Oct. 27, 1984, at 33.

[¶86] Contemporaneous news accounts reported the proponents were motivated by recent court decisions rejecting Second Amendment challenges to a Morton Grove, Illinois, ordinance banning sale and possession of handguns.

Other cities' laws contribute to N.D. gun issue, Bismarck Tribune, Nov. 4, 1984, at 1B. On the day before the election, the Bismarck Tribune described Measure 3 as "most assured of passage," stating one might vote no "if you think it's redundant" to the federal constitution's right to keep and bear arms. Bismarck Tribune, Nov. 5, 1984, at 4A. On the same page, the Bismarck Tribune printed three letters to the editor advocating the pro-life position on abortion, with one concluding: "We need to vote for candidates who have traditional family values and who respect the sanctity of human *life*. There is no greater issue!" *Id.* (emphasis in original). The measure overwhelmingly passed on Nov. 6, 1984, with 236,596 in favor and 58,582 opposed. 1985 N.D. Sess. Laws ch. 702. Evidence of the public understanding of voters is rarely this consistent or clear.

[¶87] I am aware of no evidence that any person voting in 1984 believed changing "men" to "individuals" would alter individual constitutional rights to include abortion, then, as now, a contentious political issue. One might argue that the plain language of the provision carries that meaning and whether or not the voters intended that, those were the words they voted to include. That would turn the absurdity canon on its head—we normally avoid clearly unintended results; to premise an abortion-inclusive interpretation of art. I, § 1 on an unintended meaning would run counter to every interpretive canon intended to aid in determining what substantive laws the lawmakers intended to enact with the words they used.

[¶88] RRWC has presented no reasoned basis to infer a substantive intent by the voters to update the meaning of art. I, § 1 to encompass the concept of "liberty" as of 1984. In contrast to what was added to section 1 (a right to bear arms), RRWC offers only inference built on silence to support the claim that the 1984 amendment froze into the constitution a new, broader scope of "liberty" that included the *Roe* abortion right. The district court's citations to later substantive due process cases such as *Casey* provide no insight into what the voters in 1984 intended by the amendment. "We must interpret what is actually contained in the Constitution, not what the parties would prefer it contained." *RECALLND v. Jaeger*, 2010 ND 250, ¶ 13, 792 N.W.2d 511. This argument fails.

D

[¶89] The district court also violated the party presentation principle. RRWC raised constitutional claims under art. I, § 1 and art. I, § 12 as well as vagueness, which is a due process claim. The first time in the record any reference was made to N.D. Const. art. I, § 25 was in the district court's order on summary judgment. In granting judgment to RRWC, the district court relied in part on the victims' rights provision in art. I, § 25: "The law also impermissibly infringes on the constitutional rights for victims of crimes." This appears to be the first reference in the record to that provision. Because no party asserted a constitutional claim under this provision, the district court erred when it raised and addressed a constitutional issue not presented by either party. *Overbo v. Overbo*, 2024 ND 233, ¶ 10; *State v. Hansen*, 2006 ND 139, 717 N.W.2d 541.

V

A

[¶90] The State argues it will suffer irreparable injury and that a stay would not cause substantial harm to RRWC because: (1) RRWC does not operate in North Dakota; and (2) N.D.C.C. ch. 12.1-19.1 allows for life- and health-preserving abortions. RRWC admits that because it no longer operates in North Dakota, "[p]ractically, denying the stay will therefore not result in the widespread availability of abortions in North Dakota outside the hospital setting." RRWC argues, however, that a stay would create confusion and ultimately chill the willingness of physicians to provide life- and health-preserving abortion care.

[¶91] As stated in *Wrigley*, "[t]he death of unborn children and the potential death or injury of a pregnant woman are both tragic." 2023 ND 50, ¶ 35. The State has a compelling interest in protecting unborn human life. *Id.* ¶ 29. These factors—whether there will be irreparable harm if the stay is not granted or if it is granted—are neutral in considering whether to grant the State's request for a stay. Although these factors should be weighed neutrally, RRWC's argument that a stay would create confusion and ultimately chill the willingness of

physicians to provide life- and health-preserving abortion care is misplaced, as discussed above.

B

[¶92] The State argues that a stay would serve the public interest, because: (1) upholding duly enacted statutes generally serves the public interest; (2) a stay would offset "the raw judicial power" exercised by the district court in its recognition of a new fundamental right to obtain a pre-viability abortion under the N.D. Constitution; and (3) a stay would maintain the status quo. RRWC responds that denying the stay would serve the public interest, because: (1) N.D.C.C. ch. 12.1-19.1 infringes on the fundamental right to obtain a life- and health-preserving abortion and "it is always in the public interest to protect constitutional rights"; and (2) denying the stay would preserve the status quo.

[¶93] The *Wrigley* majority noted that North Dakota's abortion regulation statute "is an issue of vital concern regarding a matter of important public interest." 2023 ND 50, ¶ 11. Because maintaining the status quo is a fundamental principle that informs the four criteria for granting a motion to stay, the Court must determine whether a stay would preserve the status quo here. *See Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14, 16 (D. Haw. 1972). In *Wrigley*, we held "the status quo in North Dakota for 49 years"—from *Roe v. Wade*, 410 U.S. 113 (1973) until *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)—"has been to allow for abortion care." *Wrigley*, at ¶ 38. Chapter 12.1-19.1, N.D.C.C., was in effect for approximately eighteen months, from April 23, 2023, until the district court issued its order declaring N.D.C.C. ch. 12.1-19.1 unconstitutional on September 12, 2024.

[¶94] A stay would preserve the status quo. The most recent edition of Black's Law Dictionary defines "status quo" as: "The situation that currently exists." *Black's Law Dictionary* 1709 (12th ed. 2024). The *Stop H-3 Ass'n* court explained that maintaining the status quo is a fundamental principle informing the four stay criteria. *Stop H-3 Ass'n*, 353 F. Supp. at 16. *Stop H-3 Ass'n* was published in 1973; an edition of Black's Law Dictionary published closer to that time defines "status quo" as: "The existing state of things at any given date." *Black's Law*

Dictionary 1581 (rev. 4th ed. 1975). Under that definition is the following citation: "Last actual, peaceable, noncontested condition which preceded the pending controversy." *State ex rel. Pay Less Drug Stores v. Sutton*, 98 P.2d 680, 683–84 (Wash. 1940), cited in *Black's Law Dictionary* 1581 (rev. 4th ed. 1975). Although access to abortion care had been the status quo in North Dakota for 49 years, for the most recent eighteen months, abortion regulation under N.D.C.C. ch. 12.1-19.1 was the status quo. A new "status quo" was not triggered by the district court's determination that the legislation is unconstitutional. Maintaining the status quo weighs in favor of granting the stay.

VI

[¶95] I would grant the motion for a stay.

[¶96] Jerod E. Tufte

Jensen, Chief Justice, dissenting.

[¶97] I dissent from the majority opinion to deny the stay. I am persuaded by Justice Tufte's separate which leaves open a final decision on the merits and concludes a stay of the district court decision to hold unconstitutional an act of the legislature is required. My colleagues have provided scholarly reviews of the pending motion, with significant agreement on the legal framework for review of the pending motion for a stay. However, they ultimately reach different conclusions. I do not have significant disagreement with the legal framework adopted by my colleagues. I write separately to express my application of that framework in what I hope is plain language and explain why I reach the conclusion a stay is required.

I

[¶98] Following the United States Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, regulation, if any, of abortion was returned to the individual states and specifically "to the people's elected representatives." 597 U.S. 215, 232 (2022). Each state legislature, subject to the language of its respective constitution, is now tasked with determining the scope of the right to

abortion, whether the state has a compelling interest in regulating that right, and whether any regulation is narrowly tailored to further the compelling interest. Individual states have taken vastly different approaches. As of December 20, 2024, abortion is banned in 12 states, has a gestational limit between 6 and 12 weeks in 6 states, has a gestational limit between 18 and 22 weeks in 4 states, has a gestational limit at or near viability in 19 states, and no gestational limit in 9 states and the District of Columbia. Either through legislation or their constitutions, the range of state regulation extends from allowing the procedure up to the time of birth to a total ban on the procedure.

[¶99] North Dakota, following the decision in *Dobbs*, banned the procedure but provided affirmative defenses to prevent the death of the pregnant female, to terminate a pregnancy that was the result of gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest. In the context of reviewing the district court grant of an injunction, this Court determined our constitution provided a fundamental right to an abortion in instances where a woman's life or health were endangered. *Wrigley v. Romanick*, 2023 ND 50, ¶ 33, 988 N.W.2d 231. We also acknowledged the State's compelling interest in regulating the procedure and in protecting unborn children. *Id*. We upheld the injunction.

[¶100] Subsequent to our decision to uphold the injunction, the legislature repealed the prior regulation of abortion provided in North Dakota Century Code ch. 12.1-19 and enacted ch. 12.1-19.1 defining the limitations on abortions. The current law limits abortions to instances when a woman's life is endangered, when there is a serious health risk to the pregnant woman, and in instances where the pregnancy is the result of gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest if the procedure is performed within the first six weeks. The definition of serious health risk includes medical conditions that necessitate an abortion to prevent substantial physical impairment of a major bodily function but excludes any psychological or emotional condition.

[¶101] Acknowledging the State has a compelling interest in protecting unborn children is significant. It provides the legislature, as the "people's elected representatives," with authority to regulate the procedure. Our function as the

Judicial Branch is not to define the limits of the procedure but to simply review whether the State's regulation is narrowly tailored to advance a compelling interest to the extent it conflicts with a fundamental right.

[¶102] As restrictive as this legislation may be, we are required to apply a presumption the legislature has acted in accordance with the constitution in enacting legislation. This principle is so significant in North Dakota that our constitution requires not just a majority of this Court to declare a statute unconstitutional, it requires a supermajority of four of the five members of the Court. Here, the legislation at issue was enacted in direct response to our prior decision determining a fundamental right to abortion where the life or the health of the mother are endangered. The current legislation statutorily recognizes the availability of the procedure to protect the life and health of the mother at any time during the gestational period, recognizes limited availability of the procedure in instances of rape and incest, and specifically excludes mental health conditions from the definition of serious health risk. Our prior decision found a fundamental right with respect to a woman's health and life and determined the State has a compelling interest even in those instances to engage in regulation of the procedure. We have not yet determined whether the scope of that right exceeds circumstances involving a woman's health or life, or if any regulation in addition to those circumstances would be subject to strict scrutiny.

II

[¶103] In the present case, the district court reached its holding after finding the statute was vague and finding a fundamental right to a pre-viability abortion. We have never previously applied the void for vagueness doctrine outside the First Amendment. While we may do so after review of the full merits, for the purpose of evaluating a motion for a stay, I cannot accept that a theory never before applied in this context defeats the presumption the legislation is constitutional. With respect to the district court's finding there is a fundamental right to pre-viability abortions, the court itself acknowledged that this was a novel finding. While we may do so after a review of the full merits, for the purpose of evaluating a motion for a stay, I cannot accept a theory the court

recognized as novel defeats the presumption the legislation is constitutional. Our review of the request for a stay is not intended to be a final determination on the merits. Regardless of how restrictive this legislation may be, in the context of a stay, I believe we are compelled to grant the stay of the district court's determination that the legislation is unconstitutional.

[¶104] Jon J. Jensen, C.J.

CHAPTER 23-06.5
HEALTH CARE DIRECTIVES

23-06.5-01. Statement of purpose.

Every competent adult has the right and responsibility to make the decisions relating to the adult's own health care, including the decision to have health care provided, withheld, or withdrawn. The purpose of this chapter is to enable adults to retain control over their own health care during periods of incapacity through health directives and the designation of an individual to make health care decisions on their behalf. This chapter does not condone, authorize, or approve mercy killing, or permit an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying.

23-06.5-02. Definitions.

In this chapter, unless the context otherwise requires:

1. "Agent" means an adult to whom authority to make health care decisions is delegated under a health care directive for the individual granting the power.
2. "Attending physician" means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient.
3. "Capacity to make health care decisions" means the ability to understand and appreciate the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care, and the ability to communicate a health care decision.
4. "Health care decision" means consent to, refusal to consent to, withdrawal of consent to, or request for any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition, including:
   a. Selection and discharge of health care providers and institutions;
   b. Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate;
   c. Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care; and
   d. Establishment of an individual's abode within or without the state and personal security safeguards for an individual, to the extent decisions on these matters relate to the health care needs of the individual.
5. "Health care directive" means a written instrument that complies with this chapter and includes one or more health care instructions, a power of attorney for health care, or both.
6. "Health care instruction" means an individual's direction concerning a health care decision for the individual, including a written statement of the individual's values, preferences, guidelines, or directions regarding health care directed to health care providers, others assisting with health care, family members, an agent, or others.
7. "Health care provider" means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care, for profit or otherwise, in the ordinary course of business or professional practice.
8. "Long-term care facility" or "long-term care services provider" means a long-term care facility as defined in section 50-10.1-01.
9. "Principal" means an adult who has executed a health care directive.

23-06.5-03. Health care directive.

1. A principal may execute a health care directive. A health care directive may include one or more health care instructions to health care providers, others assisting with health care, family members, and a health care agent. A health care directive may include a power of attorney to appoint an agent to make health care decisions for the principal when the principal lacks the capacity to make health care decisions, unless otherwise specified in the health care directive. Subject to the provisions of this chapter and any express limitations set forth by the principal in the health care

directive, the agent has the authority to make any and all health care decisions on the principal's behalf that the principal could make.

2. After consultation with the attending physician and other health care providers, the agent shall make health care decisions:
   a. In accordance with the agent's knowledge of the principal's wishes and religious or moral beliefs, as stated orally, or as contained in the principal's health care directive; or
   b. If the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests. In determining the principal's best interests, the agent shall consider the principal's personal values to the extent known to the agent.
3. A health care directive, including the agent's authority, is in effect only when the principal lacks capacity to make health care decisions, as certified in writing by the principal's attending physician and filed in the principal's medical record, and ceases to be effective upon a determination that the principal has recovered capacity.
4. Notwithstanding subsection 3, the principal may authorize in a health care directive that the agent make health care decisions for the principal even though the principal retains capacity to make health care decisions. In that case, the health care directive is in effect as stated in the health care directive under any conditions the principal may impose. The principal's authorization under this subsection may be revoked in the same manner as a health care directive may be revoked under section 23-06.5-07.
5. The principal's attending physician shall make reasonable efforts to inform the principal of any proposed treatment, or of any proposal to withdraw or withhold treatment.
6. Nothing in this chapter permits an agent to consent to admission to a mental health facility or state institution for a period of more than forty-five days without a mental health proceeding or other court order, or to psychosurgery, abortion, or sterilization, unless the procedure is first approved by court order.

23-06.5-04. Restrictions on who can act as agent.

A person may not exercise the authority of agent while serving in one of the following capacities:

1. The principal's health care provider;
2. A nonrelative of the principal who is an employee of the principal's health care provider;
3. The principal's long-term care services provider; or
4. A nonrelative of the principal who is an employee of the principal's long-term care services provider.

23-06.5-05. Health care directive requirements - Execution and witnesses.

1. To be legally sufficient in this state, a health care directive must:
   a. Be in writing;
   b. Be dated;
   c. State the principal's name;
   d. Be executed by a principal with capacity to do so with the signature of the principal or with the signature of another person authorized by the principal to sign on behalf of the principal;
   e. Contain verification of the principal's signature or the signature of the person authorized by the principal to sign on behalf of the principal, either by a notary public or by witnesses as provided under this chapter; and
   f. Include a health care instruction or a power of attorney for health care, or both.
2. A health care directive must be signed by the principal and that signature must be verified by a notary public or at least two or more subscribing witnesses who are at least eighteen years of age. A person notarizing the document may be an employee of a health care or long-term care provider providing direct care to the principal. At least one witness to the execution of the document must not be a health care or long-term

care provider providing direct care to the principal or an employee of a health care or long-term care provider providing direct care to the principal on the date of execution. The notary public or any witness may not be, at the time of execution, the agent, the principal's spouse or heir, a person related to the principal by blood, marriage, or adoption, a person entitled to any part of the estate of the principal upon the death of the principal under a will or deed in existence or by operation of law, any other person who has, at the time of execution, any claims against the estate of the principal, a person directly financially responsible for the principal's medical care, or the attending physician of the principal. If the principal is physically unable to sign, the directive may be signed by the principal's name being written by some other person in the principal's presence and at the principal's express direction.

23-06.5-05.1. Suggested health care directive form.

A health care directive may include provisions consistent with this chapter, including:

1. The designation of one or more alternate agents to act if the named agent is not reasonably available to serve;
2. Directions to joint agents regarding the process or standards by which the agents are to reach a health care decision for the principal, and a statement whether joint agents may act independently of one another;
3. Limitations, if any, on the right of the agent or any alternate agents to receive, review, obtain copies of, and consent to the disclosure of the principal's medical records;
4. Limitations, if any, on the nomination of the agent as guardian under chapter 30.1-28;
5. A document of gift for the purpose of making an anatomical gift, as set forth in chapter 23-06.6 or an amendment to, revocation of, or refusal to make an anatomical gift;
6. Limitations, if any, regarding the effect of dissolution or annulment of marriage on the appointment of an agent;
7. Health care instructions regarding artificially administered nutrition or hydration; and
8. The designation of an agent authorized to make health care decisions for the principal even though the principal retains the capacity to make health care decisions.

23-06.5-06. Withdrawal as agent.

Subject to the right of the agent to withdraw, the health care directive creates authority for the agent to make health care decisions on behalf of the principal at such time as the principal becomes incapacitated. Until the principal becomes incapacitated, the agent may withdraw by giving notice to the principal. After the principal becomes incapacitated, the agent may withdraw by giving notice to the attending physician. The attending physician shall cause the withdrawal to be recorded in the principal's medical record.

23-06.5-07. Revocation.

1. A health care directive is revoked:
   a. By notification by the principal to the agent or a health care or long-term care services provider orally, or in writing, or by any other act evidencing a specific intent to revoke the directive; or
   b. By execution by the principal of a subsequent health care directive.
2. A principal's health care or long-term care services provider who is informed of or provided with a revocation of a health care directive shall immediately record the revocation in the principal's medical record and notify the agent, if any, the attending physician, and staff responsible for the principal's care of the revocation.
3. Unless otherwise provided in the health care directive, if the spouse is the principal's agent, the divorce of the principal and spouse revokes the appointment of the divorced spouse as the principal's agent.

23-06.5-08. Inspection and disclosure of medical information.

Subject to any limitations set forth in the health care directive by the principal, an agent whose authority is in effect may for the purpose of making health care decisions:

1. Request, review, and receive any information, oral or written, regarding the principal's physical or mental health, including medical and hospital records;
2. Execute any releases or other documents which may be required in order to obtain such medical information; and
3. Consent to the disclosure of such medical information.

23-06.5-09. Duties of provider.

1. A principal's health care or long-term care services provider, and employees thereof, having knowledge of the principal's health care directive, are bound to follow the health care decisions of the principal's designated agent or a health care instruction to the extent they are consistent with this chapter and the health care directive.
2. A principal's health care or long-term care services provider may decline to comply with a health care decision of a principal's designated agent or a health care instruction for reasons of conscience or other conflict. A provider that declines to comply with a health care decision or instruction shall take all reasonable steps to transfer care of the principal to another health care provider who is willing to honor the agent's health care decision, or instruction or directive, and shall provide continuing care to the principal until a transfer can be effected.
3. This chapter does not require any physician or other health care provider to take any action contrary to reasonable medical standards.
4. This chapter does not affect the responsibility of the attending physician or other health care provider to provide treatment for a patient's comfort, care, or alleviation of pain.
5. Notwithstanding a contrary direction contained in a health care directive executed under this chapter, health care must be provided to a pregnant principal unless, to a reasonable degree of medical certainty as certified on the principal's medical record by the attending physician and an obstetrician who has examined the principal, such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication.
6. In the absence of a direction to the contrary contained in a health care directive prepared under this chapter, nothing in this chapter requires a physician to withhold, withdraw, or administer nutrition or hydration, or both, from or to the principal. Nutrition or hydration, or both, must be withdrawn, withheld, or administered, if the principal for whom the administration of nutrition or hydration is considered, has directed in a health care directive the principal's desire that nutrition or hydration, or both, be withdrawn, withheld, or administered. If a health care directive prepared under this chapter does not indicate the principal's direction with respect to nutrition or hydration, nutrition or hydration, or both, may be withdrawn or withheld if the attending physician has determined that the administration of nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the principal or would be physically harmful or would cause unreasonable physical pain to the principal.

23-06.5-10. Freedom from influence.

A health care provider, long-term care services provider, health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital service plan may not charge a person a different rate or require any person to execute a health care directive as a condition of admission to a hospital or long-term care facility nor as a condition of being insured for, or receiving, health care or long-term care services. Health care or long-term care services may not be refused because a person has executed a health care directive.

23-06.5-11. Reciprocity.

This chapter does not limit the enforceability of a health care directive or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction.

23-06.5-12. Immunity.

1. A person acting as agent pursuant to a health care directive or person authorized to provide informed consent pursuant to section 23-12-13 may not be subjected to criminal or civil liability for making a health care decision in good faith pursuant to the provisions of this chapter or section 23-12-13.
2. A health care or long-term care services provider, or any other person acting for the provider or under the provider's control may not be subjected to civil or criminal liability, or be deemed to have engaged in unprofessional conduct, for any act or intentional failure to act done in good faith and with ordinary care if the act or intentional failure to act is done pursuant to the dictates of a health care directive, the directives of the patient's agent, or other provisions of this chapter or section 23-12-13.
3. A health care provider who administers health care necessary to keep the principal alive, despite a health care decision of the agent to withhold or withdraw that health care, or a health care provider who withholds health care that the provider has determined to be contrary to reasonable medical standards, despite a health care decision of the agent to provide the health care, may not be subjected to civil or criminal liability or be deemed to have engaged in unprofessional conduct if that health care provider promptly took all reasonable steps to:
   a. Notify the agent of the health care provider's unwillingness to comply;
   b. Document the notification in the principal's medical record; and
   c. Arrange to transfer care of the principal to another health care provider willing to comply with the decision of the agent.

23-06.5-13. Presumptions and application.

1. Unless a court of competent jurisdiction determines otherwise, the appointment of an agent in a health care directive executed pursuant to this chapter takes precedence over any authority to make medical decisions granted to a guardian pursuant to chapter 30.1-28.
2. To the extent that health care directives conflict, the instrument executed later in time controls.
3. The principal is presumed to have the capacity to execute a health care directive and to revoke a health care directive, absent clear and convincing evidence to the contrary.
4. A health care provider or agent may presume that a health care directive is legally sufficient absent actual knowledge to the contrary. A health care directive is presumed to be properly executed, absent clear and convincing evidence to the contrary.
5. An agent and a health care provider acting pursuant to the direction of an agent are presumed to be acting in good faith, absent clear and convincing evidence to the contrary.
6. A health care directive is presumed to remain in effect until the principal modifies or revokes it, absent clear and convincing evidence to the contrary.
7. This chapter does not create a presumption concerning the intention of an individual who has not executed a health care directive and does not impair or supersede any right or responsibility of an individual to consent, refuse to consent, or withdraw consent to health care on behalf of another in the absence of a health care directive.
8. A copy of a health care directive is presumed to be a true and accurate copy of the executed original, absent clear and convincing evidence to the contrary, and must be given the same effect as an original.
9. Death resulting from the withholding or withdrawal of health care pursuant to a health care directive in accordance with this chapter does not constitute, for any purpose, a suicide or homicide.
10. The making of a health care directive under this chapter does not affect in any manner the sale, procurement, or issuance of any policy of life insurance or annuity, nor does it

affect, impair, or modify the terms of an existing policy of life insurance or annuity. A policy of life insurance or annuity is not legally impaired or invalidated in any manner by the withholding or withdrawal of health care from an insured principal, notwithstanding any term to the contrary.

11. A person may not prohibit or require the execution of a health care directive as a condition for being insured for, or receiving, health care services.
12. This chapter does not affect the right of a patient to make decisions regarding use of health care, so long as the patient is able to do so, or impair or supersede any right or responsibility that a person has to effect the provision, withholding, or withdrawal of health care.
13. Health care directives prepared under this chapter which direct the withholding of health care do not apply to emergency treatment performed in a prehospital situation.

23-06.5-14. Liability for health care costs.

Liability for the cost of health care provided pursuant to the agent's decision is the same as if the health care were provided pursuant to the principal's decision.

23-06.5-15. Validity of previously executed durable powers of attorney or other directives.

A health care directive executed before August 1, 2005, which complies with the law in effect at the time it was executed, including former chapter 23-06.4, must be given effect pursuant to this chapter. This chapter does not affect the validity or enforceability of a durable power of attorney for health care executed before August 1, 2005.

23-06.5-16. Use of statutory form.

The statutory health care directive form described in section 23-06.5-17 may be used and is an optional form, but not a required form, by which a person may execute a health care directive pursuant to this chapter. Another form may be used if it complies with this chapter.

23-06.5-17. Optional health care directive form.

The following is an optional form of a health care directive and is not a required form:

HEALTH CARE DIRECTIVE

I_____, understand this document allows me to do ONE OR ALL of the following:

PART I: Name another individual (called the health care agent) to make health care decisions for me if I am unable to make and communicate health care decisions for myself. My health care agent must make health care decisions for me based on the instructions I provide in this document (Part II), if any, the wishes I have made known to him or her, or my agent must act in my best interest if I have not made my health care wishes known.

AND/OR

PART II: Give health care instructions to guide others making health care decisions for me. If I have named a health care agent, these instructions are to be used by the agent. These instructions may also be used by my health care providers, others assisting with my health care, and my family, in the event I cannot make and communicate decisions for myself.

AND/OR

PART III: Allows me to make an organ and tissue donation upon my death by signing a document of anatomical gift.

PART I: APPOINTMENT OF HEALTH CARE AGENT
THIS IS WHO I WANT TO MAKE HEALTH CARE DECISIONS
FOR ME IF I AM UNABLE TO MAKE AND COMMUNICATE
HEALTH CARE DECISIONS FOR MYSELF
(I know I can change my agent or alternate agent at any time
and I know I do not have to appoint an agent or an alternate agent)

NOTE: If you appoint an agent, you should discuss this health care directive with your agent and give your agent a copy. If you do not wish to appoint an agent, you may leave Part I blank

and go to Part II and/or Part III. None of the following may be designated as your agent: your treating health care provider, a nonrelative employee of your treating health care provider, an operator of a long-term care facility, or a nonrelative employee of a long-term care facility.

When I am unable to make and communicate health care decisions for myself, I trust and appoint_____ to make health care decisions for me. This individual is called my health care agent.

Relationship of my health care agent to me: _____

Telephone number of my health care agent: _____

Address of my health care agent: _____

(OPTIONAL) APPOINTMENT OF ALTERNATE HEALTH CARE AGENT: If my health care agent is not reasonably available, I trust and appoint _____ to be my health care agent instead.

Relationship of my alternate health care agent to me: _____

Telephone number of my alternate health care agent: _____

Address of my alternate health care agent: _____

THIS IS WHAT I WANT MY HEALTH CARE AGENT TO BE ABLE TO DO IF I AM UNABLE TO MAKE AND COMMUNICATE HEALTH CARE DECISIONS FOR MYSELF

(I know I can change these choices)

My health care agent is automatically given the powers listed below in (A) through (D). My health care agent must follow my health care instructions in this document or any other instructions I have given to my agent. If I have not given health care instructions, then my agent must act in my best interest.

Whenever I am unable to make and communicate health care decisions for myself, my health care agent has the power to:

(A) Make any health care decision for me. This includes the power to give, refuse, or withdraw consent to any care, treatment, service, or procedures. This includes deciding whether to stop or not start health care that is keeping me or might keep me alive and deciding about mental health treatment.

(B) Choose my health care providers.

(C) Choose where I live and receive care and support when those choices relate to my health care needs.

(D) Review my medical records and have the same rights I would have to give my medical records to other people.

If I DO NOT want my health care agent to have a power listed above in (A) through (D) OR if I want to LIMIT any power in (A) through (D), I MUST say that here:

_____

_____

_____

My health care agent is NOT automatically given the powers listed below in (1) and (2). If I WANT my agent to have any of the powers in (1) and (2), I must INITIAL the line in front of the power; then my agent WILL HAVE that power.

____(1) To decide whether to donate any parts of my body, including organs, tissues, and eyes, when I die.

____(2) To decide what will happen with my body when I die (burial, cremation).

If I want to say anything more about my health care agent's powers or limits on the powers, I can say it here:

_____

_____

_____

PART II: HEALTH CARE INSTRUCTIONS

NOTE: Complete this Part II if you wish to give health care instructions. If you appointed an agent in Part I, completing this Part II is optional but would be very helpful to your agent. However, if you chose not to appoint an agent in Part I, you MUST complete, at a minimum, Part II (B) if you wish to make a valid health care directive.

These are instructions for my health care when I am unable to make and communicate health care decisions for myself. These instructions must be followed (so long as they address my needs).

(A) THESE ARE MY BELIEFS AND VALUES ABOUT MY HEALTH CARE

(I know I can change these choices or leave any of them blank)

I want you to know these things about me to help you make decisions about my health care:

My goals for my health care:

_____
_____
_____

My fears about my health care:

_____
_____
_____

My spiritual or religious beliefs and traditions:

_____
_____
_____

My beliefs about when life would be no longer worth living:

_____
_____
_____

My thoughts about how my medical condition might affect my family:

_____
_____
_____

(B) THIS IS WHAT I WANT AND DO NOT WANT FOR MY HEALTH CARE

(I know I can change these choices or leave any of them blank)

Many medical treatments may be used to try to improve my medical condition or to prolong my life. Examples include artificial breathing by a machine connected to a tube in the lungs, artificial feeding or fluids through tubes, attempts to start a stopped heart, surgeries, dialysis, antibiotics, and blood transfusions. Most medical treatments can be tried for a while and then stopped if they do not help.

I have these views about my health care in these situations:

(Note: You can discuss general feelings, specific treatments, or leave any of them blank).

If I had a reasonable chance of recovery and were temporarily unable to make and communicate health care decisions for myself, I would want:

_____
_____
_____

If I were dying and unable to make and communicate health care decisions for myself, I would want:

_____
_____
_____

If I were permanently unconscious and unable to make and communicate health care decisions for myself, I would want:

_____
_____
_____

If I were completely dependent on others for my care and unable to make and communicate health care decisions for myself, I would want:

_____
_____
_____

In all circumstances, my health care providers will try to keep me comfortable and reduce my pain. This is how I feel about pain relief if it would affect my alertness or if it could shorten my life:

_____
_____
_____

There are other things that I want or do not want for my health care, if possible:

Who I would like to be my health care provider:

_____
_____
_____

Where I would like to live to receive health care:

_____
_____
_____

Where I would like to die and other wishes I have about dying:

_____
_____
_____

My wishes about what happens to my body when I die (cremation, burial, whole body donation):

_____
_____
_____

Any other things:

_____
_____
_____

PART III: MAKING AN ANATOMICAL GIFT

(A) I WANT TO BE AN ORGAN DONOR

[ ] I would like to be an organ donor at the time of my death. I have told my family my decision and ask my family to honor my wishes. I wish to donate the following (initial one statement):

[ ] Any needed organs and tissue.

[ ] Only the following organs and tissue:_____

(B) I DO NOT WANT TO BE AN ORGAN DONOR

[ ] I do not want to be an organ donor at the time of my death. I have told my family my decision and ask my family to honor my wishes.

PART IV: MAKING THE DOCUMENT LEGAL

EARLIER DESIGNATIONS REVOKED. I revoke any earlier health care directive.

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS HEALTH CARE DIRECTIVE)

I sign my name to this Health Care Directive Form on_____ at
(date)

_____
(city)

_____
(state)

_____
(you sign here)

(THIS HEALTH CARE DIRECTIVE WILL NOT BE VALID UNLESS IT IS NOTARIZED OR SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME TIME YOU DATE AND SIGN THIS HEALTH CARE DIRECTIVE.)

NOTARY PUBLIC OR STATEMENT OF WITNESSES

This document must be (1) notarized or (2) witnessed by two qualified adult witnesses. The individual notarizing this document may be an employee of a health care or long-term care provider providing your care. At least one witness to the execution of the document may not be a health care or long-term care provider providing you with direct care or an employee of the health care or long-term care provider providing you with direct care. None of the following may be used as a notary or witness:

1. An individual you designate as your agent or alternate agent;
2. Your spouse;
3. An individual related to you by blood, marriage, or adoption;
4. An individual entitled to inherit any part of your estate upon your death; or
5. An individual who has, at the time of executing this document, any claim against your estate.

Option 1: Notary Public

State of _____
County of _____
In my presence on _____ (date), _____ (name of declarant) acknowledged the declarant's signature on this document or acknowledged that the declarant directed the individual signing this document to sign on the declarant's behalf.

_____
(Signature of Notary Public)
My commission expires _____, 20__.

Option 2: Two Witnesses

Witness One:

(1) In my presence on _____ (date), _____ (name of declarant) acknowledged the declarant's signature on this document or acknowledged that the declarant directed the individual signing this document to sign on the declarant's behalf.
(2) I am at least eighteen years of age.
(3) If I am a health care provider or an employee of a health care provider giving direct care to the declarant, I must initial this box: [ ].
I certify that the information in (1) through (3) is true and correct.

_____
(Signature of Witness One)

_____
(Address)

Witness Two:

(1) In my presence on_____(date), _____ (name of declarant) acknowledged the declarant's signature on this document or acknowledged that the declarant directed the individual signing this document to sign on the declarant's behalf.
(2) I am at least eighteen years of age.
(3) If I am a health care provider or an employee of a health care provider giving direct care to the declarant, I must initial this box: [ ].
I certify that the information in (1) through (3) is true and correct.

_____
(Signature of Witness Two)

_____
(Address)

PRINCIPAL'S STATEMENT

I have read a written explanation of the nature and effect of an appointment of a health care agent which is attached to my health care directive.

Dated this _____ day of _____, 20 _____. _____
(Signature of Principal)

23-06.5-18. Penalties.

1. A person who, without authorization of the principal, willfully alters or forges a health care directive or willfully conceals or destroys a revocation with the intent and effect of causing a withholding or withdrawal of life-sustaining procedures which hastens the death of the principal is guilty of a class C felony.
2. A person who, without authorization of the principal, willfully alters, forges, conceals, or destroys a health care directive or willfully alters or forges a revocation of a health care directive is guilty of a class A misdemeanor.
3. The penalties provided in this section do not preclude application of any other penalties provided by law.

23-06.5-19. Health care record registry - Fees.

1. As used in this section:
   a. "Health care record" means a health care directive or a revocation of a health care directive executed in accordance with this chapter.
   b. "Registration form" means a form prescribed by the information technology department to facilitate the filing of a health care record.
2. a. The information technology department may establish and maintain a health care record registry, through which a health care record may be filed. The registry must be accessible through a website maintained by the information technology department.
   b. An individual who is the subject of a health care record, or that individual's agent, may submit to the information technology department for registration, using a registration form, a health care record executed in accordance with this chapter.
3. Failure to register a health care record with the information technology department under this section does not affect the validity of the health care record. Failure to notify the information technology department of the revocation of a health care record filed under this section does not affect the validity of a revocation that otherwise meets the statutory requirements for revocation.
4. a. Upon receipt of a health care record and completed registration form, the information technology department shall create a digital reproduction of the health care record, enter the reproduced health care record into the health care record registry database, and assign each registration a unique file number. The information technology department is not required to review a health care record to ensure the health care record complies with any particular statutory requirements that may apply to the health care record.
   b. The information technology department shall delete a health care record filed with the registry under this section upon receipt of a revocation of the health care record along with that document's file number.
   c. The entry of a health care record under this section does not affect or otherwise create a presumption regarding the validity of the health care record or the accuracy of the information contained in the health care record.
5. a. The registry must be accessible by entering the file number and password on the internet website. Registration forms, file numbers, and other information maintained by the information technology department under this section are confidential and the state may not disclose this information to any person other than the subject of the document, or the subject's agent. A health care record may be released to the subject of the document, the subject's agent, or the subject's health care provider. The information technology department may not use information contained in the registry except as provided under this chapter.
   b. At the request of the subject of the health care record, or the subject's agent, the information technology department may transmit the information received regarding the health care record to the registry system of another jurisdiction as identified by the requester.
   c. This section does not require a health care provider to seek to access registry information about whether a patient has executed a health care record that may

be registered under this section. A health care provider who makes good-faith health care decisions in reliance on the provisions of an apparently genuine health care record received from the registry is immune from criminal and civil liability to the same extent and under the same conditions as prescribed in section 23-06.5-12. This section does not affect the duty of a health care provider to provide information to a patient regarding health care directives as may be required under federal law.

6. The information technology department may charge and collect a reasonable fee for filing a health care record and a revocation of a health care record.