

SUPREME COURT CASE NO. 20240291

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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 HOF LAND, M.D., on behalf of herself and her patients; COL-LETTE LESSARD, M.D. on behalf of herself and her patients,

Plaintiffs-Appellees,

vs.

DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota,

Defendant-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.

**On Appeal from Judgment Dated October 10, 2024
The Honorable Bruce Romanick, District Court Judge
Burleigh County District Court, South Central Judicial District
District Ct. No. 08-2022-CV-1608**

**BRIEF SUBMITTED BY CONSTITUTIONAL ACCOUNTABILITY CENTER AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND AFFIRMANCE**

Elizabeth B. Wydra (*pro hac*)
Brienne J. Gorod (*pro hac*)
David H. Gans (*pro hac*)
Miriam Becker-Cohen (*pro hac*)
Nargis Aslami (*pro hac*)
Constitutional Accountability Center
1200 18th Street NW, Suite 501
Washington, DC 20036
(202) 296-6889
brienne@theusconstitution.org

Zachary Tomczik (N.D. # 09454)
Rosenquist Law Office
2750 26th St. S., Suite C
Grand Forks, ND 58201
(701) 775-0654
zachary@rosenquistlawoffice.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
Table of Authorities.....	3
	Paragraph
Identity and Interest of <i>Amicus Curiae</i>	¶1
Introduction and Summary of Argument	¶2
Argument	¶8
I. Inspired by the Powerful Protections for Individuals Rights in the Declaration of Independence, North Dakotans Adopted a Sweeping Inalienable Rights Clause in Their Founding Charter	¶8
II. The North Dakota Constitution Protects the Inalienable and Fundamental Right to Reproductive Autonomy	¶17
Conclusion	¶28

TABLE OF AUTHORITIES

Paragraph

CASES

<i>Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.</i> , 309 A.3d 808 (Pa. 2024)...	¶27
<i>Armstrong v. State</i> , 989 P.2d 364 (Mont. 1999).....	¶6, 26, 27
<i>Buzzell v. Libi</i> , 340 N.W.2d 36 (N.D. 1983)	¶5, 19
<i>Doe v. Celani</i> , No. S81-84CnC (Vt. Super. Ct. May 26, 1986)	¶27
<i>Hodes & Nauser, MDs, P.A. v. Schmidt</i> , 440 P.3d 461 (Kan. 2019)	¶6, 25, 27
<i>Hoff v. Berg</i> , 595 N.W.2d 285 (N.D. 1999).....	¶5, 17, 18, 20
<i>In re R.D.S.</i> , 259 N.W.2d 636 (N.D. 1977).....	¶20
<i>Jaskoviak v. Gruver</i> , 638 N.W.2d 1 (N.D. 2002).....	¶19
<i>Matter of Adoption of K.A.S.</i> , 499 N.W.2d 558 (N.D. 1993).....	¶5, 17, 20
<i>Peterson v. Peterson</i> , 559 N.W.2d 826 (N.D. 1997).....	¶20
<i>Planned Parenthood of Cent. N.J. v. Farmer</i> , 762 A.2d 620 (N.J. 2000).....	¶23
<i>Power v. Williams</i> , 205 N.W. 9 (N.D. 1925).....	¶18
<i>Preterm Cleveland v. Voinovich</i> , 627 N.E.2d 570 (Ohio Ct. App. 1993).....	¶26
<i>Right to Choose v. Byrne</i> , 450 A.2d 925 (N.J. 1982).....	¶6, 23
<i>Schloendorff v. Soc'y of N.Y. Hosp.</i> , 105 N.E. 92 (N.Y. 1914)	¶5, 19
<i>State v. Cromwell</i> , 9 N.W.2d 914 (N.D. 1943).....	¶5, 18, 20
<i>State v. Phelps</i> , 286 N.W.2d 472 (N.D. 1979)	¶19
<i>State ex rel. Schuetzle v. Vogel</i> , 537 N.W.2d 358 (N.D. 1995)	¶5, 17, 19
<i>Wrigley v. Romanick</i> , 988 N.W.2d 231 (N.D. 2023).....	¶17

CONSTITUTIONAL PROVISIONS AND STATUTES

Kan. Const. § 1.....	¶25
N.D. Const. art. I, § 1	¶2, 8
N.D. Const. art. I, § 20.....	¶2
N.D. Const. of 1889, art. I, § 1.....	¶13, 24
N.J. Const. art. I, § 1	¶24
N.J. Const. of 1884, art. I, § 1	¶24

1973 N.D. Sess. Laws ch. 529	¶15
1985 N.D. Sess. Laws ch. 702	¶15
2015 N.D. Sess. Laws ch. 496	¶15

BOOKS, ARTICLES, AND OTHER AUTHORITIES

Lynn Boughey, <i>An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation</i> , 63 N.D. L. Rev. 157 (1987).....	¶14
Steven G. Calabresi & Sofia M. Vickery, <i>On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees</i> , 93 Tex. L. Rev. 1299 (2015).....	¶4, 10, 16, 25
<i>Daily Press and Dakotaian</i> (July 2, 1886).....	¶11
<i>Daily Press and Dakotaian</i> (Apr. 30, 1877).....	¶9
<i>Daily Press and Dakotaian</i> (June 28, 1889).....	¶2
Joseph R. Grodin, <i>Rediscovering the State Constitutional Right to Happiness and Safety</i> , 25 Hastings Const. L. Q. 1 (1997)	¶13
Ryan Johnson, <i>Voters Reject ‘Right to Life’ Measure 1</i> , Dickinson Press (Nov. 4, 2014), https://www.thedickinsonpress.com/news/voters-reject-right-to-life-measure-1	¶12
<i>Journal of the Proceedings of the Constitutional Convention of South Dakota</i> (1885).....	¶13, 14
<i>Journal of the Constitutional Convention for North Dakota</i> (1889)	¶13, 14
Clement A. Lounsberry, <i>Early History of North Dakota: Essential Outlines of an American History</i> (1919)	¶12, 13, 26
Herbert L. Meschke & Lawrence D. Spears, <i>Digging for Roots: The North Dakota Constitution and the Thayer Correspondence</i> , 65 N.D. L. Rev. 343 (1989).....	¶24
N.D. Legis. Council, <i>Measures Before the Voters</i> (Mar. 2022), https://ndlegis.gov/files/resource/library/measuresbeforethevoters.pdf	¶15
<i>Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota</i> (1889).....	¶2, 9
Elwyn B. Robinson, <i>History of North Dakota</i> (2017 ed.)	¶9
Burleigh F. Spalding, <i>Constitutional Convention, 1889</i> , 31 N.D. Hist. J. 151 (1964).....	¶11, 12
Robert Vogel, <i>Sources of the 1889 North Dakota Constitution</i> , 65 N.D. L. Rev. 331 (1989).....	¶12
<i>Webster’s Complete Dictionary of the English Language</i> (1886)	¶13

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

[¶1] Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the U.S. Constitution’s text and history. CAC has studied how the Declaration of Independence inspired and influenced provisions in the U.S. Constitution, as well as state constitutional individual rights protections like North Dakota’s Inalienable Rights Clause. CAC thus has an interest in the questions this case raises about the scope of that Clause and an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

[¶2] After a decade-long struggle for “those inalienable rights guaranteed by the founders of the republic,” *Daily Press and Dakotian* 2 (June 28, 1889), the Framers of the North Dakota Constitution unequivocally aspired to “see all safeguards thrown around the people in the protection of their rights,” *Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota* 377 (1889) [hereinafter “*Official Report*”]. The North Dakota Constitution’s Inalienable Rights Clause does just that. The first section of its Declaration of Rights states that “[a]ll 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; [and] pursuing and obtaining safety and happiness.” N.D. Const.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

art. I, § 1. The Framers proclaimed that these and all other fundamental rights protected by Article I “shall forever remain inviolate.” *Id.* § 20. Yet by enacting N.D.C.C. ch. 12.1-19.1 (the “Abortion Ban”), the State has defied that command and deprived North Dakotans of their inalienable rights, including the right to reproductive autonomy—a fundamental component of life, liberty, safety, and happiness.

[¶3] The text, structure, and history of the North Dakota Constitution establish the Inalienable Rights Clause as a sweeping protection for individual rights. The Framers of the Clause felt a kinship with the colonists, analogizing their struggle for statehood to the colonists’ fight for freedom from the Crown and their demand for the guarantee of Lockean natural rights. The Framers thus made deliberate drafting choices to convey the Clause’s expansive scope, including choosing broader language protecting individual rights than the constitutional models at their disposal and making the Inalienable Rights Clause the first section of the first article of their Constitution.

[¶4] Indeed, the drafters of the North Dakota Constitution adopted one of the most comprehensive versions of the various individual rights clauses in existence at the time. *See generally* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 *Tex. L. Rev.* 1299 (2015) (surveying individual rights clauses of the twenty-four state constitutions with such clauses in 1868). And over the past century and a half, the people of North Dakota have voted time and again to retain or even expand that breadth.

[¶5] Consistent with that history, this Court has construed the Inalienable Rights Clause in an expansive manner, employing reasoning which makes clear that the right to reproductive autonomy is part and parcel of the rights to life, liberty, safety, and

happiness. Liberty, as this Court has explained, is commonly understood to encompass “the opportunity to do those things which are ordinarily done by free men.” *State v. Cromwell*, 9 N.W.2d 914, 918 (N.D. 1943). The pursuit of happiness “must comprise personal freedom,” as it is “the mainspring of human activity.” *Id.* at 918-19. And because a “person’s interest in personal autonomy and self-determination is a fundamentally commanding one,” *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995), this Court has repeatedly rejected statutes and state actions that infringe on “the matter of child rearing,” *Hoff v. Berg*, 595 N.W.2d 285, ¶ 10 (N.D. 1999); fail to adequately protect parental rights, *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993); interfere with medical decisions, *Vogel*, 537 N.W.2d at 360; and undermine the core principle that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body,” *Buzzell v. Libi*, 340 N.W.2d 36, 40 (N.D. 1983) (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)). Recognizing the right to reproductive freedom follows naturally from these decisions.

[¶6] At the same time, the idea that a state constitution’s individual rights clause protects reproductive rights is far from novel. Multiple state courts have concluded that the right to reproductive autonomy is an axiomatic element of life, liberty, safety, and happiness. *See, e.g., Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982); *Armstrong v. State*, 989 P.2d 364, ¶ 30 (Mont. 1999); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 484 (Kan. 2019). This is true of near-identical clauses (like New Jersey’s) that were available as a model to the North Dakota Framers in 1889, as well as narrower clauses (like Kansas’s) which nevertheless enshrine a Lockean natural rights philosophy derived from the Declaration of Independence, much like North Dakota’s.

[¶7] In sum, the text and history of the North Dakota Constitution compel the conclusion that its Inalienable Rights Clause protects the right to abortion. This Court should affirm.

ARGUMENT

I. Inspired by the Powerful Protections for Individuals Rights in the Declaration of Independence, North Dakotans Adopted a Sweeping Inalienable Rights Clause in Their Founding Charter.

[¶8] Section 1 of the North Dakota Constitution declares that “[a]ll 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; [and] pursuing and obtaining safety and happiness.” N.D. Const. art. I, § 1. The text and history of that provision demonstrate its sweeping nature as a substantive protection for all those individual rights wrapped up in the concepts of life, liberty, safety, and happiness.

[¶9] A. The 1889 Constitutional Convention took place after a years-long fight for statehood and “revolt against outside control, against colonial status.” Elwyn B. Robinson, *History of North Dakota 197-98* (2017 ed.). Dakotans felt a kinship with the pre-Revolution colonists, viewing their struggles for statehood as analogous to the colonists’ fight for independence. A leading newspaper captured the public sentiment at that time:

We are so heartily disgusted with our dependent condition, with being snubbed at every turn in life, with having all our interests subjected to the whims and corrupt acts of persons in power that we feel very much as the thirteen colonies felt when they flung away their dependent condition.

Daily Press and Dakotaian 2 (Apr. 30, 1877). Against this backdrop, the Framers turned to the Declaration of Independence for guidance, as they “believe[d] that this Convention

should throw all the safeguards it is possible to throw, around the rights of the people.”
Official Report, supra, at 377.

[¶10] North Dakotans’ decision to incorporate the language of the Declaration of Independence into their constitution was a common one. By 1889, twenty-five of the thirty-eight state constitutions “contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.” Calabresi, *supra*, at 1303. As history shows, from the Founding on, Americans wrote these fundamental principles of liberty into their own state constitutions, insisting that the Declaration’s principles imposed substantive limitations on the power of government, which were critical to ensuring the full scope of liberty for the people. *See id.* at 1312-24.

[¶11] Adopting these protections was thus an easy decision for the Framers. Although some provisions of the new constitution provoked vigorous debate at the Convention, there “was little or no difference of opinion over the Articles to be contained in the Bill of Rights.” Burleigh F. Spalding, *Constitutional Convention, 1889*, 31 N.D. Hist. J. 151, 159 (1964). At long last, North Dakotans no longer had to “try to imagine that [they] . . . possessed . . . those ‘unalienable rights’ of which [the] declaration ha[d] been boasting since the dawn of liberty.” *Daily Press and Dakotaian* 1 (July 2, 1886).

[¶12] **B.** In their “sedulous . . . efforts to protect [the] inalienable rights to life, liberty and the pursuit of happiness,” Spalding, *supra*, at 159, the Framers “diligently searched” other state constitutions to adopt “a compilation of the best provisions of existing constitutions modified to conform to the conditions in the state,” Clement A. Lounsbury, *Early History of North Dakota: Essential Outlines of an American History* 413 (1919). Two key documents known to have been in every Delegate’s possession were the

1885 South Dakota Constitution and Delegate Erastus Williams’s draft constitution, which was highly revered by the Delegates and North Dakotans generally. Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. L. Rev. 331, 332 (1989); see Lounsberry, *supra*, at 398 (noting that one newspaper described the Williams draft constitution as “[a] marvel of strength, sense and diction”).

[¶13] Despite drawing extensively from these charters, the Framers did not adopt them wholesale; rather, the Framers made structural and textual decisions clearly evincing an intent to protect individual rights even more broadly than the charters they used as models did. Lounsberry, *supra*, at 398. Most critically, the Framers elected to expand on the inalienable rights clauses set out in these two documents. The South Dakota and Williams Constitutions recognized only a right to pursue happiness, *Journal of the Proceedings of the Constitutional Convention of South Dakota* 65 (1885) [hereinafter “*S.D. Journal*”]; *Journal of the Constitutional Convention for North Dakota* 66 (1889) [hereinafter “*N.D. Journal*”], but the Framers chose to protect the right of “pursuing *and obtaining safety* and happiness,” N.D. Const. of 1889, art. I, § 1 (emphasis added). The choice to add the word “safety”—particularly in the same clause as “happiness”—reflected the importance of bodily integrity and its close relationship to mental wellbeing. See, e.g., *Webster’s Complete Dictionary of the English Language* 1162 (1886) (defining “safe” as “[f]ree from harm, injury, or risk; untouched or unthreatened by danger; unharmed; unhurt; secure; whole; as, *safe* from disease; *safe* from storms; *safe* from foes”); see also Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L. Q. 1, 17 (1997) (“[S]afety connotes not merely physical safety, but a state of wholeness, or well-being.”). And the choice to add the word “obtaining”

alongside “pursuing” made clear that the rights protected by the new charter were not merely aspirational. *Compare Webster’s Dictionary, supra*, at 1065 (defining “pursue” as “[t]o follow with a view to overtake; to follow with haste; to chase”), *with id.* at 904 (defining “obtain” as “[t]o maintain a hold upon; to keep; to possess”).

[¶14] The Framers made other important changes as well in their efforts both to broaden and to foreground their Constitution’s protections for inalienable rights. They switched the word “inherent” from the South Dakota provision to “inalienable” in their charter, and added the right to protect one’s “reputation” alongside one’s “property.” *See S.D. Journal, supra*, at 65; *N.D. Journal, supra*, at 353. And while the Williams Constitution buried the Declaration of Rights in the third article, *N.D. Journal, supra*, at 66, and the South Dakota Constitution in the sixth article, *S.D. Journal, supra*, at 65, the Framers of the North Dakota Constitution instead placed the Declaration of Rights as the very first article in their Constitution. Thus, the chosen structure of the Constitution illustrates the supremacy of protection for North Dakotans’ individual rights, and the chosen text illustrates the expansiveness of those rights themselves. Lynn Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D. L. Rev. 157, 255 (1987).

[¶15] C. In the years since the ratification of the original North Dakota Constitution, the people of North Dakota have repeatedly voted to retain or expand the constitutional protections they were first guaranteed in 1889. *See* N.D. Legis. Council, *Measures Before the Voters* (Mar. 2022), <https://ndlegis.gov/files/resource/library/measuresbefore-thevoters.pdf>. When a new constitution was drafted and presented to the voters in 1972 with a significantly pared down Inalienable Rights Clause, providing only that “[a]ll

people are endowed with certain inalienable rights; among these are life, liberty and the pursuit of health and happiness,” it was overwhelmingly rejected by nearly 110,000 North Dakotans. 1973 N.D. Sess. Laws ch. 529. In 1984, nearly 237,00 North Dakotans voted to adopt a citizen-initiated ballot measure to amend the Inalienable Rights Clause by providing for gender-neutral language, changing “men” to “individuals,” and enumerating the right to keep and bear arms for lawful purposes. 1985 N.D. Sess. Laws ch. 702. And more recently, in the 2014 general election, the Legislative Assembly’s proposal to add a new section to the Declaration of Rights providing that “[t]he inalienable right to life of every human being at any stage of development must be recognized and protected” was resoundingly rejected. 2015 N.D. Sess. Laws ch. 496. Over 160,000 North Dakotans “decided that they do not want government intervening in their most personal medical decisions from pregnancy to end-of life.” Ryan Johnson, *Voters Reject ‘Right to Life’ Measure 1*, Dickinson Press (Nov. 4, 2014), <https://www.thedickinsonpress.com/news/voters-reject-right-to-life-measure-1>.

[¶16] In sum, the Framers of the North Dakota Constitution made deliberate textual and structural choices, including selecting one of the most comprehensive versions of the various inalienable rights clauses found in state constitutions at the time, to ensure that their new Constitution would provide the people of North Dakota broad protections for individual rights. *See generally* Calabresi, *supra*. Those broad protections for individual rights include protection for reproductive autonomy, as the next Section discusses.

II. The North Dakota Constitution Protects the Inalienable and Fundamental Right to Reproductive Autonomy.

[¶17] Among the rights protected by the North Dakota Constitution’s Inalienable Rights Clause is the right to reproductive autonomy, as decisions of this Court make

clear. Time and again, this Court has emphasized that the Clause is a sweeping guarantee of personal freedom in nearly all aspects of life, including child rearing, the home, bodily autonomy, and health in all of its aspects. *See, e.g., Matter of Adoption of K.A.S.*, 499 N.W.2d 558; *Hoff*, 595 N.W.2d 285; *Vogel*, 537 N.W.2d 358; *Wrigley v. Romanick*, 988 N.W.2d 231 (N.D. 2023).

¶18 A. This Court has repeatedly recognized both the breadth and paramount importance of the Inalienable Rights Clause in North Dakota’s constitutional scheme, recognizing that “[i]n adopting the constitutional system of government, [North Dakotans] agreed to the rule of the majority,” but only subject to “definite restrictions, devised for the protection of certain fundamental rights.” *Power v. Williams*, 205 N.W. 9, 14 (N.D. 1925). Construing the terms of the Clause in line with their “commonly accepted meaning[s],” this Court has defined “liberty” to include “the opportunity to do those things which are ordinarily done by free [people],” and “embrace[d] the free use by all citizens of their powers and faculties subject only to the restraints necessary to secure the common welfare.” *Cromwell*, 9 N.W.2d at 918. Relatedly, the “pursuit of happiness,” this Court has explained, is an aggregate of enumerated and unenumerated rights that “must comprise personal freedom, . . . 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; *see, e.g., Hoff*, 595 N.W.2d at ¶ 10. This constitutionally guaranteed right “can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, . . . except in so far as may be necessary to secure the equal rights of others.” *Cromwell*, 9 N.W.2d at 919.

[¶19] Consistent with these principles, this Court has recognized that a “person’s interest in personal autonomy and self-determination is a fundamentally commanding one,” and includes the “constitutionally protected liberty interest to refuse unwanted medical treatment.” *Vogel*, 537 N.W.2d at 360. In the informed-consent setting, this Court has adopted the foundational concept, stated by Justice Cardozo, that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.” *Buzzell*, 340 N.W.2d at 40 (quoting *Schloendorff*, 105 N.E. at 93); *see also Jaskoviak v. Gruver*, 638 N.W.2d 1, ¶ 13 (N.D. 2002). And this Court has also concluded that the government’s invasion of bodily autonomy even beyond the medical context “invaded the shield of personal security that our constitution was designed to protect.” *State v. Phelps*, 286 N.W.2d 472, 477 (N.D. 1979) (holding unconstitutional the forcible removal of a suspect’s clothing without his consent).

[¶20] This Court has further held that “[k]eeping State intervention in the matter of child rearing to a minimum, consistent with necessity, is essential to the American ideal” and the pursuit of happiness guaranteed by the Inalienable Rights Clause. *Hoff*, 595 N.W.2d at ¶ 10 (quoting *In re R.D.S.*, 259 N.W.2d 636, 639 (N.D. 1977)). Numerous decisions of this Court reflect that understanding. For instance, in *Hoff v. Berg*, this Court struck down a statute that “broadly authorize[d] the courts to compel visitation with unmarried minor grandchildren for grandparents.” *Id.* at ¶ 5 (quoting *Peterson v. Peterson*, 559 N.W.2d 826, ¶ 13 (N.D. 1997)). And in *Matter of Adoption of K.A.S.*, this Court held that an indigent parent was entitled to court-appointed counsel in a parental-rights termination proceeding, reasoning that “the right to enjoy ‘the domestic relations and the privileges of the family and the home’ is embraced by the liberty and pursuit of happiness

guarantees contained in Article I, Section 1 of the North Dakota Constitution.” 499 N.W.2d at 564-65 (quoting *Cromwell*, 9 N.W.2d at 919).

[¶21] Together, these precedents—particularly when considered alongside the historical backdrop of the North Dakota Constitution described above—make clear that the Inalienable Rights Clause protects the right to reproductive freedom. A corollary to the fundamental right to parent is necessarily the right to decide whether or not to become a parent, without undue interference from the state. The salience of that principle is only heightened when, as in the case of abortion, state interference with a parental decision necessarily would also involve state interference with bodily autonomy and private medical decisions.

[¶22] **B.** This concept—that a sweeping and powerful Inalienable Rights Clause protects the right to abortion beyond circumstances necessary to preserve a pregnant person’s life or health—is not novel. Indeed, other states have interpreted their inalienable or natural rights clauses, several of which are textually narrower than North Dakota’s, to protect the right to reproductive autonomy.

[¶23] Most notably, New Jersey has construed its natural rights clause, which is nearly identical to the North Dakota Constitution’s Inalienable Rights Clause, to guarantee “the fundamental right of a woman to control her body and destiny,” which “encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child.” *Byrne*, 450 A.2d at 934. In a later decision, the court reiterated its holding in *Byrne*, explaining that the right to control one’s body and future is “fundamental to individual liberty,” and that “the principle of individual autonomy . . .

lies at the heart of a woman’s right to make reproductive decisions.” *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 632-33 (N.J. 2000).

[¶24] New Jersey’s natural rights clause is particularly instructive not only because it is nearly *identical* to North Dakota’s Inalienable Rights Clause, but also because it was available to the Framers of that Clause in 1889. See Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. Rev. 343, 380 (1989) (noting that the Declaration of Rights was drawn from other state constitutions). At the time of the North Dakota Convention, New Jersey’s Constitution provided that “[a]ll men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. Const. of 1884, art. I, § 1; compare N.D. Const. of 1889, art. I, § 1 (“[a]ll men 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; and pursuing and obtaining safety and happiness”). That provision has remained largely the same since except that, as in North Dakota, it now reads “[a]ll persons,” rather than men. N.J. Const. art. I, § 1.

[¶25] Also instructive is the Kansas Supreme Court’s conclusion, grounded in the natural rights philosophy at the heart of inalienable rights guarantees, that its inalienable rights clause protects reproductive autonomy. Calabresi, *supra*, at 1304-09. The Kansas Constitution provides that “[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Kan. Const. § 1. The

Kansas Supreme Court held that this clause “includes the rights to liberty and the pursuit of happiness, protects the core right of personal autonomy—which includes the ability to control one’s own body, to assert bodily integrity, and to exercise self-determination,” thus “protect[ing] a woman’s right to make decisions about whether she will continue a pregnancy.” *Hodes & Nauser*, 440 P.3d at 491-92. Because the framers of the Kansas Constitution looked to the Declaration of Independence when drafting Section 1, the court closely examined its Lockean natural rights philosophical underpinnings to conclude:

At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy. Few decisions impact our lives more than those about issues that affect one’s physical health, family formation, and family life. We conclude that this right to personal autonomy is firmly embedded within section 1’s natural rights guarantee and its included concepts of liberty and the pursuit of happiness.

Id. at 483.

[¶26] The Lockean natural right guarantee of personal autonomy equally informs the meaning of North Dakota’s Inalienable Rights Clause, as the Framers of the North Dakota Constitution relied on the language of the Declaration of Independence just like the framers of the Kansas Constitution did. *See Lounsberry, supra*, at 413-14. Other state courts have also relied on concepts of natural law and natural rights when construing their inalienable rights clauses, *see, e.g., Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 574 (Ohio Ct. App. 1993) (finding the right to choose an abortion in a provision recognizing natural law), and other constitutional provisions, *see, e.g., Armstrong*, 989 P.2d at ¶ 30 (relying on Lockean natural rights philosophy to find a right to abortion under privacy clause). This philosophy should serve as a lodestar to this Court in interpreting the

North Dakota Constitution’s sweeping Inalienable Rights Clause and in deciding this case.

[¶27] In sum, numerous state courts have agreed that personal autonomy, bodily integrity, self-determination, the right to be left alone, and the right to generally direct one’s own life are crucial and axiomatic components of the inalienable rights to life, liberty, safety, and happiness. *See, e.g., Hodes & Nauser*, 440 P.3d at 646 (“At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, . . . bodily integrity, and . . . self-determination”); *Armstrong*, 989 P.2d at ¶ 72 (“the inalienable right to seek safety, health and happiness . . . in the context of this case, [includes] the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one’s own health and bodily integrity without government interference”); *Doe v. Celani*, No. S81-84CnC, slip op. at 8 (Vt. Super. Ct. May 26, 1986) (recognizing that state inalienable rights provision “gives constitutional stature to individuals’ unalienable rights to health in the form of happiness, safety and the ability to enjoy life”). The Pennsylvania Supreme Court perhaps said it most clearly: “The right to reproductive autonomy is the right to self-determination. . . . The right of all individuals to be left alone to pursue happiness and enjoy liberty is central to our compact with the government.” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 916-17 (Pa. 2024). This Court should follow suit.

CONCLUSION

[¶28] For the foregoing reasons, this Court should affirm the District Court's judgment.

Date: February 4, 2025

Respectfully submitted,

Elizabeth B. Wydra (*pro hac*)
Brianna J. Gorod (*pro hac*)
David H. Gans (*pro hac*)
Miriam Becker-Cohen (*pro hac*)
Nargis Aslami (*pro hac*)
Constitutional Accountability Center
1200 18th Street NW, Suite 501
Washington, DC 20036
(202) 296-6889
brianna@theconstitution.org

/s/ Zachary Tomczik
Zachary Tomczik (N.D. # 09454)
Rosenquist Law Office
2750 26th St. S., Suite C
Grand Forks, ND 58201
(701) 775-0654
zachary@rosenquistlawoffice.com

Counsel for *Amicus Curiae*

SUPREME COURT CASE NO. 20240291

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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-Appellees,

vs.

DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota,

Defendant-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.

CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing *Amicus Curiae* Brief in Support of Plaintiffs and Affirmance was prepared in a proportionally spaced, 12-point type, is 19 pages in length, and complies with the page limitation applicable to *amicus curiae* briefs under Rule 29(a)(5) and Rule 32(a)(8)(B).

/s/ Zachary Tomczik
Zachary Tomczik

Counsel for *Amicus Curiae*