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; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, 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 HEGVICK, 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 ENGLESTAD, in her official capacity as the 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

BRIEF OF *AMICI CURIAE* EILEEN MCDONAGH, LINDA MCCLAIN AND JAMES FLEMING IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND IN OPPOSITION TO DEFENDANT-APPELLANT'S APPEAL OF THE DISTRICT COURT'S JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota Cases **Paragraph Number(s)**

Federal Cases

North Dakota Constitution and Statutes

Secondary Sources and Other Authorities

STATEMENT OF INTEREST AND IDENTITY OF *AMICI CURIAE*

[¶1] *Amicus curiae* Eileen McDonagh is a Professor Emerita of Political Science at the College of Social Sciences and Humanities at Northeastern University. She has published extensively on topics related to women's equality and health, including related to the efficacy of abortions and pregnancies. Professor McDonagh's book, *Breaking the Abortion Deadlock: From Choice to Consent* (Oxford University Press, 1996), focuses on her extensive research and informed perspective that the relationship between a woman and a fetus, which relies on the fetus's use of the woman's body, should require consent and that, without this consent, the state should provide protections to support a woman's right to defend her bodily autonomy, including through abortion care.

[¶2] *Amicus curiae* Linda C. McClain is the Robert Kent Professor of Law at Boston University and Co-Director of the Boston University Law Program on Reproductive Justice. Professor McClain is a former Laurance S. Rockefeller Fellow at Princeton University's University Center for Human Values and a former faculty fellow at the Harvard University Center for Ethics and the Professions (now the Safra Center). She is a member of the American Law Institute, the Council on Contemporary Families, the American Political Science Association, and the American Society for Political and Legal Philosophy. Professor McClain has written extensively on topics related to family, gender, and constitutional issues, including about the constitutional right to reproductive freedom. Professor McClain's research, and in particular her book *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Harvard University Press, 2006), describes the constitutional foundations for reproductive freedom.

[¶3] *Amicus curiae* James E. Fleming is a scholar in constitutional law and interpretation, who is the Honorable Paul J. Liacos Professor of Law at Boston University School of Law. He also teaches torts, including the right of self-defense. Professor Fleming's most recent

book, *Constructing Basic Liberties: A Defense of Substantive Due Process* (University of Chicago Press, 2022), defends judicial protections for basic personal liberties, including reproductive rights. He has written and lectured extensively on personal autonomy and bodily integrity in relation to the Supreme Court's decisions on abortion restrictions. Professor Fleming also co-authored *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press, 2013) with Professor McClain, which analyzes the interplay of rights, responsibilities, and civic virtues in justifying constitutional rights such as reproductive freedom.

[¶4] The *amici curiae* have a particular interest in the intersection between the constitutional rights to reproductive freedom and self-defense, including in instances where an abortion would protect the mother's bodily integrity. The *amici* support the district court's holding declaring the entirety of N.D. Cent. Code ("N.D.C.C.") ch. 12.1-19.1 (which replaced N.D.C.C. ch. 12.1-19) unconstitutional and finding that the North Dakota Constitution's reference in Article I, Section 1 to "life, liberty, safety, and happiness" provides a right to abortion.

STATEMENT OF AUTHORSHIP AND SUPPORT

[¶5] No counsel for a party authored this brief in whole or in part. No party, party's counsel, or other entity or person—other than *amici curiae* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

[¶6] The North Dakota Constitution has always guaranteed each and every individual in the state the fundamental and inalienable right to use force to protect his or her life and safety. This constitutional right to self-defense is supported by over a hundred years of judicial precedent. There is *no dispute* that pregnant women in North Dakota enjoy this fundamental right. The dispute narrowly focuses on the scope of the self-defense right in the pregnancy context and the limitations on when that right may be exercised against an embryo or fetus.

[¶7] The latest iteration of the North Dakota statute criminalizing abortion (N.D.C.C. ch. 12.1-19.1) unconstitutionally abridges the self-defense rights of pregnant women by failing to recognize that every pregnancy, even a medically uncomplicated pregnancy, causes or threatens to cause serious bodily injury. Absent the pregnant woman's consent, these injuries trigger the right to use self-defense to terminate the pregnancy. As such, the limited exceptions provided by the statute—which purport to allow abortions under limited medical circumstances and based on the judgment of a reasonably prudent physician—impermissibly circumscribe the self-defense rights of pregnant women. For these reasons, as explained fully herein, the statute cannot stand.

PROCEDURAL POSTURE

[¶8] In 2007, the North Dakota Legislature enacted Section 12.1-31-12 of the North Dakota Century Code (the "2007 Abortion Ban"), which purported to criminalize all abortions in North Dakota on the 30th day after "[t]he attorney general certifies to the legislative council the issuance of the judgment in any decision of the U.S. Supreme Court which, in whole or in part, restores to the states authority to prohibit abortion." N.D.C.C. § 12.1-31-12 (as amended 2019).

[¶9] Fifteen years later, on June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, "return[ing] the issue of abortion to the people's elected representatives." 597 U.S. 215, 232 (2022). As a result of the *Dobbs* decision, the 2007 Abortion Ban was scheduled to take effect the following month on July 28, 2022. *See Access Indep. Health Servs, Inc. v. Wrigley*, No. 08-2022-CV-108, 2022 WL 3009722, at ¶ 4 (N.D. Dist. Ct. July 27, 2022).

[¶10] On July 9, 2022, before the 2007 Abortion Ban took effect, Plaintiffs-Appellees moved to enjoin its enforcement. *See id.* ¶ 1. The district court granted the motion, *id.* ¶ 10, and Defendant-Appellant sought a writ from this Court to vacate the injunction, *see Wrigley v. Romanick (Wrigley I)*, 2023 ND 50, ¶ 3, 988 N.W.2d 231.

[¶11] This Court twice addressed the district court's injunction of the 2007 Abortion Ban. On the first occasion, this Court remanded and "direct[ed] the district court to determine [Plaintiffs-Appellees'] substantial likelihood of success on the merits of its cause of action and thereafter reconsider whether a preliminary injunction was appropriate." *Wrigley I*, 2023 ND 50, ¶ 3, 988 N.W.2d 231. On the second occasion, after the district court again concluded an injunction was appropriate and necessary, this Court affirmed and left the injunction in place. *Id.* ¶ 40.

[¶12] Specifically, this Court found that Plaintiffs-Appellees demonstrated likely success on the merits because

> 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.

Id. ¶ 27 (emphasis added). Accordingly, this Court held there was a substantial likelihood that the 2007 Abortion Ban would fail under the applicable strict scrutiny review because the statute was "not narrowly tailored to achieve a compelling government interest, at least in the limited instances of life-saving and health-preserving circumstances." *Id.* ¶ 40.

[¶13] Writing in concurrence, Justice Tufte considered the 2007 Abortion Ban through the lens of whether a woman's right to self-defense permitted her to terminate certain pregnancies. *Wrigley I*, 2023 ND 50, ¶ 42, 988 N.W.2d 231 (Tufte, J., concurring). Justice Tufte concluded "there is a substantial probability [the 2007 Abortion Ban] is unconstitutional in violation of the right of self-defense protected by N.D. Const. art. I, § 1" and explained that when pregnancy causes

a "threat of serious bodily injury or death, the pregnant woman has a fundamental right to preserve her life and health with the aid of a physician." *Id.* ¶¶ 42, 43. This encompasses the "inalienable right to employ deadly force against another person when necessary. . . ." *Id.* ¶ 43 (citing *State v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983) and *United States v. Leighton*, 3 Dakota 29, 13 N.W. 347, 348 (1882)).

[¶14] Justice Tufte left open the "scope of health risks [that] may give rise to abortion as medical self-defense" and invited the parties "to present historical evidence illuminating the meaning of Article I, § 1" to help the court better evaluate whether the 2007 Abortion Ban conflicted with the fundamental self-defense right. *Wrigley I*, 2023 ND 50, ¶ 45, 988 N.W.2d 231.

[¶15] Following *Wrigley I*, the North Dakota Legislature passed Senate Bill 2150, which repealed the 2007 Abortion Ban and enacted N.D.C.C. ch. 12.1-19.1 (the "Amended 2023 Ban"). *See* N.D. Sess. Laws 2023, ch. 122, § 1. The Amended 2023 Ban provides 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. The statute creates an exception for "abortion[s] deemed necessary based on reasonable medical judgment which [are] intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). "Serious health risk" is defined by the law as "a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function, not including any psychological or emotional condition." N.D.C.C. § 12.1-19.1-01(5).

[¶16] In August 2023, Plaintiffs-Appellees filed an amended complaint challenging the constitutionality of the Amended 2023 Ban.

[¶17] This *amici* brief responds to Justice Tufte's invitation to demonstrate how the constitutional right of self-defense guarantees a parallel constitutional right to abortion care.

LAW AND ARGUMENT

I. History and Scope of the Right to Self-Defense in North Dakota

[¶18] "The right of self-defense is well established in North Dakota law." *Potts v. City of Devils Lake*, 2021 ND 2, ¶ 28, 953 N.W.2d 648 (Tufte, J., concurring). As this Court explained nearly 100 years ago, the use of lethal force in self-defense is a "fundamental right [that] has come down to us through the ages, and is now incorporated in our statutes." *State v. Swift*, 53 ND 916, 208 N.W. 388, 390 (1926).

[¶19] Indeed, in 1889, the people of North Dakota employed "clear, perhaps even majestic, statements," *Potts*, 2021 ND 2, ¶ 28, 953 N.W.2d 648, to enshrine the right to self-defense in the first section of the first article of the North Dakota Constitution:

> All 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; *pursuing and obtaining safety* and happiness.

N.D. Const. art. I, § 1 (1889) (emphasis added).

[¶20] The right to self-defense was further codified as part of "a massive revision" of the North Dakota Criminal Code that "began in 1971 and culminated in 1973 with the legislative enactment of Senate Bill No. 2045." *Leidholm*, 334 N.W.2d at 814. The Legislature looked to the Proposed Federal Criminal Code "as a model for the revision process" and largely adopted that model's provisions on justification and excuse defenses, including self-defense. *A Hornbook to the North Dakota Criminal Code*, 50 N.D. L. Rev. 639, 668 n.174 (1974); *see* Rodney S. Webb, *A Prosecutor Looks at the Criminal Code*, 50 N.D. L. Rev. 631, 632 (1973) ("[T]he proposed Federal Criminal Code, finalized on January 7, 1971, was drafted by a distinguished group of lawyers,

judges and criminologists and provided the starting basis for the North Dakota code revision."); *see also State v. Schumaier*, 1999 ND 239, ¶ 12, 603 N.W.2d 882 (similar).

[¶21] As a result of this overhaul to the criminal laws, by statute "[a] person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person[.]" N.D.C.C. § 12.1-05-03. North Dakota law additionally provides that deadly force is justified under certain circumstances, including "[w]hen used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence." N.D.C.C. § 12.1-05-07(2)(b).

[¶22] Deadly force is also justified under the North Dakota Criminal Code:

> [w]hen used by a duly licensed physician, or an individual acting at the physician's direction, if the force is necessary to administer a recognized form of treatment to promote *the physical or mental health of a patient* and if the treatment is administered in an emergency; with the consent of the patient . . . .

N.D.C.C. § 12.1-05-07(2)(f) (emphasis added). This provision mirrors a subsection of the Proposed Federal Criminal Code, which the drafters explained was "necessary because 'deadly force' is defined in § 619(b) as force, *i.e.*, physical action, which the actor knows creates a substantial risk of death or serious bodily injury. Major operations create this risk." Proposed Federal Criminal Code Final Report, Comment on § 607(2)(h), Limits on Use of Force, at 51 (1971). "Force" is identically defined under the North Dakota Criminal Code to mean "physical action." N.D.C.C. § 12.1-01-04(10).

[¶23] As this Court has described and clarified through more than 100 years of precedent, the right to self-defense is robustly protected under North Dakota law. First, a trial court must instruct the jury on self-defense where "there is evidence in the case 'sufficient to raise a reasonable doubt on the issue.'" *State v. Thiel*, 411 N.W.2d 66, 67 (N.D. 1987) (quoting N.D.C.C. § 12.1-01-

03(2)(b)). This does not present a high hurdle: "a defendant is entitled to an instruction on a theory of defense even though the evidentiary basis for that theory is 'weak, inconsistent, or of doubtful credibility.'" *State v. Gagnon*, 1997 ND 153, ¶ 9, 567 N.W.2d 807 (citation omitted).

[¶24] Once the right to a self-defense instruction is established, the nonexistence of the defense becomes an essential element of the charged offense. *State v. Olander*, 1998 ND 50, ¶ 18, 575 N.W.2d 658; *see State v. Hoerner*, 55 ND 761, 215 N.W. 277, 279 (1927) (similar); N.D.C.C. § 12.1-01-03(1)(e) (defining "element of an offense" to include the "nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue."). Accordingly, due process demands that the prosecution prove beyond a reasonable doubt that the defendant did not act in self-defense. *See Olander*, 1998 ND 50, ¶ 19, 575 N.W.2d 658; *Schumaier*, 1999 ND 239, ¶ 16, 603 N.W.2d 882 (similar); *State v. Falconer*, 2007 ND 89, ¶ 13, 732 N.W.2d 703 (similar).

[¶25] There are two elements to self-defense, both of which turn on the subjective beliefs of the person exercising the self-defense right. First, "a person must *actually and sincerely* believe that the conditions exist which give rise to a claim of self-defense." *Leidholm*, 334 N.W.2d at 815 (emphasis added). Second, "a person must *reasonably* believe that circumstances exist which permit him to use defensive force." *Id.* at 815-16 (emphasis added and citations omitted). Taken together, these elements instruct that "[a] person who believes force is necessary to prevent imminent unlawful harm is justified in using force if his belief is correct, while a person who reasonably but incorrectly believes force is necessary to protect himself against imminent harm is excused in using force." *City of Jamestown v. Kastet*, 2022 ND 40, ¶ 17, 970 N.W.2d 187.

[¶26] This Court has long held that a subjective reasonableness standard applies to the second self-defense element. *See State v. Hazlett*, 16 ND 426, 113 N.W. 374, 380 (1907) (holding

"that the circumstances bearing upon the reasonableness of defendant's belief must be viewed from the standpoint of defendant alone, and that he will be justified or excused if such circumstances were sufficient to induce in him an honest and reasonable belief that he was in danger."). This Court readopted and elaborated on the subjective reasonableness standard following the 1973 codification of the self-defense right, stating that:

> the jury [is] to assume the physical and psychological properties peculiar to the accused, viz., to place itself as best it can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm."

Leidholm, 334 N.W.2d at 818 (citations omitted); *see also Kastet*, 2022 ND 40, ¶ 18, 970 N.W.2d 187 ("A defendant's actions are to be viewed from the standpoint of a person who shares the defendant's mental and physical characteristics, sees what the defendant sees, and knows what the defendant knows.") (citation omitted).[1]

[¶27] Notably, as this Court reaffirmed in *State v. Jacob*, the law in North Dakota does not require "that there be actual danger to justify self-defense, if, from the defendant's standpoint it appeared to him that he was in great danger, and if the defendant acted in a way he, in good faith, believed necessary." 222 N.W.2d 586, 589 (N.D. 1974).

---

[1] In *Gagnon*, the jury was appropriately instructed on self-defense as follows:

> You are to assume the physical and psychological properties peculiar to the accused; place yourself as best you can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm.

1997 ND 153, ¶ 11, 567 N.W.2d 807.

[¶28] This Court's decision in *Leidholm* is instructive on this point. In that case, the defendant, a domestic abuse victim, fatally stabbed her sleeping husband. 334 N.W.2d at 814. At trial, the defendant argued that the stabbing "was done in self-defense and in reaction to the severe mistreatment she received from [her husband] over the years." *Id.* at 818-19. The district court instructed the jury on self-defense, but erroneously charged that, for the defense to apply, "[t]he circumstances under which [defendant] acted must have been such as to produce in the mind of reasonably prudent persons, regardless of their sex, similarly situated, the reasonable belief that the other person was then about to kill her or do serious bodily harm to her." *Id.* at 818. As this Court explained, the instruction "amount[ed] to reversible error requiring a new trial" because the jury properly must consider "the unique physical and psychological characteristics of an accused" to assess "the reasonableness of the accused's actions against the accused's subjective impressions of the need to use force[.]" *Id.* at 818-19.

[¶29] Moreover, the Legislature recently enhanced the already robust self-defense rights afforded under North Dakota law by removing the traditional obligation to retreat prior to using deadly force in self-defense, thereby expanding the availability of the defense. *See* 2021 ND HB 1498 (amending N.D.C.C. § 12.1-05-07(2)(b)(2)).[2]

[2] North Dakota is not the only state to expand self-defense rights in recent years: as of January 2024, 35 states have enacted statutes that remove the duty to retreat before using lethal self-defense in at least some circumstances. *See The Effect of Stand-Your-Ground Laws*, RAND (July 16, 2024), https://www.rand.org/research/gun-policy/analysis/stand-your-ground.

II. North Dakota's Constitutional and Statutory Self-Defense Rights Permit a Person to Use Force to Resist Nonconsensual Intrusions of Their Bodily Integrity.

[¶30] As explained above, in North Dakota there is a constitutional and statutory right to use deadly force where a person sincerely and reasonably believes that doing so is necessary to protect themselves from death or serious bodily injury. N.D. Const. art. I, § 1; *Leidholm*, 334 N.W.2d at 815-16; N.D.C.C. § 12.1-05-07(2)(b). This inalienable right does not evaporate because that force is being used against an embryo or fetus—rather, "[w]here a pregnancy raises a similar threat of serious bodily injury or death, the pregnant woman has a fundamental right to preserve her life and health with the aid of a physician." *Wrigley I*, 2023 ND 50, ¶ 43, 988 N.W.2d 231; *see* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813, 1825 (2007) (contending that "abortion-as-self-defense right is largely uncontroversial").

[¶31] Defendant-Appellant concedes that the self-defense right applies in the abortion context. *See* Defendant-Appellant Brief, ¶¶ 85-90. While Defendant-Appellant may disagree that the self-defense right encompasses situations to protect a pregnant woman's mental health, *see id.*, imposing such a limitation is inconsistent with North Dakota constitutional and statutory law and would diminish the self-defense rights of pregnant women.

[¶32] As a general matter, every pregnancy, including an uncomplicated or medically "normal" pregnancy,[3] threatens or causes serious bodily injury that triggers a pregnant woman's

[3] *See* Eileen L. McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 Emory L.J. 1173, 1187 (2007) ("The medical risks to a pregnant woman's health and life can be evaluated on a continuum from relatively uncomplicated to very complicated, but all pregnancies are conditions in a woman's

right to self-defense. North Dakota law defines "serious bodily injury" to mean "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." N.D.C.C. § 12.1-01-04(28). The physiological impacts, and considerable risks and harms, of pregnancy on the human body are well-documented—and clearly satisfy this definition of serious bodily injury.[4]

[¶33] Pregnancy is "the condition of having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon." *Pregnancy*, Dorland's Illustrated Medical Dictionary

---

body that pose risks to her health and life over and above risks posed when her body is in a nonpregnant condition."); Warren M. Hern, *Is Pregnancy Really Normal?*, 3 Fam. Plan. Persps. 5, 9 (1971) ("[T]he risks of serious morbidity and mortality are so much increased over the nonpregnant state that constant medical supervision is required when pregnancy occurs").

[4] Courts in other jurisdictions have routinely recognized that pregnancy results in serious bodily injury. *See, e.g.*, *Dobbs*, 597 U.S. at 396 (Breyer, J., Kagan, J., Sotomayor, J., dissenting) ("[A]n uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992), *overruled* by *Dobbs*, 597 U.S. 215 ("The mother who carries a child to full term is subject to anxieties, to physical constraints, [and] to pain"); *Moyle v. United States*, 603 U.S. 324, 328 (2024) (recognizing there are situations in which continuing a pregnancy poses a serious threat to a pregnant woman's health); *see also* Brief for Idaho Coalition for Safe Healthcare, Inc. as *Amicus Curiae* Supporting Respondent at 13, *Moyle*, 603 U.S. 324 (pregnant women may face medical issues that result in "permanent organ failure and loss of fertility").

1486 (33 ed. 2020). A pregnancy results from the presence and implantation of an embryo, which is the "attachment of the blastocyst to the epithelial lining of the uterus, its penetration through the epithelium, and its embedding in the compact layer of the endometrium, beginning six or seven days after fertilization of the oocyte." *Implantation*, Dorland's Illustrated Medical Dictionary 912-13 (33 ed. 2020). The implantation process alone clearly demonstrates the serious bodily injury imposed by each and every pregnancy:

> When the fertilized ovum first "adheres to the endometrium," or tissue lining of the uterus, its "cells secrete an enzyme which enables" it "to literally eat a hole in the luscious endometrium and become completely buried within it." The "erosive implantation" of the fertilized ovum . . . allows it "to readily absorb nutrients" from the woman's endometrial glands and blood vessels . . . During the early weeks of gestation, the cells of the fertilized ovum "stream out," "penetrate," and "extensively colonize" areas of the woman's uterus. Its cells also "destroy and replace the endothelium [lining] of the maternal vessels" and then "invade the [woman's] media with resulting destruction of the medical elastic and muscular tissue." The end result of the fertilized ovum's "invasion of, and attack on" the woman's blood vessels is that her "thick-walled muscular spinal arteries are converted" into flaccid vessels, "which can passively dilate in order to accommodate the greatly augmented blood flow through this vascular system which is required as pregnancy progresses." Around the eleventh day, the "advancing" fertilized ovum "penetrates a maternal capillary and initiates a flow of blood" into a primitive placenta.

Gannon Palmiter, *Justifying the Abortion Right During an Age of Expanding Self-Defense*, 33 B.U. Pub. Int. L.J. 153, 168-69 (2024) (quoting Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* 70 (Oxford University Press 1996)).

[¶34] Moreover, "*[e]very organ system in a woman's body changes during pregnancy* in order to meet the needs of the developing fetus and to prepare the woman for delivery." Barbara J. Buchanan-Davidson & David Polin, *Trauma in Pregnancy*, 41 Am. Jur. Proof of Facts 2d 1 (emphasis added); Priya Soma-Pillay et al., *Physiological Changes in Pregnancy*, 27:2 Cardiovascular J. Africa, at 89 (March/April 2016) (similar). "During pregnancy, enlargement of

the uterus within the abdominal cavity displaces and compresses the other abdominal contents including the heart, lungs and gastro-intestinal tract." Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 Yale J.L. & Feminism 327, 348 (1991) (internal quotation marks and citations omitted). "A [pregnant] woman's lungs respire 45 per cent more air than normal in an attempt to obtain the needed oxygen, but oxygen absorbed is less than normal despite the extra effort of the crowded lungs." *Id.* at 349; *see also* McDonagh, 56 Emory L.J. at 1208 (lung volume "progressively decreases from the middle of the second trimester of pregnancy by as much as 20%"). "Pregnancy also causes increased congestion and engorgement of the lining of the respiratory tract. The nasal mucous membranes become thicker and produce more secretions, and breathing through the nose may become more difficult." Buchanan-Davidson, 41 Am. Jur. Proof of Facts 2d 1 (citing Taylor & Slate, *Trauma and Diseases Requiring Surgery During Pregnancy*, in 2 Principles and Practice of Obstetrics and Perinatology 1388 (Iffy & Kaminetzky 1981)). These symptoms create serious bodily injury by impairing the pregnant woman's airflow. *See* N.D.C.C. § 12.1-01-04(28).

[¶35] Additionally, even during a medically uncomplicated pregnancy, the "weight of the contents of the uterus cause sacroiliac strain accompanied by pain and backache, with the effects of the pressure being felt as far as the outermost extremities of the woman's body." Neff, 3 Yale J.L. & Feminism at 348 (internal quotation marks and citations omitted); *see also* Donald H. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1580 (1979) (listing common pregnancy complaints that are "not merely uncomfortable but painful, some of which can be very painful indeed" to include: "backache; costal-marginal pain (caused by the enlarged uterus pushing against the lower ribs); abdominal 'round ligament' pain; abdominal muscle pain; pelvic ache; pelvic shooting pain (as the fetus bumps a nerve at the rim of the pelvis); foot and leg cramps; the different

pain and leg cramps associated with varicose veins; hemorrhoids; pain and pins-and-needles in the wrist (carpal tunnel syndrome); and mastitis.") (citation omitted). These common byproducts of pregnancy create serious bodily injury by subjecting the pregnant woman to extreme pain. *See* N.D.C.C. § 12.1-01-04(28).

[¶36] Further, "[t]earing and overstretching of the muscles of the pelvic floor occurs frequently during delivery, causing extensive and irreparable damage to the pelvic organs and their supporting connections. Surgery is often required to return these organs to position. Bladder control may be permanently lost." Neff, 3 Yale J.L. & Feminism at 348 (internal quotation marks and citation omitted). Birth "can also involve a major operation, with all the added risk and discomfort that entails, if the fetus is delivered by cesarean section." Regan, 77 Mich. L. Rev. at 1581; *see also* Cesarean section, 2 Am. Law Med. Malp. § 13:25 ("The cesarean section rate increased from 4.5% in 1965 to almost 25% in 1988" and the major abdominal surgery "is now one of the most commonly performed operations in this country."). Even impacts from a normal pregnancy and delivery create serious bodily injury by subjecting the pregnant woman to extreme pain, potential permanent disfigurement (for example, scarring from a caesarian section or other delivery-related surgery), and potential permanent impairment of the function of a bodily organ (for example, the bladder or pelvic organs). *See* N.D.C.C. § 12.1-01-04(28).

[¶37] The serious bodily injuries caused by even an uncomplicated pregnancy, much less those threatened or caused by a complicated pregnancy, trigger the pregnant woman's right to self-defense under North Dakota constitutional and statutory law. *See* N.D. Const. art. I, § 1; N.D.C.C. § 12.1-05-07(2)(b); *see also Severance v. Howe*, 2023 ND 197, ¶ 13, 997 N.W.2d 99 ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person") (quoting *Union Pac. Ry. Co. v.*

Botsford, 141 U.S. 250, 251-52 (1891)). The key issue then becomes consent, that is, a woman's "right to consent to what a separate entity, the fetus, does to her when pregnancy results from its presence and implantation in her uterus." Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 Alb. L. Rev. 1057, 1063 (1999); *see also* McDonagh, 56 Emory L.J. at 1202 (arguing that, "without consent, all pregnancies constitute serious bodily harm and a serious intrusion of a woman's liberty resulting from the fetus" because "what defines harm is not so much what transformations occur in people's bodies as much as whether people consent to those transformations.").

[¶38] A woman who does not want to be pregnant or to remain pregnant has not consented to the serious bodily injury that continued pregnancy entails. Significantly, a woman does not consent to become and/or remain pregnant by engaging in consensual sex (nor, clearly, nonconsensual sex). *See* Palmiter, 33 B.U. Pub. Int. L.J. at 173, 177 (explaining medical cause of pregnancy is implantation of fertilized ovum); *see also supra*, ¶ 33 (defining pregnancy). "A person who consents to an action that has the foreseeable risk of a subsequent condition may be held morally responsible for that condition, should it occur, but that person is not presumed by law to have consented to the condition itself." McDonagh, 62 Alb. L. Rev. at 1091. Consider, for example, a person who smokes cigarettes. That person "may be considered responsible for the subsequent condition of lung cancer . . . should it occur, but the person is not required to consent to the presence of the cancer in her body." *Id.* The same applies to pregnancy: a person "who voluntarily engages in sexual intercourse . . . may be partially morally responsible for the condition of pregnancy . . . should it occur, but it does not follow that she is legally required to consent to that condition." *Id.* at 1091-92. In any event, "[r]egardless of who or what may be designated as the legal cause of pregnancy or as legally responsible for pregnancy, a woman nevertheless retains

an inviolate right to be free of nonconsensual" and seriously harmful "effects on her body and liberty 'resulting from' a separate entity, the fetus." *Id.* at 1068.

[¶39] Moreover, "even when a woman indicates in some way that her consent to sexual intercourse, artificial insemination, or in vitro fertilization (IVF) techniques signifies her express or implied consent to be pregnant, she nevertheless retains the right to withdraw that consent to pregnancy." *Id.* at 1092. This conclusion is reinforced by the constitutional right to self-defense established under Article I, Section 1 of the North Dakota Constitution, which guarantees the right of all people to use lethal force to defend against death or serious bodily injury, including by a pregnant woman against an embryo or fetus (*see Wrigley I*, 2023 ND 50, ¶ 43)—regardless of how the person became pregnant.

III. The Amended 2023 Ban Violates North Dakota's Constitutional Right to Self-Defense.

[¶40] Defendant-Appellant argues that "a self-defense right only provides a right to use lethal force when the individual against whom that force will be used (here, the unborn child) is threatening another with death or serious bodily injury. And that is what N.D.C.C. § 12.1-19.1-03(1) provides for." Defendant-Appellant Brief, ¶90. Defendant-Appellant is wrong.

[¶41] N.D.C.C. § 12.1-19.1-03(1) creates an exception for "abortion[s] 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) (emphasis added). In other words, the law purports not to apply to abortions performed under certain circumstances (*i.e.*, in some medically complicated pregnancies) and fails to recognize that, *without consent*, all pregnancies threaten and cause serious bodily harm to the pregnant woman. The Amended 2023 Ban, therefore, violates the constitutional right to self-defense for at least two reasons.

[¶42] First, the "reasonable medical judgment" requirement imposed by the Amended 2023 Ban abridges the subjective reasonableness standard applicable to the right to self-defense. *See supra*, ¶¶ 24-27. In North Dakota, a pregnant woman is entitled under state constitutional and statutory law to use lethal self-defense where the *pregnant woman* reasonably believes doing so is necessary to avoid death or serious bodily injury. *See* N.D. Const. art. I, § 1; N.D.C.C. § 12.1-01-04(28); *Leidholm*, 334 N.W.2d at 815-16. The relevant self-defense inquiry, therefore, turns on the subjective "physical and psychological properties peculiar to the" pregnant woman, *Leidholm*, 334 N.W.2d at 818; *see also Kastet*, 2022 ND 40, ¶ 18, 970 N.W.2d 187 (self-defense should be "viewed from the standpoint of a person who shares the defendant's mental and physical characteristics, sees what the defendant sees, and knows what the defendant knows")—*not* those of a reasonably prudent physician, *see* N.D.C.C. § 12.1-19.1-01(4).

[¶43] Second, whereas a "serious bodily injury" encompasses, among other injuries, extreme pain (*see* N.D.C.C. § 12.1-01-04(28)), the Amended 2023 Ban's definition of "serious health risk" covers only "substantial physical impairment of a major bodily function, not including any psychological or emotional condition" (N.D.C.C. § 12.1-19.1-01(5)). Accordingly, on its face, the Amended 2023 Ban unconstitutionally circumscribes (i) the pregnant women's self-defense rights; and (ii) North Dakota physicians' right to defend others by "administer[ing] a recognized form of treatment to promote the physical *or mental health* of a patient" in emergencies and with patient consent. N.D.C.C. § 12.1-05-07(2)(f) (emphasis added).

CONCLUSION

[¶44] For the foregoing reasons, the undersigned *Amici Curiae* respectfully request that this Court affirm the district court's grant of summary judgment in favor of Plaintiffs-Appellees and hold that the Amended 2023 Ban is unconstitutional.

Dated: February 5, 2025

Respectfully submitted,

/s/ *Dane DeKrey*

Dane DeKrey
North Dakota Bar No. 09524
RINGSTROM DEKREY PLLP
814 Center Avenue, Suite 5
Moorhead, MN 56560
218-284-0484
dane@ringstromdekrey.com

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
Janice Mac Avoy*
Laura Sinrod*
Rachel Demma*
One New York Plaza
New York, NY 10004
(212) 859-8000
janice.macavoy@friedfrank.com
laura.sinrod@friedfrank.com
rachel.demma@friedfrank.com

Katherine St. Romain*
Elizabeth J. Kalanchoe*
801 17th Street, NW
Washington, D.C. 20006
(202) 639-7000
katherine.st.romain@friedfrank.com
elizabeth.kalanchoe@friedfrank.com

Counsel for Amici Curiae Eileen McDonagh, Linda McClain, and James Fleming

** Application for Pro Hac Vice Pending*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned, as counsel for the *amici curiae* in the above matter, hereby certify that the foregoing *Amici Curiae* Brief in Support of Plaintiffs-Respondents and in Opposition to Defendant-Appellant's Appeal of the District Court's Judgment was prepared in a proportionally spaced, 12-point roman type and is 19 pages in length in compliance with Rule 29(a)(5).

/s/ *Dane DeKrey*
Dane DeKrey
North Dakota Bar No. 09524
RINGSTROM DEKREY PLLP
814 Center Avenue, Suite 5
Moorhead, MN 56560
218-284-0484
dane@ringstromdekrey.com

Counsel for Amici Curiae
Eileen McDonagh, Linda McClain, and James Fleming

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients, Plaintiffs-Appellees, v. DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota, Defendant-Appellant, and KIMBERLEE JO HEGVICK, 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 ENGLESTAD, in her official capacity as the State's Attorney for Stark County; and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County, Defendants.	Supreme Court No. 20240291 **CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

I, Dane DeKrey, the undersigned, state as follows:

1. I am an attorney licensed to practice law in North Dakota, and hereby certify that on February 5, 2024, a true and correct copy of the following document: **Brief of *Amici***

***Curiae* Eileen McDonagh, Linda McClain, and James Fleming in Support of Plaintiffs-Respondents and in Opposition to Defendant-Appellant's Appeal of the District Court's Judgment** was served via electronic mail on all parties to this lawsuit.

2. I completed service by sending true and correct copies of this document to the following email addresses:

To the Plaintiff-Appellees:

- Meetra Mehdizadeh: mmehdizadeh@reprorights.org
- Astrid Ackerman: aackerman@reprorights.org
- Caroline Sacerdote: csacerdote@reprorights.org
- Jiaman Wang: awang@reprorights.org
- Marc Hearron: mhearron@reprorights.org
- Z. Beatrix Lu: blu@reprorights.org
- Christina A. Sambor: christina.sambor@genderjustice.us
- Jess Braverman: jess.braverman@genderjustice.us
- Caroline Elvig: caroline.elvig@weil.com
- Robert Niles-Weed: robert.niles-weed@weil.com
- Krystel Delauney: krystel.delauney@weil.com
- Naz Akyol: naz.akyol@weil.com
- Luna Barrington: luna.barrington@weil.com
- Liz Grefath: liz.grefath@weil.com
- Lauren Kelly: lauren.kelly@weil.com
- Caroline Zalka: caroline.zalka@weil.com
- Sarah Sternlieb: sarah.sternlieb@weil.com
- Jason Kleinwaks: jason.kleinwaks@weil.com
- Todd Larson: todd.larson@weil.com

To the Defendant-Appellants:

- Daniel Gaustad: dan@grandforkslaw.com
- Joseph Quinn: jquinn@grandforkslaw.com
- Marcus Skonieczny: marcus@grandforkslaw.com

- Philip Axt: pjaxt@nd.gov
- Courtney Titus: ctitus@nd.gov
- Scott Porsborg: sporsborg@smithporsborg.com
- Bradley Weiderholt: bwiederholt@bgwattorneys.com

Dated: February 5, 2025

/s/ Dane DeKrey

Dane DeKrey
RINGSTROM DEKREY PLLP
804 Center Avenue, Suite 5
Moorhead, MN 56560
Phone: (218) 284-0484
dane@ringstromdekrey.com