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 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 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 Ct. 20240291** **District Ct. 08-2022-CV-1608** South Central Judicial District

On Appeal from Judgment dated October 10, 2024
The Honorable Bruce Romanick, District Court Judge
Burleigh County District Court, South Central Judicial District

REPLY BRIEF OF DREW H. WRIGLEY

State of North Dakota
Drew H. Wrigley
Attorney General

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521

Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota

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INTRODUCTION

[¶1] The State of North Dakota recognizes unborn children to be more than meaningless clumps of cells; it recognizes them as human beings. And the State "has a compelling interest" in protecting those unborn human lives from wanton extermination. *Wrigley v. Romanick*, 2023 ND 50, ¶29, 988 N.W.2d 231.

[¶2] Acknowledging that point is "significant." *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, __N.W.3d__, ¶101 (Jensen, C.J., dissenting) ("*Stay Order*"). Because that point is what distinguishes the position of the State—which recognizes an abortion involves at least two lives and requires balancing both the rights of the mother and the rights of the unborn child—from the position of the Plaintiffs—who ignore the humanity of the unborn child to argue the only interests relevant are those of the mother.

[¶3] For nearly 50 years, the federal judiciary overrode the democratic process to impose an abortion regime on every State in the nation. It did so not by pointing to any clear constitutional mandate, but by squinting hard at constitutional "penumbras." *Roe v. Wade*, 410 U.S. 113, 152 (1973). In 2022, the U.S. Supreme Court righted that error and returned the issue "to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 259 (2022); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.").

[¶4] With the issue returned to the States, this Court held "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." *Wrigley*, 2023 ND 50, ¶33. And the people of North Dakota, through their elected legislature, responded by enacting N.D.C.C. ch.

12.1-19.1. Nonetheless, without much regard for the democratic process, established precedent, or even the arguments presented by the parties, the District Court took it upon itself to judicially enshrine an on-demand abortion regime for the entire State.

[¶5] In the order denying a stay of that judgment pending appeal, some members of this Court suggested certain aspects of that decision might be upheld based on an initial analysis which, if implemented, risks materially distorting other areas of State law. *Cf. Dobbs*., 597 U.S. 215 at 286-87 (discussing how judicial contortions to enshrine an abortion right have distorted "many important but unrelated legal doctrines"). Most notably:

[¶6] *First*, it was suggested that in deciding this appeal the Court "need not consult the historical record." *Stay Order*, 2025 ND 26, ¶33. Respectfully, that would be deeply inconsistent with how this Court has long conducted constitutional interpretation. This Court's prior decisions did not resolve important questions, to include the scope of health risks that would have been understood as implicating a fundamental right to abortion. That question requires an examination of how Article I, Section 1 was understood when ratified. To ignore that inquiry now—to adopt a "living constitutionalist" approach to the health exception—would be in stark contradiction to a century of this Court's precedent.

[¶7] *Second,* it was suggested that N.D.C.C. ch. 12.1-19.1 might not survive strict scrutiny because it prohibits abortions that are intended to prevent a woman from committing self-harm. *Stay Order*, 2025 ND 26, ¶36. However, the State urges the Court to thoroughly examine the logic that would underlie a holding that constitutional rights can spring from someone claiming they will harm themselves unless they get to do something—especially where that "something" is killing another human being.

[¶8] *Third*, it was suggested that N.D.C.C. ch. 12.1-19.1 might be void for vagueness

because it imposes serious criminal and reputational liability based on a determination of an individual's reasonableness. *Stay Order,* 2025 ND 26, ¶¶18-20. But so do the felonies of manslaughter, negligent homicide, and reckless endangerment—and this Court has repeatedly rejected arguments that such laws are void for vagueness.

[¶9] *Fourth*, it was suggested that the statute might be held unconstitutionally vague because the Court cannot "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." *Stay Order*, 2025 ND 26, ¶20. But so do people exercising their Article I, Section 1 constitutional right to self-defense or the defense of others—yet they are still held criminally liable if, after-the-fact, it is determined that they unreasonably concluded the use of lethal force was necessary.

[¶10] And *fifth*, it was suggested that it may have been acceptable for the District Court to facially invalidate the entire statute based on alleged vagueness, appearing to treat the question as solely going to standing. *Stay Order*, 2025 ND 26, ¶27. However, the issue is not necessarily one of standing, but of permissible remedy. Outside of the First Amendment, this Court's precedent is clear: statutes are not struck down facially for vagueness when there are applications of the law that are understandable. And here, there are many factual scenarios where application of the law would be entirely clear.

[¶11] In the rushed posture of a motion to stay, some aspects of this case may not have been thoroughly addressed or briefed. But now that the merits are squarely presented, the State asks the Court to reject Plaintiffs' attempt to upend the democratic process and distort significant aspects of State law in order to enshrine an abortion right that can be found nowhere in the text of our Constitution, nor in the traditions of our State.

[¶12] As the State noted in its opening brief: if the people of North Dakota want to enshrine a sweeping constitutional right to abortion beyond what is necessary to protect the mother's life or physical health, they are capable of doing so. Our Constitution has been amended more than 160 times. But the people of our State have decidedly *not* done so. And it is *not* the role of the judiciary to step in and create one for them.

ARGUMENT

I. The Issues Abandoned by Plaintiffs on Appeal.

[¶13] In their brief to this Court, Plaintiffs notably do not attempt to defend several of the bases that were cited by the District Court for invalidating N.D.C.C. ch. 12.19.1.

[¶14] *First*, Plaintiffs do not defend the methodological rejection of using history and tradition to establish fundamental rights. The District Court's deliberate decision to do so in this case, (R603:13-15:¶¶39-43), should be repudiated. State Br. ¶¶33-44.

[¶15] *Second*, Plaintiffs do not defend the District Court's suggestion that the 1984 amendment to Article I, Section 1 created an abortion right. (R603:14:¶41). As the State thoroughly addressed, there is no evidence that by changing the term "men" to "individuals" that amendment was understood as silently creating an abortion right. *See* State Br. ¶¶57-65. The District Court's suggestion otherwise should be rejected.

[¶16] *Third,* Plaintiffs do not defend the District Court's statement that recognizing the State's authority to restrict abortions would somehow equate to an authority to compel abortions. (R603:18:¶50). The District Court's statement to this effect reflects a profound misunderstanding of the interests and should be rejected. State Br. ¶¶113-18.

[¶17] *Fourth*, Plaintiffs do not defend the District Court's proclamation of a "viability" line for when the State can protect unborn lives. *E.g.*, (R603:23:¶68). The imposition of such a line appears to reflect the District Court's own policy preferences rather than

constitutional law, and it should be rejected. State Br. ¶¶108-12.

[¶18] *And fifth,* Plaintiffs do not attempt to defend the District Court's holding that crime victims have a constitutional right to on-demand abortions, whether under Article I, Section 25 or otherwise. *E.g.*, (R603:23:¶67). The State thoroughly addressed why that portion of the District Court's decision was wrong, both as a matter of procedure and on the merits, and this Court should reject it as well. State Br. ¶¶126-41.

[¶19] Plaintiffs chose to abandon all of those arguments, perhaps recognizing they were some of the weakest limbs on a teetering tree. But the Court should similarly reject the other bases relied upon by the District Court for invalidating N.D.C.C. ch. 12.19.1.

II. North Dakota's History and Traditions Are Critically Relevant.

[¶20] In the order denying a stay, some members of the Court suggested further historical inquiry might be unnecessary for this appeal because the Court previously determined 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." *Wrigley*, 2023 ND 50, ¶33. *See Stay Order*, 2025 ND 26, ¶33 ("Having already addressed our history and tradition on this topic, we need not consult the historical record here.").

[¶21] The State respectfully, but strenuously, disagrees. This Court's prior decisions have not resolved multiple, fundamentally important questions about the scope of any abortion right provided by Article I, Section 1 of our Constitution.

A. North Dakota's History and Traditions Must Be Examined to Determine Whether There Is a Right to On-Demand Abortions.

[¶22] The District Court purported to find, silently lurking in Article I, Section 1 of the North Dakota Constitution, a fundamental right to end the lives of unborn children for any reason or for no reason at all, at least prior to the child's "viability." (R603:18-19:¶53).

[¶23] In *Wrigley*, this Court did not address whether our Constitution contains a fundamental right to abortions when not necessary for the mother's life or health. 2023 ND 50, ¶42 (Tufte, J., concurring) ("That question is not resolved here."); *see also id*. at ¶55 (McEvers, J., concurring). Resolving that question requires examining "the history and traditions of North Dakota," *id.* at ¶33, and Plaintiffs don't argue otherwise.

B. North Dakota's History and Traditions Must Be Examined to Determine the Scope of Any Right to Perform Medically Necessary Abortions.

[¶24] In *Wrigley*, this Court also did not purport to examine the extent of the fundamental right to perform medically necessary "health preserving" abortions. 2023 ND 50, ¶42 (Tufte, J., concurring) ("At this time … we need not decide the constitutionally necessary scope of any health exception.").[1] Resolving that question also requires turning to "the history and traditions of North Dakota." *Id.* at ¶33.

[¶25] And if the right to a medically necessary abortion comes from Article I, Section 1's right to life, liberty, safety, and happiness, then this Court's precedent establishes a need to examine how that provision was understood when ratified—to include the scope of medical necessity that was understood as creating a fundamental right to abortions.

[¶26] To approach the question otherwise in a piecemeal fashion—to find a health exception by looking to our history and traditions, but then treat that health exception as changeable over time based on current needs or preferences—would be to adopt a "living constitutionalist" understanding of the health exception. For this Court to adopt such an

[1] But the Court did suggest there would need to be a high threshold of risk. *Wrigley*, 2023 ND 50, ¶31 ("Preserving the life or health of the woman necessarily includes providing an abortion when necessary to prevent *severe, life altering damage*.") (emphasis added).

approach to the health exception would contradict its long-held precedent on how to perform constitutional interpretation. State Br. 33-43; *contra* Thomas M. Cooley, *Treatise on Constitutional Limitations*, 67-68 (5th ed. 1883) ("The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time.").

[¶27] If, as this Court has repeatedly held, the purpose of constitutional interpretation "is to give effect to the intent and purpose of the people adopting the constitutional provision," *Wrigley*, 2023 ND 50, ¶17 (citation omitted), then the State urges the Court not to create an abortion exception to that approach.

III. The District Court's Fundamental Rights Analysis Was Deeply Flawed.

A. There is Not a Fundamental Right to On-Demand Abortions.

[¶28] The State has extensively addressed how there is no historical evidence the people of this State have ever intended to constitutionalize a right to perform abortions that are not necessary to protecting the mother's life or health. State Br. ¶¶46-65.

[¶29] Plaintiffs tack a short attempt to defend that notion at the end of their brief. Pls. Br. 101-05. But despite rhetorical flourishes about the historical importance of rights to "liberty" and "happiness," Plaintiffs offer no explanation for why, if on-demand abortion was understood to be included in such rights, it was illegal in North Dakota *before* statehood, *upon* statehood, and for *nearly a century afterwards* (until *Roe*).

B. There is Not a Fundamental Right to "Mental Health" Abortions.

[¶30] In the order denying a stay pending appeal, some members of the Court suggested that the statute might be subject to strict scrutiny because it prohibits abortions deemed necessary to prevent a woman from committing self-harm. *Stay Order*, 2025 ND 26, ¶36. Plaintiffs unsurprisingly try to buoy this suggestion. *E.g.*, Pls. Br. ¶80.

[¶31] But now that the merits of this case are properly before it, the State urges the Court

to critically examine the logic that would underlie a holding that constitutional rights can spring from someone claiming they will harm themselves unless another human being is killed. Following that logic to its natural terminus would raise significant issues.

[¶32] Apply that logic to the self-defense right, for example. This Court has held there is a constitutional right to use lethal force to defend oneself or others. But this Court has never held there is a right to use lethal force when thought necessary to prevent others from harming themselves. A hypothetical to illustrate: imagine a child who tells their parent that she is going to harm herself if another child continues to tease her. Assume the parent believes the child. The State urges the Court to examine whether it intends to render a decision suggesting that the parent has a constitutional right to kill the other child in order to stop her own child from harming herself. Respectfully, there is a reason that no jurisdiction in the country has gone down that path. State Br. ¶¶85-90.

[¶33] The Court should reject the idea that fundamental rights—especially a right to kill another human being—can be created by someone claiming they will harm themselves unless they get something. *Accord Hatchard v. State*, 48 N.W. 380, 382 (Wis. 1891) (rejecting idea that a "threat[] to commit suicide unless … relieved of the child" could establish medical "necessity for destroying the child"); *cf. Ziemba v. Rell*, 409 F.3d 553, 554 (2d Cir. 2005) (rejecting idea that plaintiffs had standing to allege constitutional injuries by claiming "suicide-prone class members will attempt to harm themselves").

[¶34] If the people of this State want to create a constitutional abortion right when a woman threatens self-harm unless her unborn child is killed, they are capable of creating one. But they have *not* done so, for reasons that are likely self-evident.

[¶35] In short, there has never been a fundamental right to "mental health" abortions

under the laws of this State—despite the concept of mental health being written into our earliest legal codes, and even into our original 1889 Constitution. State Br. ¶¶66-94. Plaintiffs' scattershot of arguments to the contrary (Pls. Br. ¶¶72-84) do not establish otherwise. And because there is not a fundamental right to "mental health" abortions—including when a woman claims she will engage in self-harm unless someone kills her unborn child—N.D.C.C. ch. 12.19.1's exclusion of "mental health" abortions does not subject the statute to strict scrutiny. *Contra* Pls. Br. ¶96.

C. There Is Not a Fundamental Right to an Abortion Because the Child Received a "Life-Limiting" Diagnosis.

[¶36] This Court generally doesn't decide issues not addressed by the District Court. But if the Court addresses Plaintiffs' arguments on this point, they should be rejected.

[¶37] The State has a compelling government interest protecting the lives of all human beings, including those who may have received a "life-limiting" diagnosis. State Br. ¶¶95-101. Plaintiffs' brief to this Court utterly and completely ignores that point.

[¶38] Instead, Plaintiffs claim that the State "offers no historical evidence" (Pls. Br. ¶86) there wasn't a fundamental right to kill unborn children with a "life-limiting" diagnosis. But the historical evidence for the absence of such a right is an unbroken history of this State's criminal law never recognizing an exception for such abortions.

[¶39] Even more notably, Plaintiffs' entire basis for claiming such a fundamental right is two secondary sources, neither of which advocate for the unfettered execution of unborn children with "life-limiting" conditions. Rather, both indicate that where a child is unlikely to survive *and* he or she threatens the life or health of the mother, *then* an abortion may be warranted. *See* Pls. Br. ¶86. And that is what N.D.C.C. ch. 12.1-19.1 provides for.

[¶40] Plaintiffs also suggest there is a fundamental right to kill unborn children with "life-

limiting" diagnoses because other States have recognized a parent's right to make end-of-life decisions for terminally ill minors. Pls. Br. ¶88. But there is a fundamental difference between allowing a child to die from natural causes and affirmatively killing them.

D. Other Points in Reply on Fundamental Rights.

[¶41] *The Statute Does Not Prohibit Abortions Necessary for Physical Health*. Plaintiffs dedicate a section of their brief to argue this point, Pls. Br. ¶¶69-71, even though the statute expressly provides for such abortions. Plaintiffs' argument seems to be that physicians may "delay care to seek second opinions or documentation." Pls. Br. ¶70. But the statute, on its face, only requires the physician have a reasonable medical judgment. That some physicians may misread the statute to impose other obligations (whether genuinely, or as an act of malicious over-compliance with a law they don't like) does not render the statute violative of fundamental rights. Relatedly, nothing in the statute requires a physician to deny care until the patient's "health deteriorates." *Cf.* Pls. Br. ¶71. To the contrary, there is no imminency requirement anywhere on the face of the statute.

[¶42] *Plaintiffs' Insanity Argument*. Plaintiffs' claim to a sweeping abortion right for "mental health" is notably based on a few historical journals that mention performing abortions on the insane. Pls. Br. ¶76.[2] None of those sources establish that performing abortions on physically healthy but clinically insane women would have been legal under the laws of North Dakota. But, even if they did, there is a world of difference between insanity and the amorphous right to "mental health" abortions that Plaintiffs seek to

[2] Though the author of one of the historical sources relied upon by Plaintiffs for making this assertion (Parish) expressly states that providing an abortion based on a "fear that insanity would develop" would itself "merge into criminality." *See* State Br. ¶77.

enshrine here. If the Court finds those sources establish a fundamental right to kill unborn children who were conceived by a woman that is clinically insane, any relief the Court grants to recognize such a right should be appropriately tailored.

IV. The District Court's Void-for-Vagueness Holding Was Deeply Flawed.

A. Criminal Laws Are Not Rendered Unconstitutionally Vague Simply Because They Require Determinations of Reasonableness.

[¶43] In the order denying a stay, some members of the Court suggested the statute might be held unconstitutionally vague because, "[g]iven the undisputable gravity of the conduct these statutes regulate, the specificity required by our Constitution is high." *Stay Order*, 2025 ND 26, ¶18; *see also id*. at ¶29. Concern was expressed about criminal liability and reputational injury turning on terms such as "reasonable," prudent" and "knowledgeable." *Id.* at ¶¶19-20. And it was noted that "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." *Id.* at ¶20.

[¶44] Plaintiffs agree with that reasoning, publicly proclaiming their supposed confusion over a statute that they privately acknowledged "will allow us to do what we need medically." *Compare* Pls. Br. ¶¶40-59 *with* (R562:5) (Tobiasz Text).

[¶45] However, that line of reasoning—suggesting that a law affecting abortion requires an (unexplained) level of super-specificity or it will be void for vagueness—risks distorting other areas of the law to enshrine an abortion right. *Cf. Dobbs*, 597 U.S. at 286-87.

[¶46] Criminal laws that turn on determinations of reasonableness have never been limited to trivialities like noise restrictions. The felonies of manslaughter, negligent homicide, and reckless endangerment, just to name a few, all turn on such determinations—and this Court has repeatedly held that "much-used legal test" does not render them void

for vagueness. *E.g.*, *State v. Tranby*, 437 N.W.2d 817, 821-22 (N.D. 1989) (negligent homicide); *State v. Hanson*, 256 N.W.2d 364, 367 (N.D. 1977) (reckless endangerment).

[¶47] And if the question is severity of sanction, there is no apparent reason why it would be permissible to sentence a doctor for violating standards of reasonableness under the manslaughter statute (a Class B felony—N.D.C.C. § 12.1-16-02), yet constitutionally impermissible to sentence that same doctor for violating standards of reasonableness under the abortion statute (a Class C felony—N.D.C.C. § 12.1-19.1-02).

[¶48] It was also suggested that the statute might be unconstitutionally vague because "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." *Stay Order*, 2025 ND 26, ¶20. But so do people exercising their Article I, Section 1 constitutional right to self-defense—yet they are still held criminally liable if, after-the-fact, it is determined they acted unreasonably. *State v. Leidholm*, 334 N.W.2d 811, 816 (N.D. 1983) ("an unreasonable belief may result in a conviction for either manslaughter or negligent homicide"); *see also City of Jamestown v. Kastet*, 2022 ND 40, ¶22, 970 N.W.2d 187 ("The jury … must decide whether [the defendant] had a reasonable belief....").

[¶49] If the right to self-defense is on-par with the right to a medically necessary abortion—both flowing from Article I, Section 1's life, liberty, safety, and happiness—it would make little sense to hold that one manifestation of that right (self-defense) is subject to after-the-fact determinations of reasonableness, but the other manifestation of that right (medically necessary abortions) is somehow constitutionally exempted.

[¶50] In short, major felonies—not just trivial noise ordinances—have long turned on the reasonableness of a person's conduct. And there is nothing unconstitutional, or even

uncommon, about criminal law holding doctors (or anyone) to such a standard—especially when the conduct at issue is the killing of another human being. In asking the Court to hold otherwise, Plaintiffs are asking the Court to distort its vagueness doctrine to enshrine abortion rights in precisely the ways the U.S. Supreme Court warned of in *Dobbs*.

B. The Statute Should Not Have Been Declared Facially Invalid When There Are Understandable Applications of It.

[¶51] In the order denying a stay pending appeal, some members of the Court suggested it might have been acceptable for the District Court to strike down N.D.C.C. ch. 12.19.1 on its face for alleged vagueness, appearing to view it solely as a question of standing. *Stay Order*, 2025 ND 26, ¶21. Plaintiffs agree with that framing. Pls. Br. ¶36.

[¶52] However, the problem with invalidating the statute in its entirety due to purported vagueness is not necessarily one of standing, but of permissible remedy—as even Plaintiffs themselves appear to acknowledge. *See* Pls. Br. ¶39 (stating that the issue "goes to the 'breadth of the remedy employed by the Court'") (citation omitted).[3]

[¶53] Outside of First Amendment challenges, this Court's precedent is unvarying: statutes are not struck down facially for vagueness when there are applications of the law

[3] The Court's caselaw on the distinction is perhaps not entirely clear. *Compare, e.g., State v. Tibor*, 373 N.W.2d 877, 880-81 (N.D. 1985) (rejecting facial vagueness challenge by referring to it as an issue of standing) *with Best Products Co. v. Spaeth*, 461 N.W.2d 91, 100 (N.D. 1990) (rejecting facial vagueness challenge on the merits). But regardless of how it's been framed, the Court has been consistent: "In order to invalidate an *entire* statute for vagueness, … the statute must be vague in *all* its applications." *Best Products Co.*, 461 N.W.2d at 100 (emphases added); *Tibor*, 373 N.W.2d at 882.

that are understandable. State Br. ¶¶146-54; *see also Best Products 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.") (emphasis added); *accord Hill v. Colorado*, 503 U.S. 703, 733 (2000) ("[I]mportantly, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications[.]'") (citation omitted).

[¶54] And here, the record establishes there are numerous scenarios where performing an abortion would clearly be allowed under the statute, and there are also numerous scenarios where an abortion would clearly not be allowed. *See* State Br. ¶¶152-53.

[¶55] Moreover, even if it is viewed strictly as a question of standing, this Court's cases on facial vagueness "uniformly reflect a factual record of the challenger's conduct that led to enforcement of the challenged statute." *Stay Order*, 2025 ND 26, ¶56 (Tufte, J., dissenting). Members of the Court suggested Plaintiffs might meet that bar here because they "provide the type of medical care implicated by the law." *Id.* at ¶¶26-27. But nothing in the record suggests Plaintiffs are at imminent risk of prosecution under the statute. *Cf.* (R590:88-89) (Lessard Depo.) They have not, for example, attested to any specific scenario where they would deem an abortion necessary for the life or health of the mother but the rest of the medical community would not. Instead, they are trying to strike the entire statute down, on its face, based on its "potentially vague application" in other, unknown circumstances not before the Court. *Contra Tibor*, 373 N.W.2d at 880-82.

[¶56] If the Court wants to now change its approach to facial vagueness challenges, that is its prerogative. *Stay Order*, 2025 ND 26, ¶103 (Jensen, C.J., dissenting). But doing so

for this case would be a significant change to how this Court has long adjudicated facial vagueness challenges, and it would appear to be precisely the sort of abortion-related distortion that the U.S. Supreme Court warned about in *Dobbs.*

C. Other Points in Reply on Vagueness.

[¶57] *Reasonable Medical Judgment Standard*. Plaintiffs appear to renew the claim that, as licensed physicians, they are unable to understand the reasonable medical judgment standard. Pls. Br. ¶44 & n.3. The District Court rejected that argument, (R603:9:¶26), and so should this Court, State Br. 155-61.[4] That standard does not mean reasonable doctors may disagree; it means the State would need to prove *no* reasonable doctor could reach the conclusion the defendant did. The Texas Supreme Court squarely addressed this when analyzing a similar provision. *State v. Zurawski*, 690 S.W.3d 644, 663 (Tex. 2024). Plaintiffs try to dodge that decision in a footnote, citing the District Court's comment it uses "different language." Pls. Br. ¶44 n.3 (citing R603:10:¶9). But that part of the Order wasn't addressing the reasonable medical judgment standard, and the wording on that point is almost identical. *Compare* N.D.C.C. § 12.1-19.1-01(4) *with* Tex. Health & Safety Code § 170A.001(4). Other than that attempted dodge, Plaintiffs don't try to dispute the point.

[¶58] *Disagreement Does Not Equal Unconstitutional Vagueness*. Relatedly, a theme of Plaintiffs' void-for-vagueness argument is to throw a list of medical conditions on paper, and then observe doctors may disagree over when treatment of those conditions with an abortion would be permitted. *E.g.*, Pls. Br. ¶¶13-17, 47. But disagreement over the statute's

[4] Even the *Roe* court stated practitioners could be held liable if they did not "exercis[e] proper medical judgment" when performing abortions, 410 U.S. at 166—presupposing society's capability to recognize when medical judgments are *not* proper.

application is not the test for constitutional vagueness, nor is it even the test for liability. As noted *supra*, for a physician to be held liable under the statute, the State would need to prove beyond a reasonable doubt that either: (a) *no* reasonable physician could have determined the abortion was necessary for protecting the mother from death or a serious health risk; or (b) that was not even the physician's intent to begin with.

[¶59] *Self-Defense Analogy*. Plaintiffs attempt to twist self-defense law in support of their claims by noting the "reasonableness" of a self-defense claim is "subjective" in the sense that it's viewed "from the standpoint of the defendant." Pls. Br. ¶52 (quoting *Kastet*, 2022 ND 40, ¶18). But that simply means a jury should view the situation as someone who "sees what the defendant sees, and knows what the defendant knows." *Kastet*, 2022 ND 40, ¶18. It does not mean the defendant's actions are excused by their own idiosyncratic beliefs. Juries, placing themselves in the defendant's shoes, still decide whether the defendant had a "reasonable belief that the use of force was necessary." *Id.* at ¶22. And N.D.C.C. ch. 12.19.1's use of "reasonable medical judgment" similarly requires assessing what a "reasonably prudent physician" could conclude under the circumstances.[5]

CONCLUSION

[¶60] The State asks the Court to reverse the District Court's judgment that N.D.C.C. ch. 12.1-19.1 is unconstitutional under the North Dakota Constitution.

[5] To the extent the Court sees any merit to Plaintiffs' claim N.D.C.C. ch. 12.19.1 could be interpreted to not require assessing the reasonableness of physicians' conduct from their standpoint—to include considering whether they were acting in emergency conditions (*cf.* Pls. Br. ¶¶46, 52)—the Court should construe the statute "to avoid constitutional infirmities." *State v. Holbach*, 2014 ND 14, ¶16, 842 N.W.2d 328.

[¶61] In the event a supermajority of this Court deems some specific aspect of N.D.C.C. ch. 12.19.1 unconstitutional, the State urges the Court to render a precisely articulated declaratory judgment that the law is unconstitutional to the extent it transgresses that aspect, leaving all other provisions of the law in place and enforceable.[6]

Dated: February 14, 2025.

State of North Dakota
Drew H. Wrigley
Attorney General

/s/ Philip Axt

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521
Email: dan@grandforkslaw.com
Email: jquinn@grandforkslaw.com
Email: marcus@grandforkslaw.com

Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Email: pjaxt@nd.gov
Email: ctitus@nd.gov

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota

[6] Notably, when *Roe* purported to find an abortion right in constitutional "penumbras," it affirmed "declaratory relief [that] stopped short of issuing an injunction against enforcement of the Texas statutes." 410 U.S. at 166. The State believes *Roe* was wrong the day it was decided, but at least in announcing a remedy it stopped short of prohibiting the state from enforcing, *in toto*, the law that restricted the killing of all unborn children.

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 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 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 Ct. 20240291** **District Ct. 08-2022-CV-1608** South Central Judicial District

CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure and the Court's Order granting Appellant's Motion for Increased Page Limitations, the undersigned hereby certifies that the following document:

REPLY BRIEF OF DREW H. WRIGLEY

contains 20 pages and was prepared with a plain, roman style typeface in a 12-point font.

Dated: February 14, 2025.

/s/ *Philip Axt*
Philip Axt
Solicitor General of North Dakota