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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota, Petitioner, v. The Honorable Bruce Romanick, Judge of District Court, South Central Judicial District; Access Independent Health Services, Inc., d/b/a Red River Women's Clinic, on behalf of itself and its patients, and Kathryn L. Eggleston, M.D., on behalf of herself and her patients; and Birch P. Burdick, in his official capacity as the State Attorney for Cass County, Respondents.	**Supreme Ct. No. 20220260** **District Ct. No. 08-2022-CV-01608**

BRIEF OF RESPONDENTS ACCESS INDEPENDENT HEALTH SERVICES, INC. d/b/a RED RIVER WOMEN'S CLINIC AND KATHRYN L. EGGLESTON, M.D.

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STATEMENT OF THE ISSUES

1. Whether this Court should grant the extraordinary and rare relief of a supervisory writ when the District Court has now addressed the substantial probability of success on the merits?

2. Whether the District Court abused its discretion when it determined that Respondents Access Independent Health Services, Inc. d/b/a Red River Women's Clinic and Kathryn L. Eggleston, M.D. ("Providers") had met their burden of showing that they were entitled to a preliminary injunction to prevent enforcement of N.D. Cent. Code § 12.1-31-12 (the "Abortion Ban" or the "Statute") because (1) Providers are likely to succeed on the merits of their claims; (2) Providers and their patients will suffer irreparable injury absent injunctive relief; and (3) the potential harm to others and the public interest weigh in favor of granting the injunction?

STATEMENT OF THE CASE

3. On July 7, 2022, Providers sued to prevent enforcement of the Abortion Ban. The Abortion Ban is a draconian law that effectively bans all abortions in North Dakota—with ***no*** exceptions—thereby stripping North Dakotans of their reproductive autonomy. On July 27, 2022, the District Court granted Plaintiffs' motion for a temporary restraining order, finding that the Attorney General had prematurely certified the date that the Statute would go into effect. TRO Order, (R73). The Attorney General then submitted his Answer to Plaintiffs' Complaint on July 29, 2022.

4. A motion hearing on Providers' motion for preliminary injunction was held on August 19, 2022. On August 25, 2022, the District Court granted Providers' motion for a preliminary injunction. PI Order, (R95). On September 8, 2022, the Attorney General

filed a notice of appeal with this Court and, in the District Court, an expedited motion for a stay of the District Court's order pending an appeal to the North Dakota Supreme Court. *See* (R97), (R100).

5. On September 16, 2022, this Court advised the Attorney General that he must either advise whether he will attempt to obtain Rule 54(b) certification or submit a written response regarding this Court's supervisory jurisdiction. On September 20, 2022, the Attorney General filed a response in which he requested this Court exercise its supervisory jurisdiction to review the District Court's order granting a preliminary injunction. *See* NDSC Docket No. 20220260, Seq. 8.

6. On September 22, 2022, the District Court denied the Attorney General's request to stay the injunction. *See* (R104).

7. On September 28, 2022, the Attorney General filed an expedited motion in the Supreme Court seeking a stay of the District Court's preliminary injunction. *See* NDSC Docket No. 20220260, Seq. 21. Later that day, the Supreme Court determined that the District Court's preliminary injunction order was not appealable and advised the Attorney General that, to the extent that he had requested that this Court exercise its supervisory jurisdiction, he must comply with the North Dakota Rules of Appellate Procedure and properly submit a petition for a supervisory writ. *See* NDSC Docket No. 20220260, Seq. 22.

8. On October 10, 2022, the Attorney General filed a petition for a supervisory writ. *See* NDSC Docket No. 20220260, Seq. 25. The Attorney General asked this Court to determine whether the District Court abused its discretion in granting the August 25, 2022 injunction because it failed to address Providers' substantial probability of success on the

merits and because, according to the Attorney General, the decision to enjoin enforcement of the Statute was "legally erroneous."

9. On October 11, 2022, this Court granted the Petition in part, directing the District Court to determine Providers' probability of success on the merits. NDSC Docket No. 20220260, Seq. 26. On October 31, 2022, the District Court entered its Findings on Substantial Probability Factor ("Findings"), (R112), concluding that this factor favored a preliminary injunction because the Abortion Ban could not withstand any level of judicial scrutiny. Findings (R112:5:¶¶ 11, 12), (R112:6:¶¶14-16), (R112:9-10:¶¶24-25). The District Court re-weighed the preliminary injunction factors in light of its findings on the probability of success and determined that its decision to grant a preliminary injunction "is only solidified." *Id.* (R112:10:¶27).

10. On November 2, 2022, the Supreme Court requested simultaneous briefing from the parties on the supervisory writ and scheduled oral argument for November 29, 2022. *See* NDSC Docket No. 20220260, Seq. 34, 35.

STATEMENT OF FACTS

11. For nearly 50 years, access to abortion has allowed pregnant North Dakotans to make autonomous decisions about their families, health, education, and well-being. Physicians in North Dakota were likewise able to treat pregnant patients experiencing emergency pregnancy complications without the fear of criminal penalties for abortion chilling their provision of care.

12. Legal abortion is extremely safe and is far safer than carrying a pregnancy to term. Declaration of Mark Nichols, M.D. ("Nichols Decl.") (R8:3-6:¶¶8-17). The risk of pregnancy-related complications is higher for people carrying pregnancies to term than

those having abortions; in particular, the risk of death following childbirth is about 14 times greater than that associated with abortion. *Id.* (R8:4:¶11). Abortion is also a common medical procedure; approximately one in four women in the United States will have an abortion by the age of 45. *Id.* (R8:2:¶-6). In 2020, 1,171 patients received abortions in North Dakota. Declaration of Tammi Kromenaker (R7:2:¶7).

13. On April 26, 2007, then-Governor John Hoeven signed the Abortion Ban into law. The Statute was unconstitutional under then-settled federal law at the time it was passed and therefore did not go into effect immediately. Instead, the legislature added a provision which, as modified in 2019, provided that the Ban would become effective on the 30th day after either "[t]he adoption of an amendment to the United States Constitution which, in whole or in part, restores to the states the authority to prohibit abortion," or "[t]he attorney general certifies to the legislative council the issuance of the judgment in any decision of the United States Supreme Court which, in whole or in part, restores to the states authority to prohibit abortion." H.B. 1546, 66th Leg. Assemb., Reg. Sess. § 2 (N.D. 2019).

14. Fifteen years later, on June 24, 2022, the U.S. Supreme Court overruled its prior decisions recognizing a federal constitutional right to abortion recognized in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, (2022). On June 28, although the U.S. Supreme Court had not yet issued its judgment in *Dobbs*, the Attorney General certified that the Abortion Ban would take effect on July 28, 2022.

15. The Statute bans abortion at any point in pregnancy. There are no exceptions. Providing an abortion constitutes a Class C felony: punishable by five years' imprisonment, a $10,000 fine, or both. *See* N.D. Cent. Code § 12.1-32-01.4. The Statute

therefore imposes criminal liability on healthcare providers for performing an abortion on a pregnant patient, regardless of the patient's wishes and regardless of her health or life circumstances.

16. A person who is charged with violating the Statute would bear the burden to prove, by a preponderance of the evidence, one of only three narrow affirmative defenses. *See* Findings (R112:8-9:¶¶21-22). Physicians charged with providing an abortion must prove either that the abortion was "necessary in professional judgment" and "intended to prevent the death of the pregnant female," or that the abortion terminated a pregnancy resulting from "gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as . . . defined in chapter 12.1-20." N.D. Cent. Code § 12.1-31-12.3. For non-physicians, it is an affirmative defense if the defendant was acting within the scope of her regulated profession and at the direction of a physician. *Id. See* N.D. Cent. Code § 12.1-31-12.3. These affirmative defenses, as the District Court articulated, "are the burden of the defendant to prove by a preponderance of the evidence," and "are not bars to prosecution." Findings (R112:8-9:¶¶21-22). Even when providing care to survivors of rape or incest or to patients experiencing life-threatening medical conditions, health care providers nonetheless face the threat of criminal prosecution and "must first be charged with a felony, proceed through the case, take the matter before a jury, and plead their case in order to obtain the protections of the Statute[,] [which] puts an exuberant burden on doctors and their decision on whether to perform an abortion." *Id.* (R112:8-9:¶22). As the District Court recognized, the monumental threat of prosecution will undoubtedly dissuade at least some healthcare providers from offering essential care, putting the lives and wellbeing of North Dakotans at risk.

17. Today, medical providers in North Dakota are able to offer timely and safe medical care, such as miscarriage management services, to patients experiencing pregnancy-related medical emergencies because Providers have secured a preliminary injunction preventing enforcement of the Abortion Ban. Without the injunction, "[t]he threat of prosecution may be so great that doctors refuse to perform abortions, even if they believe in their medical opinion that it is necessary to preserve the mother's life." *Id.* (R112:8-9:¶22).

LEGAL STANDARD

18. This Court determines whether to exercise supervisory jurisdiction on a case-by-case basis, considering the circumstances of each case, including factors such as whether there are compelling reasons to exercise jurisdiction and whether the district court has committed an error. *Winter v. Solheim*, 2015 ND 210, ¶ 13, 868 N.W.2d 842, 846, *reh'g denied*, 868 N.W.2d 842 (2015) (declining to exercise supervisory jurisdiction when the requesting party fails to "present[] any compelling reasons" for the exercise of such jurisdiction); *Mann v. N.D. Tax Comm'r*, 2005 ND 36, ¶ 22, 692 N.W.2d 490, 497 ("One of the factors we consider in deciding whether to exercise our discretion and grant a supervisory writ is whether the district court has committed an error."). This Court uses its authority to exercise supervisory jurisdiction "rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists." *Sauvageau v. Bailey*, 2022 ND 86, ¶ 7, 973 N.W.2d 207, 210 (citations omitted). A party's inability to appeal a district court's ruling does not alone create an extraordinary circumstance justifying supervisory jurisdiction. *State v. Powley*, 2019 ND 51, ¶ 13, 923 N.W.2d 123, 128.

19. This Court applies the abuse of discretion standard when reviewing whether a preliminary injunction was properly granted. *See Black Gold OilField Servs., LLC v. City of Williston*, 2016 ND 30, ¶ 12, 875 N.W.2d 515, 521. A district court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Id.* (citation omitted).

20. Staying a preliminary injunction during the pendency of an appeal "is an extraordinary remedy." *Geston v. Olson*, 857 F. Supp. 2d 863, 885 (D.N.D. 2012), *aff'd sub nom. Geston v. Anderson*, 729 F.3d 1077 (8th Cir. 2013); *see also Fredin v. Middlecamp*, No. 17-cv-03058, 2020 WL 7090771, at *2 (D. Minn. Dec. 4, 2020)), *aff'd*, 855 F. App'x. 314 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1417 (2022) (same). In considering whether a stay of an order is warranted, this Court lends "appreciable weight . . . to the decision of the district court." *Bergstrom v. Bergstrom*, 271 N.W.2d 546, 549 (N.D. 1978); *see also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) ("[A] district court's conclusion that a stay is unwarranted is entitled to considerable deference.") (citations omitted). In particular, once a district court has denied a motion to stay an injunction pending appeal, the district court's decision denying a stay "ordinarily will not be set aside unless the district court is found to have abused its discretion." *Bergstrom*, 271 N.W.2d 546, 549.

ARGUMENT

21. This Court should deny the remainder of the Attorney General's petition for a supervisory writ. The District Court properly considered each of the preliminary injunction factors and, in particular, found that Providers were likely to succeed on the

merits regardless of whether the State Constitution protects the right to abortion as a fundamental right because the Abortion Ban cannot withstand any standard of judicial review. To the extent that an error existed in the District Court's initial PI Order (R95) because the District Court did not consider Providers' likelihood of success on the merits, that error has now been addressed and corrected by the District Court's October 31 Findings (R112). Accordingly, there is no further need for this Court to exercise its supervisory authority.

22. Finally, this Court should deny any request by the Attorney General to stay the preliminary injunction while this matter is pending. The District Court properly granted the preliminary injunction, and the District Court has already considered whether a stay pending appeal was appropriate and determined that the Attorney General is not entitled to a stay.

I. The North Dakota Supreme Court Should Deny the Remainder of the Petition Because There is No "Injustice" to Prevent and Because the Attorney General Has Failed to Take Advantage of Alternative Remedies.

23. This Court should decline to further exercise its supervisory jurisdiction because the Attorney General cannot demonstrate that this is the sort of "extraordinary case" where the Court's intervention is necessary "to rectify errors and prevent injustice" and "when no adequate alternative remedy exists." *Sauvageau v. Bailey*, 2022 ND 86, ¶ 7, 973 N.W.2d 207, 210; *see also Roe v. Rothe-Seeger*, 2000 ND 63, ¶ 5, 680 N.W.2d 289, 291. As a preliminary matter, the Attorney General cannot show that temporarily enjoining a law that is likely unconstitutional is an "injustice," *see* Section II *infra*, nor can he show that "no adequate alternative remedy exists" which would allow him to obtain the requested

relief. The Attorney General should not be permitted to circumvent the normal rules of civil procedure applicable to every other litigant.

24. The Supreme Court's supervisory jurisdiction is not a means for a party to appeal a non-final order; indeed, the Court generally "will not exercise [its] supervisory jurisdiction where the proper remedy is an appeal." *State v. Louser*, 2017 ND 10, ¶ 5, 890 N.W.2d 1, 3 (citation omitted); *see also State ex rel. Harris v. Lee*, 2010 ND 88, ¶ 18, 782 N.W.2d 626, 631 ("[A] supervisory writ is not intended to be a substitute for appeal."). (citation omitted). Rather, the Court has exercised supervisory jurisdiction where a petitioner has shown that, absent the Court's intervention, the petitioner's substantial rights are at risk and where immediate intervention from this Court is necessary. *See, e.g., B.H. v. K.D.*, 506 N.W.2d 368, 373 (N.D. 1993) (exercising supervisory jurisdiction in case requiring paternity testing because family's substantial rights were implicated and, had the Court waited for the final judgment and appeal, "[t]he irreparable damage may have already taken place"); *see also Sauvageau*, 2022 ND 86 ¶ 28, 973 N.W.2d 207, 214 (granting supervisory writ where, absent writ, petitioners' property would be taken and destroyed through incorrect eminent domain procedure).

25. But here, the Attorney General has failed to produce any evidence demonstrating harm or that such harm is imminent and requires this Court's immediate intervention, particularly given that the Statute was enacted 15 years ago and has never gone into effect. A common feature of cases where this Court has granted supervisory writs is that petitioners have demonstrated that they would suffer immediate harm without the Court's action. For example, in *Sauvageau*, absent the supervisory writ, the respondent intended "to close the public road, remove all structures from [petitioners'] property,

engage in disturbance of the surface and subsurface, and inundate the property with water." *Sauvageau*, 2022 ND 86, ¶ 26, 973 N.W.2d 207, 215. Thus, waiting to appeal the district court's final decision on the merits would result in a harm that could not be addressed at the conclusion of the litigation. Likewise, in *B.H. v. K.D*, the petitioners had been ordered to submit to paternity testing and would have learned—against their will—about their child's biological parentage had this Court not granted the writ. 506 N.W.2d at 373.

26. No such harm exists here. In contrast, the Attorney General cannot show that his purported interest in enforcing laws will be irreparably damaged by a short delay while the litigation continues. The District Court carefully considered and rejected this precise argument, finding that "[t]he State has offered no evidence on how delaying the enactment of the statute during the pendency of this litigation implicates any additional harm than has already been in place for the last 15 years" while the Abortion Ban has not been in effect. PI Order (R95:6:¶14). For the same reasons, the Attorney General cannot show that it is appropriate for this Court to intervene at this juncture.

27. Moreover, the Attorney General has failed to take advantage of alternative remedies to challenge the preliminary injunction. In response to a request from this Court to brief whether he will attempt to obtain 54(b) certification, the Attorney General failed to explain why he would not seek Rule 54(b) certification and instead asserted, without support, that "any decision to enjoin the operation of state law is direct rather than incidental and serves an active purpose" and thus should be appealable without 54(b) certification. *See* NDSC Docket No. 20220260, Seq. 8. Although such certification is not always granted, it is available "'where failure to allow an immediate appeal would create a demonstrated prejudice or hardship.'" *James Vault & Precast Co. v. B&B Hot Oil Serv.,*

Inc., 2018 ND 63, ¶ 9, 908 N.W.2d 108, 112 (quoting *Citizens State Bank-Midwest v. Symington*, 2010 ND 56, ¶ 7, 780 N.W.2d 676). If the Attorney General truly believes that the preliminary injunction interferes with a fundamental interest, then it would be procedurally proper for him to request 54(b) certification from the District Court and to properly appeal the preliminary injunction. And, to the extent that the Attorney General is trying to use a supervisory writ to obtain a ruling that Providers do not state a claim that the Abortion Ban is unconstitutional, he had an opportunity to make that argument much earlier in the litigation by moving to dismiss Providers' claim under Rule 12(b)(6)—which he tellingly failed to do in accordance with the court rules. This Court should not allow the Attorney General to circumvent the normal rules of civil procedure merely because it is more convenient for him to do so.

28. Finally, this Court would benefit from allowing proceedings to continue in the District Court before the matter can properly come before this Court on appeal. "Requiring a party to first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision." *Mahoney v. Mahoney*, 1997 ND 149, ¶ 13, 567 N.W.2d 206, 210; *see also Flemming v. Flemming*, 2010 ND 212, ¶ 3, 790 N.W.2d 762, 763 ("The district court creates and develops the record so this Court can review issues, if necessary, with a more complete understanding of the issues."); *State ex rel. DeKrey v. Peterson*, 174 N.W.2d 95, 100 (N.D. 1970) ("When controversies are litigated in the district court, this court has the benefit of the research, experience, and legal knowledge of the learned members of the trial bench, as well as of the adversaries representing their respective litigants.").

29. Because the Attorney General cannot show that he is being harmed by the preliminary injunction, this Court should deny the supervisory writ.

II. The District Court Correctly Granted Providers' Motion for a Preliminary Injunction.

30. The Court should further decline to exercise supervisory jurisdiction because the District Court correctly found that Providers met the standard for a preliminary injunction and there is thus no error to correct. The District Court did not abuse its discretion by granting and re-affirming Providers' Motion for a Preliminary Injunction. *See Black Gold OilField Servs., LLC*, 2016 ND 30, ¶ 12, 875 N.W.2d 515, 521 (applying the abuse of discretion standard in a case where the Court used its supervisory jurisdiction to review district court decision to deny preliminary injunction). "An abuse of discretion is never assumed and must be affirmatively established." *AE2S Constr., LLC v. Hellervik Oilfield Techs. LLC*, 2021 ND 35, ¶ 10, 955 N.W.2d 82, 85 (citation omitted).

31. North Dakota courts consider four factors when evaluating a motion for a preliminary injunction: "(1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest." *State ex rel. City of Marion v. Alber*, 2019 ND 289, ¶ 12, 936 N.W.2d 52, 54. Here, the District Court properly considered all four factors, finding that the factors demonstrate that Providers are entitled to a preliminary injunction preventing enforcement of the Abortion Ban while the litigation continues. The Attorney General does not argue that the Abortion Ban would survive either strict scrutiny or rational basis review. *See* (R58:16:¶38) (stating, without explanation, that the Attorney General believes that Plaintiffs are unlikely to succeed on the merits if rational basis review applies). Given the District Court's correct

conclusion that the Statute would fail to satisfy any level of judicial review, this Court should decline to review the preliminary injunction.

a. The District Court Correctly Concluded that the Abortion Ban Would Not Survive Rational Basis Review and Is Not An Appropriate Use of the State's Police Power.

32. The State's police power is not unlimited. Even where a law does not implicate a fundamental right, as is the case here, it still must be "reasonable and, within constitutional limits, promote[] the order, safety, health, morals, and general welfare of society." *Johnson v. Elkin*, 263 N.W.2d 123, 130 (N.D. 1978). Likewise, there must be a connection between the statute and the general state interest that it furthers; where, as here, "'the method adopted has no reasonable relation'" to the legitimate state interest desired, the statute is unconstitutional. *Hoff v. Berg*, 1999 ND 115, ¶ 14, 595 N.W.2d 285, 290 (citation omitted). Under the rational basis standard, "'a statute withstands a substantive due process challenge [only] if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.'" *Id.* at ¶ 14 (citation omitted).

33. The Attorney General has suggested, without explanation, that a total ban on abortion may further a state interest in "promoting respect for human life." (R58:18:¶44). But as the District Court noted, the Abortion Ban is so extreme and so likely to result in serious harm to patients experiencing life-threatening medical emergencies that Providers are likely to succeed in showing that the Statute is not rationally related to this alleged goal. Findings (R112:8-9:¶22). Specifically, the District Court found that "pregnancy is not only dangerous to women, but without the ability to obtain an abortion in some situations, deadly. If women do not have a reasonable avenue in which to get safe

abortions when their lives are in danger, the Statute does not serve its intended purpose." *Id*. (R112:9:¶23).

34. In fact, the District Court concluded that the Abortion Ban was likely to have the opposite effect by imposing serious harm on patients experiencing life-threatening medical emergencies and putting a significant burden on physicians treating those patients. As discussed *supra*, a person prosecuted under the Abortion Ban may raise as an affirmative defense that they performed an abortion with the intention of saving a patient's life, but these affirmative defenses will not prevent prosecution: "[W]ith the exceptions being affirmative defenses, doctors must first be charged with a felony, proceed through the case, take the matter before a jury, and plead their case in order to obtain the protections of the Statute." *Id*. (R112:8-9:¶22). Indeed, "[t]he threat of prosecution may be so great that doctors refuse to perform abortions, even if they believe in their medical opinion that it is necessary to preserve the mother's life." *Id.* (citation omitted).

35. The District Court's conclusion that the Statute does not survive rational basis review is well-supported by precedent of this Court. There is no rational connection, let alone a "clear" one, between "promoting respect for human life"—the State's purported interest—and enacting a law that will likely dissuade healthcare providers from treating patients and, in some instances, performing a life-saving medical procedure. In fact, denying patients the opportunity to receive abortions, especially those that are medically necessary, shows a disregard for the lives of many North Dakotans. As the District Court held, the Abortion Ban therefore "puts unreasonable burdens upon doctors and pregnant women and the manner in which the Statute restricts doctors and pregnant women is not reasonably related to the goal of preserving [a] life." Findings (R112:9:¶23).

36. Given that the District Court correctly found that Providers are likely to succeed on the merits even under the rational basis standard of review, this Court need not decide whether the State Constitution protects the right to abortion to deny the petition. Regardless of the answer to that question, Providers have demonstrated that they are likely to succeed in demonstrating that the Statute is unconstitutional. The Court should accordingly deny the petition for a supervisory writ.

b. The District Court Did Not Abuse Its Discretion in Finding that Providers Had Shown a Likelihood of Success on the Claim that the Abortion Ban Would Not Survive Strict Scrutiny.

37. This Court should further deny the petition for a supervisory writ because the District Court did not abuse its discretion when it found that Providers were likely to succeed in showing that the Statute does not survive strict scrutiny. There is considerable precedent from both this Court and other state courts interpreting similar constitutional provisions which supports the finding that the North Dakota Constitution protects the right to abortion, in which case the strict scrutiny standard would apply. Because the District Court's decision is supported by precedent, this Court should not find that it was an abuse of discretion.

38. Statutes that infringe upon a fundamental right must withstand strict scrutiny, meaning that the law must "be necessary to promote a compelling state interest." *Hoff*, 1999 ND 115, ¶ 14, 595 N.W.2d 285, 290. "[T]he idea of strict scrutiny acknowledges that [ ] political choices . . . burdening fundamental rights must . . . be subjected to close analysis in order to preserve substantive values of equality and liberty." *Id.* at ¶ 16 (quoting Laurence H. Tribe, *American Constitutional Law*, § 16-6, p. 1451 (2d ed. 1988)). To survive strict scrutiny, a state must show that a statute furthers a compelling interest—one

that is “not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interest.” Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273 (2007).

39. The Attorney General has “not even attempt[ed] to argue that the Statute would meet the strict scrutiny burden,” (R112:6:¶15), effectively conceding that a total ban on abortion is not narrowly tailored to serve a compelling state interest. Rather, the Attorney General has tried to evade addressing the strict scrutiny standard by insisting that there are no constitutional protections for abortion in the State Constitution. In making this argument, the Attorney General ignores both the history of how this Court has interpreted constitutional protections and the overwhelming weight of precedent from other state courts interpreting nearly identical provisions in their own constitutions.

i. Providers Are Likely to Succeed in Showing that the North Dakota Constitution Protects the Right to Abortion.

40. The District Court did not abuse its discretion in finding that Providers are likely to succeed in showing that State Constitution protects the right to abortion. The right to “liberty” in the North Dakota Constitution provides broad protections for inalienable or natural rights, beyond those in the U.S. Constitution.[1] Article I, Section 1 of the

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[1] This Court is not bound by decisions from the U.S. Supreme Court interpreting the U.S. Constitution. *State v. Orr*, 375 N.W.2d 171, 178 n.6 (1985) (North Dakota Constitution “may afford broader rights than those granted under the federal constitution.”) (citing *City of Bismarck v. Altevogt*, 353 N.W.2d 760 (N.D. 1984)); *see also Johnson v. Hassett*, 217 N.W.2d 771, 777 (N.D. 1974), *reh’g denied*, (May 24, 1974). (“[W]e are obliged to use different standards in considering federal constitutionality and state constitutionality.”). When the U.S. Supreme Court revokes protections that citizens have relied on for decades, “[state] courts are not obligated to accept what [they] deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. [They] are obligated to interpret [their] own organic instrument of government.” *Sitz v. Dep’t of State Police*, 506 N.W.2d 209, 218 (Mich. 1993).

Constitution (the "inalienable rights clause") protects both specifically enumerated rights—including the rights of "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness," N.D. Const. art. I, § I—but also those rights which are encompassed in a broader "guaranty of 'liberty.'" *State v. Cromwell*, 72 N.D. 565, 574, 9 N.W.2d 914, 918-19 (N.D. 1943) (quoting BLACK'S CONSTITUTIONAL LAW § 145). The inalienable rights clause was amended by an initiated measure in 1984 to, among other things, clarify that these rights extend equally to people of all genders. *See MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 89, 855 N.W.2d 31, 61, *reh'g denied*, (Jan. 7, 2015) (discussing 1984 initiated measure).

41. As this Court explained in *Cromwell*, the pursuit of happiness is "one of the most comprehensive [rights] to be found in the constitutions," and the "mainspring of human activity." 72 N.D. 565, 574, 9 N.W.2d 914, 919. This Court recognized that while happiness is difficult to quantify, it *must* comprise of "personal freedom, exemption from oppression or invidious discrimination . . . liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home." *Id.* at 918-19. The Abortion Ban infringes on these very rights.

42. The Constitution, including the inalienable rights clause, must be interpreted by looking at the structure of the document. *See McCarney v. Meier*, 286 N.W.2d 780, 785 (N.D. 1979). Notably, in drafting the North Dakota Constitution, the Framers placed the inalienable rights clause at the beginning, before any discussion of the function or structure of the state government. The placement of inalienable rights protections at the forefront of the Constitution "demonstrat[es] the supremacy placed on the right of individuals" "over the establishment of government." *Hodes & Nauser MDs,*

P.A. v. Schmidt, 28 P.3d 461, 492 (Kan. 2019) (citing *State ex rel. Zillmer v. Kreutzberg*, 90 N.W. 1098, 1099 (Wis. 1902)); *Planned Parenthood of Mich. v. Att'y Gen. of the State of Michigan*, No. 22-000044, 2022 WL 7076177, at *11 (Mich. Ct. Cl. Sep. 7, 2022) ("It was not an accident that the framers. . .placed a Declaration of Rights at the [the Constitution's] very beginning"). As in other states with similar protections, here, the Framers' deliberate decision to place protections for inalienable rights before any discussion of the State's power demonstrates the importance that they placed on individual liberty.

43. Subsequent decisions from this Court have established the primacy of such rights over state power. For example, it is now well-established that the Constitution protects "the right to enjoy the domestic relations and the privileges of the family and the home." *Hoff*, 1999 ND 115, ¶ 10 (quoting *State v. Cromwell*, 72 N.D. 565, 574, 9 N.W.2d 914, 919 (N.D. 1943)). Similarly, this Court has recognized that the Constitution protects personal and bodily autonomy. *See generally State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995) (noting that "a person's interest in personal autonomy and self-determination is a fundamentally commanding one . . . ."). The right to make the decision to terminate a pregnancy is a corollary of these rights: it is "closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental," *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000), *superseded by constitutional amendment*, Tenn. Const. art. I, § 36 (2014), and, "like the decision to refuse medical treatment, is an exercise of a woman's personal autonomy and self-determination." *MKB Mgmt.*, 2014 ND 197, ¶ 98, 855 N.W.2d 31, 64 (Op. of Kapsner, J.).

44. Although the foundational principles set out in the Constitution remain the same, when interpreting the scope of constitutional protections, "[t]he changes in North Dakota since the constitution was enacted must be taken into consideration. The constitution is unchanged but the needs over which it may control have changed." *Ferch v. Hous. Auth. of Cass Cnty.*, 79 N.D. 764, 772, 59 N.W.2d 849, 856 (N.D. 1953); *see also Tormaschy v. Hjelle*, 210 N.W.2d 100, 103 (N.D. 1973) (quoting *State ex rel. State Ry. Comm'n. v. Ramsey*, 37 N.W.2d 502, 506 (Neb. 1949). ("A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. . . . "); *Hassett*, 217 N.W.2d at 779 ("In constitutional law, as in other matters, times change and doctrines change with the times.").

45. In particular, this Court has previously had to interpret the Constitution in light of the changing role that women play in civic and political life. *State v. Norton*, 64 N.D. 675, 255 N.W. 787 (1934), *reh'g denied*, (July 3, 1934), is particularly instructive here. In *Norton*, a defendant who had been convicted of engaging in the liquor traffic challenged his conviction alleging, inter alia, that his constitutional rights were violated because women served on the jury that convicted him, despite language in the Constitution stating a jury in civil cases "may consist of less than twelve men." *Id*. at 788 (quoting N.D. Const., art. I, § 24). The defendant there made the same arguments as the Attorney General has advanced here—namely, that because women were denied certain rights in 1889 and the years thereafter, it would be unconstitutional for the Court to interpret the Constitution as allowing greater social and political equality for women now. *Id*. at 789. In *Norton*, this Court declined to adopt such a rigid interpretation of the Constitution and held that the defendant's rights were not violated by the presence of women on the jury. In doing so,

this Court emphasized that "[t]he Constitution is a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted. It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested." *Id.* at 792.

46. As in *Norton*, here, this Court must consider how to apply the fundamental principles of the Constitution in light of the "needs of the day." *Id.* It would be fundamentally inconsistent with the way that this Court has repeatedly interpreted its Constitution to decide the constitutionality of the Abortion Ban now, in 2022, based on the legality of abortion in 1889 at the time of statehood. Moreover, age does not make a law constitutional: "Even when a statute has been in effect for a long time, our duty to consider its constitutionality, when the matter comes before us, continues, and this duty has been performed even in the face of prior holdings of constitutionality." *Hassett*, 217 N.W.2d at 777 . And, in the context of abortion care, there have been significant medical advances since 1889 making abortion far safer than pregnancy, *see* Nichols Decl. (R8:4-5:¶9), making it even less logical to criminalize access to needed care based on obsolete medical standards.

47. The rights of women and pregnant people to exercise personal autonomy over their bodies and family lives were not fully recognized in 1889. But in light of circumstances as they exist today—including the amendment to the inalienable rights clause to make the language gender neutral, increased social and political equality for women, and the uncontested evidence in the record that abortion is far safer than

pregnancy[2]—it was not an abuse of discretion for the District Court to find that the constitutional guarantees of life, liberty, safety, and happiness include the right to make reproductive healthcare decisions, including the decision to terminate a pregnancy.

ii. Other State Courts Have Overwhelmingly Interpreted Similar Constitutional Provisions to Protect the Right to Abortion.

48. Numerous state courts have interpreted their inalienable or natural rights clause to find that their state Constitutions protect the right to abortion. Several of these decisions post-date this Court's split decision in *MKB Management v. Burdick* and provide additional support for Providers' arguments that was not before the Court in that case.

49. For example, the Kansas Constitution provides that, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. § 1. In 2019, the Kansas Supreme Court held that this provision—which is substantively similar to Article I of the North Dakota Constitution—protects the right to "personal autonomy," which is "the heart of human dignity and which "encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. . . . .For women, these decisions can include whether to continue a pregnancy." *Hodes*, 440 P.3d 461, 498-99.

[2] *See* Nichols Decl. (R8:4-5:¶9) ("Abortion is an extremely safe and straightforward procedure with a low risk of complications."); *id.* ¶ 11 ("Abortion is significantly safer than the alternative, which is carrying a pregnancy to term. For example, a woman's risk of death following childbirth is approximately 14 times greater than that associated with abortion, and pregnancy-related complications are more common among women who carry a pregnancy to term than among those having abortions."); *id*. ¶ 15 ("Complications such as hemorrhage, infection, and injury to other organs are all far more likely to occur with a full-term pregnancy than with an abortion.").

50. Similarly, New Jersey's Constitution protects "certain natural and unalienable rights, among which are those of enjoying and defending life and liberty…and of pursuing and obtaining safety and happiness." N.J. Const. art. I, § 1. In *Right to Choose v. Byrne*, the New Jersey Supreme Court interpreted this provision—which is nearly identical to that in the North Dakota Constitution—as protecting the right to abortion. Specifically, the Court noted "[t]hat right encompasses one of the most intimate decisions in human experience" and that "[a] woman's right to choose to protect her health by terminating her pregnancy outweighs the State's asserted interest in protecting a potential life at the expense of her health." *Right to Choose v. Byrne*, 450 A2d 925, 934, 937 (N.J. 1982).

51. While some states, including North Dakota, prohibited abortion at the time of statehood, courts have recognized that limiting rights to those only recognized at the time of statehood would allow the state to enforce outdated gender stereotypes and prevent women and pregnant people from achieving "[t]rue equality of opportunity in the full range of human endeavor," which "cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago." *Hodes* 440 P.3d 461, 491; *see also* Order Granting Pls' Mot. for Prelim. Inj. at 11, *Planned Parenthood Nw. v. Members of Med. Licensing Bd. of Ind.*, No. 52C06-2208-PL-001756, (Monroe Cnty, Ind. Sept. 22, 2022) (noting that, although abortion was not legal at time of ratification, "this does not foreclose the language of [Indiana's inalienable rights clause] from being interpreted at this point as protecting bodily autonomy, including a qualified right by women not to carry a pregnancy to term" given that "[t]he significant, then-existing deficits of those who wrote our Constitution—particularly as they pertain to the liberty of women and people of color—

are readily apparent."). This Court has always followed a similar approach in finding that a law is not constitutional merely because of its age. *See supra* ¶ 45.

52. In urging this Court to adopt Justice VandeWalle's concurrence from *MKB Management v. Burdick*, the Attorney General has, incorrectly, implied that case law from Michigan and Ohio supports a finding that the Abortion Ban here is constitutionally permissible. *See* (R25:23-24:¶39).[3] However, in both states, courts have held that similar constitutional guarantees for natural or inalienable rights protect the right to abortion. *See* Decision and Entry at 15, *Preterm-Cleveland v. Yost*, No. A2203203 (Hamilton Cnty. Ct. Com. Pl. Sept. 14, 2022) ("In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection.") (quoting *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 691 (Ohio 1993); *see also Planned Parenthood of Mich.v. Att'y Gen. of the State of Michigan*, 2022 WL 7076177, at *13 (Mich. Ct. Cl. Sep. 7, 2022) (second and third alteration in original) (citation omitted) (finding constitutional right to bodily integrity and bodily autonomy and stating that "[t]he state has no compelling interest in forcing a woman to surrender her rights to her 'individual opinion[s] and personal attitude[s]' about when life begins, or to relinquish her bodily autonomy and integrity, before fetal viability").

[3] Notably, the Michigan case that the Attorney General has referred to—*Mahaffey v. Att'y Gen.*, 564 N.W.2d 104, 109 (Mich. App. 1997)—addressed whether Michigan's generalized right of privacy protected the right to abortion, not whether state protections for inalienable rights applied.

53. Most state courts that have found state constitutional protections for abortion have applied strict scrutiny to abortion restrictions.[4] As the Kansas Supreme Court explained, "[i]imposing a lower standard than strict scrutiny…risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making." *See Hodes*, 440 P.3d at 497-98; *see also* Decision and Entry at 15, *Preterm-Cleveland v. Yost*, No. A2203203, (applying strict scrutiny to issue a preliminary injunction blocking enforcement of a six-week abortion ban).[5]

54. There is thus an ever-growing body of persuasive case law from states across the country demonstrating that protections for inalienable rights to life, liberty, and happiness provide a right to personal autonomy and a right to terminate a pregnancy. This case law, much of which has been developing in the years since this Court considered *MKB Management v. Burdick*, further supports Providers' argument that the broad rights protections in the state Constitution protect the right to abortion.

55. This Court has yet to issue a majority opinion on the scope of the right to abortion under North Dakota Constitution. But when this issue last came before the Court, at least two justices would have found that the State Constitution does protect the right. That two justices could reach that conclusion—and that numerous other state courts have

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[4] *See, e.g., Hodes,* 440 P.3d at 496; *Right to Choose*, 450 A.2d at 934, 936; *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 967 n.7, 969, (Alaska 1997); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995); *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 18; *N.M. Right to Choose v. Johnson*, 975 P.2d at 853-4 (N.M. 1998).

[5] To the extent that an earlier decision from an appellate court in Ohio applied a lower standard than strict scrutiny, that court made it clear that its use of the undue burden standard "does not mean…that we are required to follow the undue-burden test…. to the [state] Constitution…" *Preterm-Cleveland*, 627 N.E.2d 570, 577 n.9.

reached a similar conclusion—demonstrates that the District Court did not abuse its discretion in finding that Providers are likely to succeed on the merits.

c. The District Court Correctly Concluded that the Remaining Factors Weigh In Favor of Granting Providers' Request for a Preliminary Injunction.

56. In the petition for supervisory jurisdiction, the Attorney General did not challenge the District Court's findings that the remaining factors weigh in favor of granting injunctive relief. For completeness, Providers will briefly address each factor in turn.

57. The District Court correctly found that Providers' patients will suffer irreparable harm in the absence of injunctive relief. Although Providers are now providing abortion care in Minnesota, the District Court recognized that the Abortion Ban threatens North Dakotans experiencing pregnancy complications—including life-threatening emergencies—with serious harm, including death. Even in the event that patients experiencing life-threatening conditions or a pregnancy due to sexual assault or incest can access care, they then run the risk that their protected health information will become public if the physicians who treated them are subject to a criminal prosecution and are forced to rely on that personal data to prove an affirmative defense.[6] And patients who want to terminate a pregnancy for a myriad of other reasons—including ending a pregnancy where the fetus has a fatal diagnosis or where the pregnancy exacerbates an existing health condition—will be unable to do so. For the same reason, the District Court noted that physicians at regional hospitals—other interested parties here—would be irreparably harmed by the Statute taking effect. *See* (R95:7:¶18).

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[6] Off. of Att'y Gen. for the State of N.D., Letter Opinion 2022-L-06 (Nov. 15, 2022), https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/2022-L-06.pdf

58. Similarly, it is in the public interest to maintain the preliminary injunction while the case progresses. Keeping the preliminary injunction in place allows patients to continue to access emergency medical care within North Dakota; indeed, as the District Court recognized, if the Abortion Ban were to take effect, physicians may be chilled from performing abortions even in a life-threatening situation. (R112:8-9:¶22).

59. Importantly, the Attorney General has offered no evidence that a preliminary injunction will harm the State or the public, *see* (R95:5:¶12), nor did he challenge the District Court's finding that these three factors weigh in favor of granting the preliminary injunction. Given the Attorney General's decision not to submit evidence disputing Providers' claims of harm and his decision not to challenge the District Court's decision on these factors in the petition for a supervisory writ, this Court should not find that the granting of the preliminary injunction is an "injustice" warranting use of its supervisory jurisdiction.

III. This Court Should Not Stay the District Court's Preliminary Injunction.

60. The Attorney General requested in his brief from October that this Court stay the District Court's preliminary injunction. NDSC Docket No. 20220260, Seq. 25 ¶ 1. To the extent that this Court were to consider that request, the request should be denied. The Attorney General declines to meaningfully address this issue in his brief to the Court, and he has failed to meet his burden of demonstrating that a stay is warranted. *See Cass Cnty. Joint Water Res. Dist. v. Aaland*, 2020 ND 196, ¶ 4, 948 N.W.2d 829, 830; *see also Kreditverein der Bank Austria Creditanstalt fur Niederosterreich und Bergenland v. Nejezchleba*, 477 F.3d 942, 945 n.3 (8th Cir. 2007) (citing *Clinton v. Jones*, 520 U.S. 681, 708, (1997)) ("The proponent of a stay bears the burden of establishing its need."); *Nken*

v. Holder, 556 U.S. 418, 433–34 (2009) (same). Accordingly, this Court should decline to issue a stay.

61. Before this Court dismissed the Attorney General's appeal, the Attorney General had filed a motion to stay the preliminary injunction pending appeal, which the District Court correctly denied. The District Court concluded that (1) the Attorney General was unlikely to succeed in challenging the preliminary injunction order on appeal, (2) the Attorney General would not be irreparably harmed by the preliminary injunction, (3) a stay would harm Providers and pregnant women in North Dakota, and (4) a stay would not serve the public interest. (R104:1-2:¶¶2-4) (citing *Cass Cnty. Joint Water Res. Dist. v. Aaland*, 2020 ND 196, ¶ 4, 948 N.W.2d 829, 830). The District Court's determination in its Findings that Providers have a substantial likelihood of success on the merits further reinforces its conclusion that the Attorney General is unlikely to succeed in pursuing any appellate review of the PI Order (R95).

62. This Court should defer to the District Court's decision because the Attorney General cannot show that the District Court abused its discretion in denying the Attorney General's request for a stay. *See Bergstrom*, 271 N.W.2d 546, 549 (noting that this Court lends "appreciable weight . . . to the decision of the district court" when considering whether to grant a stay already denied by the District Court); *Ruckelshaus*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) ("[A] district court's conclusion that a stay is unwarranted is entitled to considerable deference.") (citations omitted). Indeed, as the District Court noted in denying the motion for a stay, the Attorney General's arguments on the factors other than likelihood of success on the merits "are essentially a re-hashing of the arguments presented to the Court during its initial determination of whether to grant

the preliminary injunction. The Court already considered such arguments and deemed them secondary to the injuries which would have occurred if the Court had not granted the injunction." (R104:2:¶4).

63. This Court should therefore deny the Attorney General's request for a stay. The preliminary injunction should remain in effect pending the District Court's adjudication of the merits. *See Brummund v. Brummund*, 2008 ND 224, ¶ 11, 758 N.W.2d 735, 739 (dismissing appeal due to "a clear preference to have cases tried to completion in the district court, with all issues brought in one appeal after entry of a final judgment disposing of all claims of all parties."); *supra* Section I ¶¶ 24-26.

CONCLUSION

64. The Attorney General has had the opportunity to seek relief from the District Court, and he cannot show that the District Court abused its discretion when it granted Providers' Motion for a Preliminary Injunction. As there is no injustice to prevent or error to rectify, the Attorney General's Petition for Supervisory Writ should be denied.

Dated this 21st day of November 2022.

/s/ Thomas Dickson

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CERTIFICATE OF COMPLIANCE

65. In accordance with N.D.R.App. P. 32(a)(8)(A), the undersigned hereby certifies that the above brief is within the limit of 38 pages.

/s/ Thomas Dickson
Thomas Dickson, Bar # 03800

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota, Petitioner, v. The Honorable Bruce Romanick, Judge of District Court, South Central Judicial District; Access Independent Health Services, Inc., d/b/a Red River Women's Clinic, on behalf of itself and its patients, and Kathryn L. Eggleston, M.D., on behalf of herself and her patients; and Birch P. Burdick, in his official capacity as the State Attorney for Cass County, Respondents.	**Supreme Ct. No. 20220260** **District Ct. No. 08-2022-CV-01608**

DECLARATION OF SERVICE

¶1 I, Ashley Miller, hereby certify that I am of legal age and not a party to the above-entitled matter. On the 21st day of November, 2022, I filed the following document(s):

BRIEF OF RESPONDENTS ACCESS INDEPENDENT HEALTH SERVICES, INC. d/b/a RED RIVER WOMEN'S CLINIC AND KATHRYN L. EGGLESTON, M.D.

electronically with the Clerk of Supreme Court and that a Notice of Electronic Filing (NEF) will be sent to the following:

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Honorable Bruce Romanick
Judge of District Court
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I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed this 21st day of November, 2022, at Bismarck, ND, USA.

By: */s/ Ashley Miller*
Ashley Miller