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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota,<br><br>Petitioner,<br><br>v.<br><br>The Honorable Bruce Romanick, District Court Judge, 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,<br><br>Respondents. | **Supreme Ct. No. 20220260**<br><br>**District Ct. No. 08-2022-CV-01608** |

**STATE OF NORTH DAKOTA'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR SUPERVISORY WRIT**

**RE: ACCESS INDEPENDENT HEALTH SERVICES, INC., D/B/A RED RIVER WOMEN'S CLINIC, ON BEHALF OF ITSELF AND ITS PATIENTS, AND KATHRYN L. EGGELSTON, M.D., ON BEHALF OF HERSELF AND HER PATIENTS v. DREW H. WRIGLEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NORTH DAKOTA, AND BIRCH P. BURDICK, IN HIS OFFICIAL CAPACITY AS THE STATES ATTORNEY FOR CASS COUNTY ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

**DATED AUGUST 25, 2022**

**THE HONORABLE BRUCE ROMANICK PRESIDING JUDGE**

**BURLEIGH COUNTY DISTRICT COURT**
**SOUTH CENTRAL JUDICIAL DISTRICT**

State of North Dakota
Drew H. Wrigley
Attorney General

By: Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email masagsve@nd.gov

By: Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email ctitus@nd.gov

Attorneys for Petitioner.

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## INTRODUCTION

[¶1] The district court's supplemental "Findings on Substantial Probability Factor," determined the Respondent, Access Independent Health Services, Inc., et al. ("RRWC"), has a substantial probability of succeeding on the merits (the "merits factor"), which is one of the four factors a court must consider when a party moves for a preliminary injunction. (R112). The district court, however, abused its discretion when it misconstrued and misapplied this Court's precedent relating to injunctions and the merits factor, and misapplied the tests applicable to a due process challenge. This Court should vacate the district court's injunction of N.D.C.C. § 12.1-31-12. *Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. ## 24, 25.

## UPDATED STATEMENT OF THE CASE

[¶2] Attorney General Drew H. Wrigley (the "State" or "Wrigley"), petitioned this Court to assert its original supervisory jurisdiction and vacate the district court's preliminary injunction of Section 12.1-31-12. The Court granted the State's Petition, in part, and directed the district court to "determine the substantial probability of [RRWC] succeeding on the merits [of its complaint,] and then to determine whether the injunction remains appropriate based on all the factors." *Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. # 26.

[¶3] The district court conducted its first analysis of the merits factor and again misapplied the precedent of this Court. (R112). The district court wrongly determined RRWC had satisfied its burden to show it has a substantial probability of succeeding on

the merits of its complaint against the State and ultimately concluded the preliminary injunction it previously entered against Section 12.1-31-12 should remain in place. *Id*. This Court subsequently requested the parties file simultaneous supplemental briefs. *Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. # 34.

## ARGUMENT

### I. The district court abused its discretion when it misinterpreted and misapplied the Court's precedent relating to injunctions and the substantial probability of success on the merits factor.

[¶4] As set forth in the State's Brief in Support of Petition for Supervisory Writ, this Court reviews a court's decision to grant a preliminary injunction subject to the abuse of discretion standard. A district court abuses its discretion "if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Black Gold OilField Servs., LLC v. City of Williston*, 2016 ND 30, ¶ 12, 875 N.W.2d 515 (citation omitted). The district court appeared to create its own novel legal standard and determined RRWC has a substantial probability of succeeding on the merits because the district court has a "real and substantial question" before it. (R112:4:¶8). The district court's framework for analyzing the merits factor is incompatible with this Court's precedent and it constitutes an abuse of discretion because it misinterpreted and misapplied the law and its decision is not the product of a rational mental process leading to a reasoned determination.

[¶5] A district court's discretion to grant or deny a preliminary injunction is undisputedly based upon four factors, and the merits factor is one of the four factors a

district court must consider when analyzing a motion for a preliminary injunction. *Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. ## 24-26; *Black Gold OilField Servs., LLC*, 2016 ND 30, ¶ 12, 875 N.W.2d 515. The North Dakota Supreme Court has relied upon these four factors since at least 1986. *F-M Asphalt, Inc. v. N.D. State Highway Dep't*, 384 N.W.2d 663, 664-65 (1986) (citing *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109 (8th Cir. 1981).

[¶6] The merits factor contains two unambiguous requirements. First, a district court must find that a movant has a "substantial probability of success." The adjective "substantial," as it is used in the phrase, modifies the words "probability of success." The definition of the word "substantial" that is relevant to the merits factor is "considerable in importance, value, degree, amount, or extent." *Substantial,* The American Heritage Dictionary of the English Language (5th ed. 2022). The definition of "probability" in this context is "[t]he quality or condition of being probable; likelihood." *Probability*, The American Heritage Dictionary of the English Language (5th ed. 2022). The plain meaning of the phrase "substantial probability of success" requires RRWC to demonstrate that it has more than a mere probability of success, it must be a "substantial probability" or that it has a considerable likelihood of success on the merits. The word "merits" refers to "[t]he factors to be considered in making a substantive decision in a case, independent of procedural or technical aspects[.]" *Merits*, The American Heritage Dictionary of the English Language (5th ed. 2022). RRWC must show that it has a substantial probability of success *on the substance* of its case.

[¶7] The district court misconstrued the merits factor by omitting the word probability from its analysis of the word substantial. The district court narrowly focused on the word substantial and reasoned the word "has never clearly been defined by the Supreme Court in terms of a preliminary injunction, nor has it been quantified." (R112:4:¶8). The district court relied upon *Gunsch v. Gunsch*, an opinion issued in 1954, where the North Dakota Supreme Court reasoned "'[i]t is not necessary that the complainant's rights be clearly established, or that the court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity[.]' 69 N.W.2d 739, 750 (N.D. 1954)." (R112:4:¶8). The district court's reliance upon *Gunsch* is misplaced.

[¶8] In *Gunsch*, the Court addressed the standard for a temporary restraining order, as opposed to a preliminary injunction. *Gunsch*, 69 N.W.2d 739, 750 (citing *Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, C.C.,* 159 F. 500, 511); *see also State v. Kenny*, 2019 ND 218, ¶ 9, 932 N.W.2d 516 (citing *Gunsch* within the context of a temporary restraining order); *Svedberg v. Stamness*, 525 N.W.2d 678, 681 (1994) (citing *Gunsch* within the context of a statute concerning disorderly conduct restraining orders and preservation of the status quo). The North Dakota Supreme Court has never held that the existence of a "real and substantial question between the parties" satisfies the merits factor. S*ee e.g. Eberts v. Billings Cnty. Bd. of Comm'rs*, 2005 ND 85, ¶ 8, 695 N.W.2d 691; *Nodak Mut. Ins. Co. v. Ward Cnty. Farm* Bureau, 2004 ND 60, ¶ 24, 676 N.W.2d 752; *Magrinat v. Trinity Hosp.*, 540 N.W.2d 625, 628-29 (N.D. 1995); *Fargo Women's Health Org., Inc. v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992); *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990); *F-M Asphalt, Inc,* 384 N.W.2d at 664-65.

[¶9] The incongruity between the Court's decision in *Gunsch* and cases involving preliminary injunctions is stark when the applicable burdens of proof are compared. A motion for preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Black Gold OilField Servs., LLC*, 2016 ND 30, ¶ 12, 875 N.W.2d 515 (quoting *Vorachek*, 461 N.W.2d at 585). By comparison, it is unnecessary for a complainant's rights to be clearly established when seeking a temporary restraining order. *Gunsch*, 69 N.W.2d at 740.

[¶10] The district court exacerbated its error by claiming its "description of the 'substantial probability' analysis is consistent with one of the definitions of 'substantial,' which states 'real and tangible rather than imaginary.'" (R112:4:¶8) (citing *New Oxford American Dictionary* 1736 (3rd ed. 2017)). While this is one definition of the word substantial, it is not the correct definition for the word substantial when the word is used to modify the word probability. The district court's choice of this definition is an error. In the context of the merits factor, the word "substantial" modifies an incorporeal concept: probability. "Substantial" cannot mean "tangible" for this purpose.

[¶11] The impact of the district court's erroneous construction of the merits factor is illustrated by the formlessness of its conclusion. The district court acknowledged that this Court "has not expressly, nor implicitly, determined whether North Dakota citizens have a constitutional right to an abortion[,]" the issue is highly contentious, and "[t]he answer to whether the Statute is constitutional is not obvious." (R112:4:¶¶9-10). The district court concluded:

> It is clear to the [district court] that there is a real and substantial question before it. Whether the North Dakota Constitution conveys a fundamental right to an abortion is an issue that is very much alive and active. This issue does not have a clear and obvious answer. Therefore the

> [district court] finds that RRWC has a substantial probability of succeeding on the merits through showing that there is a "real and substantial" question before the Court.

(R112:5:¶11). Without benefit of a single persuasive cite, the district court concluded RRWC satisfies the merits factor without analyzing whether the State Constitution provides a constitutional right to an abortion, the central question to the litigation for determining whether Section 12.1-31-12 is unconstitutional. (R112:3:¶5). This Court should determine the district court abused its discretion when it misinterpreted the merits factor and misapplied the law in determining the merits factor favors RRWC based upon what the district court terms a substantial question.

## II. The district court abused its discretion when it determined RRWC satisfied the merits factor by presuming Section 12.1-31-12 is unconstitutional.

[¶12] Section 12.1-31-12, like all regularly enacted statutes, carries "a strong presumption of constitutionality which is conclusive unless the party challenging the law clearly demonstrates the law contravenes the state or federal constitution." *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 45, 855 N.W.2d 31 (citation omitted). "Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity[,]" and "[t]he presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt." *Id.* (citations omitted). "The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity." *Id.* (citation omitted).

[¶13] The district court affirmed the permanent injunction of Section 12.1-31-12 without bothering to analyze whether the State Constitution provides a constitutional right to an abortion. (R112:5¶12). There is nothing in either of the district court's opinions supporting a conclusion that RRWC met its burden to demonstrate Section 12.1-31-12 is

unconstitutional. Instead, the district court simply concluded RRWC satisfied the merits factor based upon its presumption that this Court could possibly determine the State Constitution contains a fundamental right to an abortion and find Section 12.1-31-12 unconstitutional. *Id.* The district court's framework for analyzing Section 12.1-31-12 is wholly inconsistent with the Court's standard for analyzing the constitutionality of a statute and the requirements for granting a preliminary injunction and constitutes an abuse of discretion.

[¶14] First, the district court misapplied the law when it improperly shifted the burden to the State to prove the constitutionality of the statute when the burden is on RRWC to show it has a substantial probability of success on the merits for a permanent injunction to be granted. The district court criticizes the State for not arguing Section 12.1-31-12 "would meet the strict scrutiny burden of an infringement upon a fundamental right" and the "State has failed to show how [Section 12.1-31-12] would survive a strict scrutiny review and how the restrictions are necessary to further its goals." (R112:6:¶¶14-15). The district court concluded RRWC has a substantial probability of succeeding on its claim, *if* the State Constitution is found to contain a fundamental right to an abortion without actually analyzing and determining whether a fundamental right does indeed exist. (R112:6:¶¶15-16). It is important to again note that this Court has never made such a finding.

[¶15] It is obvious from the district court's analysis that it improperly shifted the burden to the State to prove why a preliminary injunction should not be granted rather than analyzing how RRWC has met its burden to show there is a fundamental right to abortion under the State Constitution and how it survives strict scrutiny analysis to establish a

substantial likelihood of success on the merits. (R112:6:¶15). The burden always rests with RRWC to establish that it is entitled to such extraordinary and drastic relief: "a preliminary injunction . . . should *not* be granted *unless* the movant, by a clear showing, *carries the burden of persuasion*." *Black Gold OilField Servs., LLC*, 2016 ND 30, ¶ 12, 875 N.W.2d 515 (emphasis added) (quotation omitted).

[¶16] Second, the district court abused its discretion when it did not determine the central question of whether the State Constitution contains a fundamental right to abortion before proceeding to its determination that Section 12.1-31-12 is constitutionally infirm. The district court acknowledges it is not certain whether the State Constitution contains a fundamental right to an abortion. (R112:5:¶¶11-12) ("It is clear to the Court that there is a real and substantial question before it. Whether the North Dakota Constitution conveys a fundamental right to an abortion is an issue that is very much alive and active. This issue does not have a clear and obvious answer. . . . Although the Court has found the first factor to favor RRWC without addressing whether the North Dakota Constitution provides for a constitutional right to an abortion . . . ."); (R95:4:¶10) ("At this time, this Court, nor the North Dakota Supreme Court, has not declared a right to abortion under the North Dakota Constitution."); (R95:6:¶15) ("[A]t this time, the determination of whether the North Dakota Constitution includes a right to abortion has yet to be made."). Undeterred by its own acknowledgment, the district court determined that the merits factor weighs in favor of RRWC because Section 12.1-31-12 could not survive strict scrutiny, an analysis that would need to be preceded by a finding that a fundamental constitutional right to abortion existed. Such leaps in analysis do not appear to be the product of a rational mental process leading to a reasoned determination. The district court's determination on this issue is

diminished and unsupported by its own analysis and admission that the "answer to whether the Statute is constitutional is not obvious." (R112:4:¶10). Again, the district court starts with the wrong presumption that the State must prove the statute is constitutional when the presumption of statutory interpretation before the district court is that each statute is constitutional, unless proven otherwise: "[a]ll regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates it contravenes the state or federal constitution, . . . beyond a reasonable doubt." *MKB Mgmt. Corp.*, 2014 ND 197, ¶ 45, 855 N.W.2d 31 (citations omitted). Further, "[a]ny doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity." *State v. Birchfield*, 2015 ND 6, ¶ 5, 858 N.W.2d 302 (citation omitted). The mere recognition that the district court is unsure whether the statute is constitutional must result in a finding that RRWC has failed to meet its burden of persuasion to show that there is a fundamental right to abortion under the State Constitution and the merits factor weighs in favor of the State. The district court's own admission of doubt over the conclusion as to whether a fundamental right to abortion exists under the statute must resolve in favor of the statute's validity. The district court's determination that the merits factor weighs in favor of RRWC on this point further illustrates that it abused its discretion because its analysis and its resulting conclusion are completely incongruent; it is not the product of a rational mental process leading to a reasoned determination.

### A. The district court abused its discretion by concluding RRWC satisfies the merits factor because Section 12.1-31-12 is subject to strict scrutiny.

[¶17] If this Court analyzes the merits factor and evaluates whether Section 12.1-31-12 is constitutional, this Court should determine the State Constitution does not provide a

constitutional right to an abortion and Section 12.1-31-12 is not subject to strict scrutiny. A law is subject to strict scrutiny only if the law impairs a fundamental right:

> Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Therefore, state limitations on a fundamental right such as the right of privacy are permissible only if they survive strict constitutional scrutiny. However, where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test . . . .

*MKB Mgmt. Corp.*, 2014 ND 197, ¶ 29, 855 N.W.2d 31 (quoting *Hoff v. Berg*, 1999 ND 115, ¶ 13, 595 N.W.2d 285 (citations omitted)). The State argued in the district court and in its Brief in Support of Petition for Supervisory Writ, that application of the strict scrutiny test was unnecessary since abortion is not a fundamental right protected by the State Constitution and the concurring opinion by then Chief Justice VandeWalle ("VandeWalle Concurrence") in *MKB Mgmt. Corp.*, 2014 ND 197, should be followed as persuasive authority. *See Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. # 25 at ¶¶ 26-44; State's Resp. Mot. TRO & Prelim. Inj. (R58:14:¶¶25-38). This Court has never determined the State Constitution protects the decision to have an abortion. The long-standing history of regulating abortion prior to statehood and after, paired with the State Constitution's silence on the topic, affirms that a constitutional right to abortion under the State Constitution was not intended and does not exist.

### B. Section 12.1-31-12 satisfies the strict scrutiny test if the right to an abortion is determined to be a fundamental right protected by the State Constitution.

[¶18] If the Court determines the State Constitution does provide a fundamental right to an abortion and applies the strict scrutiny test to Section 12.1-31-12, the Court should

determine Section 12.1-31-12 survives strict scrutiny. The district court determined Section 12.1-31-12 fails strict scrutiny because the law "essentially functions as a complete prohibition to abortion[,]" and because the "State has failed to show how [Section 12.1-31-12] would survive a strict scrutiny review and how the restrictions are necessary to further its goals." (R112:6:¶15). Despite these findings, the district court did not provide any substantive analysis under its review of strict scrutiny. The State believes the district court takes issue with the use of affirmative defenses rather than exceptions in finding Section 12.1-31-12 is not narrowly tailored to achieve the State's compelling interests and will therefore analyze the constitutionality of affirmative defenses under strict scrutiny. *See* (R112:6:¶¶14-16).

[¶19] It is undisputed and "clear" after the United States Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), "that the North Dakota legislature has the power to regulate and set restrictions on abortions within the state." (R112:9:¶23). It is also undisputed, based upon North Dakota's long history of regulating abortion, that the State has a legitimate and compelling interest in regulating abortion. *See MKB Mgmt. Corp.*, 2014 ND 197, ¶¶ 36-37, 855 N.W.2d 31. The State's compelling interests are codified in state law and provide that the purpose of regulating abortion is to "protect unborn human life and maternal health within present constitutional limits. State law affirms the tradition of the state of North Dakota to protect every human life whether unborn or aged, healthy or sick." N.D.C.C. § 14-02.1-01; *see also* N.D.C.C. § 14-02.1-05.3 (codifying the State's compelling interest in the unborn human life.).

[¶20] Since abortion is a "unique act" there are practical difficulties in applying the exacting standard of strict scrutiny to abortion regulations because of a state's important

and legitimate interest in a woman's health and potential life." *MKB Mgmt. Corp.*, 2014 ND 197, ¶ 31, 855 N.W.2d 31 (VandeWalle, C.J., concurring) (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 871-72 (1992); *see also Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. # 25; State's Resp. Mot. TRO & Prelim. Inj. (R58:14:¶¶33-34). Regardless, Section 12.1-31-12 is narrowly tailored to serve compelling state interests.

[¶21] Section 12.1-31-12 defines abortion as follows:

> "Abortion" means the use or prescription of any substance, device, instrument, medicine, or drug to intentionally terminate the pregnancy of an individual known to be pregnant. The term does not include an act made with the intent to increase the probability of a live birth; preserve the life or health of a child after live birth; or remove a dead, unborn child who died as a result of a spontaneous miscarriage, an accidental trauma, or a criminal assault upon the pregnant female or her unborn child.

N.D.C.C. § 12.1-31-12(1)(a). This very specific, narrow definition is carefully aligned with the State's compelling and legitimate interest in protecting unborn human life while precluding broader application of the statute. An abortion requires a physician to possess the requisite intent of the statute "to intentionally terminate the pregnancy of an individual known to be pregnant." *Id*. The statute further limits what constitutes an abortion subject to the penalties articulated in Section 12.1-31-12 and does not include any act by a physician that was done with the intent to remove a dead, unborn child who died as a result of a spontaneous miscarriage, accidental trauma, or criminal assault. *Id*. The term abortion also does not include any act done by a physician with the intent to increase the probability of a live birth or preserve the life or health of a child after live birth. *Id*. And although Section 12.1-31-12 makes it a class C felony for a person, other than the pregnant female

upon whom the abortion was performed, to perform an abortion, the law provides affirmative defenses to physicians for certain abortion procedures that may fall into the definition of abortion:

> a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.
> b. That the abortion was to terminate a pregnancy that resulted from gross sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20.
> c. That the individual was acting within the scope of that individual's regulated profession and under the direction of or at the direction of a physician.

N.D.C.C. § 12.1-31-12(3). By providing a specific definition of abortion and affirmative defenses the legislature narrowly tailored Section 12.1-31-12 to achieve its compelling interests. From the definitions and affirmative defenses it is apparent that not every procedure performed by a physician that concerns or affects fetal life is an "abortion" as defined. Indeed, the district court's analysis concerning whether Section 12.1-31-12 is narrowly tailored is flawed because it does not even analyze what procedures a physician may perform that would not only fall under the definition of abortion but also fall outside an affirmative defense such that physicians would be subject to wide ranging prosecution.

[¶22] Although the district court states the statute "essentially functions as a complete prohibition to abortion" that characterization ignores the affirmative defenses listed in Section 12.1-31-12 and disregards the statute's carefully crafted, limited definition of "abortion". (R112:6:¶15). To the extent the district court hinges its finding that Section 12.1-31-12 does not survive strict scrutiny on the mere premise that affirmative defenses are provided for in the statute rather than exceptions, that premise does not affect the constitutionality of the statute. The statute's composition satisfies the application of strict scrutiny in the event the Court decides the State Constitution includes a fundamental right

to abortion. Neither the district court nor RRWC has provided any caselaw indicating affirmative defenses are impermissible in this context. Section 12.1-31-12 survives strict scrutiny because the definition of abortion and use of affirmative defenses narrowly tailor the statute to achieve the State's compelling interest, affirmative defenses do not constitute a per se violation of substantive due process rights and are used in other criminal statutory contexts to provide defenses for physicians, and there is no authority—nor does the district court cite to any—for the premise that affirmative defenses are subject to greater scrutiny as opposed to exceptions.

[¶23] An affirmative defense is "a defendant's assertion of facts and argument that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." (R112:8:¶21) (quoting Black's Law Dictionary). The Legislature has relied upon affirmative defenses to aid physicians in other contexts. For instance, Subsection 1 of N.D.C.C. § 12.1-05-07 provides that "[a]n individual is not justified in using more force than is necessary and appropriate under the circumstances." Subsection 2 of N.D.C.C. § 12.1-05-07 provides that deadly force may be used in certain instances, and N.D.C.C. § 12.1-05-07(2)(f) provides physicians with an affirmative defense if they use force. Section 12.1-05-05, N.D.C.C., provides that the "use of force upon an individual is justified under certain circumstances." The law expressly provides a scenario where a physician may use force:

> 4. A duly licensed physician, or a person acting at a duly licensed physician's direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is administered:
>  a. In an emergency;
>  b. With the consent of the patient, or, if the patient is a minor or an individual who is incompetent, with the consent of the

patient's parent, guardian, or other person entrusted with the patient's care and supervision; or

c. By order of a court of competent jurisdiction.

N.D.C.C. § 12.1-05-05(4). The law provides that a physician may use deadly force "if the force is necessary to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered in an emergency; with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of the patient's parent, guardian, or other person entrusted with the patient's care and supervision; or by order of a court of competent jurisdiction." N.D.C.C. § 12.1-05-07(2)(f).

[¶24] In addition, N.D.C.C. § 12.1-27.2-05 provides an affirmative defense to physicians related to a sexual performance by a minor:

> It is an affirmative defense to a prosecution under this chapter that:
>
> 1. The defendant in good faith reasonably believed the person appearing in the performance was eighteen years of age or older, if the minor was in fact fifteen years of age or older; or
> 2. The material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other appropriate purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a similar interest in the material or performance.

*Id.* Even if a person makes a mistake, state law provides a further affirmative defense for a person's good faith belief that conduct does not constitute a crime if the person acted in reasonable reliance upon a statement of the law contained in:

1. A statute or other enactment
2. A judicial decision, opinion, order, or judgment.
3. An administrative order or grant of permission.

> 4. An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime.

N.D.C.C. § 12.1-05-09.

[¶25] Although many affirmative defenses are contained within Title 12.1 of the North Dakota Century Code, the legislature has enacted laws including affirmative defenses in other provisions of the law. For example, N.D.C.C. § 19-03.1-22.2(4) provides an affirmative defense to a violation of the section, and criminal prosecution, if a "controlled substance was provided by lawful prescription for the child or vulnerable adult and that it was administered to the child or vulnerable adult in accordance with the prescription instructions provided with the controlled substance." Section 19-03.1-37, N.D.C.C., additionally provides that it is not necessary for the state to negate any exemption or exception in N.D.C.C. ch. 19-03.1, and the burden of proof of any exception is upon the person claiming it. *C.f.* N.D.C.C. § 12.1-01-03(4) (describing the burden of proof for proving an affirmative defense). By comparison, N.D.C.C. § 19-03.4-08(7), provides an affirmative defense to a person who delivers a scheduled listed chemical product to a person under the age of eighteen years in an over-the-counter sale, but the law does not provide an explanation of the burden of proof. *See also* N.D.C.C. §§ 34-06-05.1, 39-08-01.

[¶26] In summary, there are provisions of law that provide express exceptions for physicians to criminal conduct and affirmative defenses, N.D.C.C. §§ 12.1-05-05 and 12.1-05-07, provisions of law that provide an affirmative defense without describing the conduct as an exception, N.D.C.C. §§ 12.1-27.2-05, 12.1-31-12, 19-03.1-22.2, provisions where an affirmative defense may be construed as an exception, N.D.C.C. § 19-03.1-37, and provisions that provide an affirmative defense without reference to the defense being an

exception or description of the burden of proof, N.D.C.C. §§ 12.1-31-12, 19-03.4-08(7), 34-06-05.1, 39-08-01.

[¶27] The Legislature's reliance upon affirmative defenses for physicians in Section 12.1-31-12, like other provisions of law, constitutes a recognition that the law provides an exception for certain types of abortion procedures, even if the law does not expressly use the word exception. Section 12.1-31-12 is narrowly drawn to protect the State's compelling interest in regulating abortion and protecting unborn human life. The use of affirmative defenses which grant physicians a statutory defense in a highly regulated and scrutinized area of law illustrates that Section 12.1-31-12 is narrowly tailored to achieve the government's interests.

[¶28] Even if Section 12.1-31-12 provides exceptions to prosecution for certain types of abortion procedures, as opposed to providing affirmative defenses, physicians could still be subject to prosecution. If a physician conducted an abortion procedure to save the life of a pregnant female and a prosecutor questioned the necessity of the procedure, a prosecutor could charge a physician with a felony and the physician would not have the benefit of an affirmative defense and a physician would be in the same position as if the physician had an affirmative defense. Physicians benefit from statutory affirmative defenses in multiple provisions of law, and Section 12.1-31-12 is no different. Section 12.1-31-12 is narrowly drawn to reach the State's compelling interest in protection and promoting human life at all stages of development.

**C. Section 12.1-31-12 satisfies rational basis review.**

[¶29] The right to an abortion is not a fundamental right protected by the State Constitution, therefore, Section 12.1-31-12 is subject to rational basis review. "Under

rational basis review, 'a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.'" *MKB Mgmt. Corp.*, 2014 ND 197, ¶ 29, 855 N.W.2d 31 (quoting *Hoff*, 1999 ND 115, ¶ 13, 595 N.W.2d 285 (citations omitted)). "Substantive due process analysis requires a close correspondence between legislation and the goals it advances." *Hoff*, at ¶ 14. The Court may declare a statute unconstitutional on substantive due process grounds if "the Legislature had no power to act in the particular matter, or, having power to act such power was exercised in an arbitrary, unreasonable, or discriminatory manner and the method adopted has no reasonable relation to attain the desired result." *Id.* (citations omitted) (quotation cleaned up). The Court should determine Section 12.1-31-12 satisfies rational basis review for the same reasons the law satisfies strict scrutiny. The law is not arbitrary, unreasonable, or discriminatory, and the method adopted is reasonably related to attain the desired result, protecting unborn human life.

[¶30] Section 12.1-31-12 clearly promotes the State's legitimate interest in protecting unborn human life because the law places limitations on abortion procedures, which is consistent with the State's long history of limiting abortions. *See MKB Mgmt. Corp.*, 2014 ND 197, ¶¶ 36-37, 855 N.W.2d 31 (reciting the history of regulation of abortion in North Dakota prior from territory to statehood and after). The district court's reasoning that the State has only "indirectly asserted an interest in upholding the statute[,]" and that the State has remained "silent as to how the Statute properly asserts its interest in respect to promoting human life[,]" (R112:7:18), is simply wrong. The State has never deviated from its defense of Section 12.1-31-12 and protecting the State's legitimate interests in protecting human life at all stages of development and regulating abortion as a result. *See*

*e.g. Access Indep. Health Servs., Inc., et al. v. Drew H. Wrigley, et al.*, *sub nom. Wrigley v. Romanick, et al.,* Supreme Court. No. 20220260, Burleigh Co. Court No. 2022-CV-01608, Seq. # 25; State's Resp. Mot. TRO & Prelim. Inj. (R58:14:¶44).

[¶31] The district court's primary rationale for concluding Section 12.1-31-12 does not satisfy the rational basis test seems to rest upon the legislature's use of affirmative defenses versus providing exceptions to criminal prosecution for certain abortion procedures. (R112:8:¶22). The district court opined:

> The Statute allows for the circumstances of pregnancy resulting from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest to be raised as affirmative defenses; they are not bars to prosecution. This is an important distinction. If the exceptions had been bars to prosecution, doctors would not have to face the threat of criminal prosecution for performing abortions under the situations outlined. Instead, with 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. This puts an exuberant burden on doctors and their decision on whether to perform an abortion.

(R112:8-9:¶22). The use of express exceptions versus affirmative defenses is not a complete grant of immunity to physicians for regulated abortion procedures, and such a change removes statutory defenses intended to benefit physicians. As discussed *supra* at ¶¶ 21-25, several statutory schemes provide physicians affirmative defenses rather than exceptions.

[¶32] The district court wrongly determined that the burden on physicians to assert an affirmative defense was not reasonably related to the goal of preserving life because it put an unreasonable burden upon doctors and pregnant women. The district court wrote: "[a]s outlined in the declarations provided by RRWC, 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, [Section 12.1-31-12] does not serve its intended purpose." (R112:9:¶23). The district court's analysis construes the reach of the statute too broadly stating that it is not a complete ban but "provides for 'affirmative defenses' to allow for abortions in a few, designated, circumstances." (R112:8:¶21). A violation of Section 12.1-31-12 requires a physician to possess the requisite intent of the statute "to intentionally terminate the pregnancy of an individual known to be pregnant." *Id*. The statute further limits what constitutes an abortion subject to the penalties articulated in Section 12.1-31-12 and does not include any act by a physician that was done with the intent to remove a dead, unborn child who died as a result of a spontaneous miscarriage, accidental trauma, or criminal assault. *Id*. The term abortion also does not include any act done by a physician with the intent to increase the probability of a live birth or preserve the life or health of a child after live birth. *Id*. Section 12.1-31-12 is reasonably related to the goal of regulating abortion to preserve fetal life and women's health while also allowing for affirmative defenses for those situations that may be considered an abortion as defined by the statute, but are otherwise necessary in limited circumstances. Again, the district court does not rely on any precedent finding that the use of affirmative defenses versus exceptions violates an individual's substantive due process right. The district court misinterpreted and misapplied the law when it determined that Section 12.1-31-12 would not survive rational basis review and RRWC has a substantial probability of success on the merits.

## CONCLUSION

[¶33] In summary, the district court abused its discretion granting the preliminary injunction and the State requests that the Court vacate the district court's injunction because

RRWC has not satisfied the merits factor. The district court's misapplication of the law and the precedents of this Court would have this Court stand in the shoes of the Legislature to determine what types of abortion regulations are allowed versus those that are not, even when it admittedly cannot determine that the State Constitution contains the very fundamental right which must exist to trigger the heightened level of review employed by the district court. This Court should reject the invitation to usurp the constitutional responsibility of a co-equal branch of our government, because it is not the Legislature, and acknowledge it is the people's elected legislative representatives who have the burden of deciding the legal parameters surrounding the decision whether to abort an unborn child. *See Dobbs*, 142 S. Ct. at 2243. As the State has explained in its Writ which it incorporates wholly herein, the merits factor is the most important factor when a party seeks to enjoin a law. Since RRWC fails to satisfy the merits factor, the preliminary injunction entered by the district court must be dissolved.

Dated this 21st day of November, 2022.

State of North Dakota
Drew H. Wrigley
Attorney General


By: /s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email masagsve@nd.gov

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email ctitus@nd.gov

Attorneys for Petitioner.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota,<br><br>Petitioner,<br><br>v.<br><br>The Honorable Bruce Romanick, District Court Judge, 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,<br><br>Respondents. | **CERTIFICATE OF COMPLIANCE**<br><br>**Supreme Ct. No. 20220260**<br><br>**District Ct. No. 08-2022-CV-01608** |

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the **STATE OF NORTH DAKOTA'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR SUPERVISORY WRIT** contains 27 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12 point font.

Dated this 21st day of November, 2022.

State of North Dakota
Drew H. Wrigley
Attorney General


By: /s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email masagsve@nd.gov

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email ctitus@nd.gov

Attorneys for Petitioner.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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|---|---|
| Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota,<br><br>Petitioner,<br><br>v.<br><br>The Honorable Bruce Romanick, District Court Judge, 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,<br><br>Respondents. | **CERTIFICATE OF SERVICE**<br><br>**Supreme Ct. No. 20220260**<br><br>**District Ct. No. 08-2022-CV-01608** |

[¶1] I hereby certify that on November 21, 2022, the following documents: **STATE OF NORTH DAKOTA'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR SUPERVISORY WRIT and CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal and served on the following:

Thomas A. Dickson at tdickson@dicksonlaw.com;
Lauren Bernstein at Lauren.Bernstein@weil.com;
Naz Akyol at Naz.Akyol@weil.com;
Luna Barrington at Luna.Barrington@weil.com;
Alexandra Blankman at Alex.Blankman@weil.com;
Cassandra D'Alesandro at Casey.Dalesandro@weil.com;
Liz Grefrath at Liz.Grefrath@weil.com;
Lauren Kelly at Lauren.Kelly@weil.com;
Todd Larson at Todd.Larson@weil.com;
Colin McGrath at Colin.McGrath@weil.com;
Meetra Mehdizadeh at mmehdizadeh@reprorights.org;
Alassandra Olsewski at Alassandra.Olsewski@weil.com;
Melissa Rutman at Melissa.Rutman@weil.com;

Caroline Zalka at caroline.zalka@weil.com;
Scott K. Porsborg at sporsborg@smithporsborg.com; and
Austin T. Lafferty at alafferty@smithporsborg.com.

Dated this 21st day of November, 2022.

State of North Dakota
Drew H. Wrigley
Attorney General


By: /s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email masagsve@nd.gov

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email ctitus@nd.gov

Attorneys for Petitioner.