STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **SOUTH CENTRAL JUDICIAL DISTRICT**

Access Independent Health Services, Inc., d/b/a Red River Women's Clinic, on behalf of itself and its patients; Kathryn L. Eggleston M.D., on behalf of herself and her patients; Ana Tobiasz, M.D. on behalf of herself and her patients; Erica Hofland, M.D., on behalf of herself and her patients; Collette Lessard, M.D. on behalf of herself and her patients,

Plaintiffs,

v.

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota; Kimberlee Jo Hegvik, in her official capacity as the State's Attorney for Cass County; Julie Lawyer, in her official capacity as the State's Attorney for Burleigh County; Amanda Engelstad, in her official capacity as State's Attorney for Stark County; and Haley Wamstad, in her official capacity as the State's Attorney for Grand Forks County,

Defendants.

Case No. 08-2022-CV-01608

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

[¶1] This matter is before the Court on the Defendant, Drew Wrigley's, *Motion for Summary Judgment* seeking dismissal of the Plaintiffs' *Amended Complaint* in this matter. *Docket No. 450* (*State Defendants Motion for Summary Judgment*). The Plaintiffs filed an *Opposition to the State's Motion for Summary Judgment* arguing there are disputed issues of material fact and requesting that the Court deny the Defendant's *Motion*. *Docket No.*

551 (Plaintiffs' Opposition to the State's Motion for Summary Judgment). The Defendant filed a *Reply Brief in Support of Motion for Summary Judgment* opposing the Plaintiffs' arguments. *Docket No. 559 (State Defendant's Reply Brief in Support of Motion for Summary Judgment)*.

[¶2] A hearing was held on the *Motion for Summary Judgment* on July 23, 2024. Both parties presented oral argument to the Court regarding their respective arguments and positions.

BACKGROUND

[¶3] The factual and procedural background of this case have been detailed extensively in prior Court orders and in the North Dakota Supreme Court's decision in *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d (2023). That decision followed a supervisory writ challenging this Court's prior issuance of a preliminary injunction enjoining enforcement of then N.D.C.C. § 12.1-31-12. The *Wrigley v. Romanick* Court left the preliminary injunction in place concluding the North Dakota Constitution "provides a fundamental right to receive an abortion to preserve a pregnant woman's life or health." 2023 ND 50 at ¶¶26-27. The Court stopped short of deciding the precise scope of potential health risks encompassed by their ruling, or whether there are fundamental rights broader in scope than where it is necessary to preserve the woman's life or health. *Id.* at ¶ 20.

[¶4] Following the Court's decision in *Wrigley v. Romanick*, the North Dakota Legislature amended North Dakota's abortion statutes by enacting Senate Bill 2150. Senate Bill 2150 repealed N.D.C.C. § 12.1-31-12 – the statute previously enjoined in this action. Senate Bill 2150 also created a new chapter to N.D.C.C. Title 12.1, which became codified at N.D.C.C. Ch. 12.1-19.1, and eliminated the affirmative defense mechanism

with respect to the criminal charges that could be brought under then existing N.D.C.C. § 12.1-31-12. Senate Bill 2150 converted these affirmative defenses into exceptions from the application of the criminal statute.

[¶5] The law now provides an exception, among other exceptions or exclusions, for "[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). The law also provides an exception for "[a]n abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual abuse of a ward, or incest . . . if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶6] Plaintiffs subsequently filed an *Amended Complaint* requesting that this Court deem the amended abortion ban unconstitutional under the North Dakota Constitution, asserting that the laws are void for vagueness, and that the laws violate North Dakota citizens' various fundamental rights. *Docket No. 151* (*Amended Complaint*).

[¶7] Following the close of discovery, the Defendants now request that the Court enter summary judgment in their favor, and dismiss the Plaintiffs' *Amended Complaint* in whole, arguing there are no disputed issues of material fact, and the Plaintiffs are unable to satisfy the necessary burdens required to establish that N.D.C.C. ch. 12.1-19.1 is unconstitutional. The Plaintiffs resist the *Motion* asserting there are disputed issues of material fact, and the matter should proceed to trial.

[¶8] The North Dakota Supreme Court previously noted this issue as being "an issue of vital concern regarding a matter of important public interest." *Wrigley v. Romanick*, 2023 ND 50, ¶ 11, 988 N.W.2d (2023). Indeed, this Court recognizes that the decision in this

matter may be one of the most important this Court issues during its time on the bench. However, in reaching the decision below, it is also not lost on the Court that, on appeal, this Court's decision is given no deference.

[¶9] The Court mentions this simply to point out that while the Court believes this issue and decision to be of vital importance for the citizens of North Dakota, the Court also recognizes that it is not ultimately this Court's decision to make. The Court is left to craft findings and conclusions on an issue of vital public importance when the longstanding precedent on that issue no longer exists federally, and much of the North Dakota precedent on that issue relied on the federal precedent now upended – with relatively no idea how the appellate court in this state will address the issue. Therefore, the decision below is the Court's best effort to apply the law as written to the issue presented and to ensure that the fundamental rights of North Dakota citizens are protected in the manner our state constitution demands.

[¶10] The United State's Supreme Court has decided to overturn its longstanding prior precedent in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 218 (2022), whereby it overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). In doing so, the United States Supreme Court determined there is no fundamental right to abortive care under the United States Constitution, and the Court essentially obliterated its prior longstanding precedent on abortion rights, leaving those decisions to the States.

[¶11] This Court sees no reason to do the same under North Dakota precedent and the North Dakota Constitution. For the reasons outlined below, the Court concludes that (1) the Amended Abortion Ban set forth in Chapter 12.1-19.1, N.D.C.C., as currently drafted,

is unconstitutionally void for vagueness; and (2) pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women** – specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness enumerated in article [I], section 1 of the North Dakota Constitution.

[¶12] Therefore, the Court concludes the Amended Abortion Ban, codified in Chapter 12.1-19.1, is unconstitutional as it impermissibly infringes on every single one of these fundamental rights.

LAW AND DECISION

1. Summary Judgment Standard

[¶13] The standard for summary judgment is well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . [W]e must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record.

Golden v. SM Energy Co., 2013 ND 17, ¶ 7, 826 N.W.2d 610, 615 (quoting *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754. "Summary judgment, when appropriate, may be rendered against the moving party." N.D.R.Civ.P. 56(c)(3).

[¶14] In this case, the Defendants argue that summary judgment is appropriate, as the issues before the Court are purely legal issues and there are no disputed issues of material fact. The Plaintiffs argue that there are factual disputes to be presented at trial and decided

by the Court.

[¶15] The Court concludes there are no material factual disputes in this case. The issues presented to the Court in this case, and the relief requested, are purely legal issues. While the Plaintiffs attempt to frame their constitutional challenge as an as-applied challenge supported by speculative facts, it simply is not an as-applied challenge. Plaintiffs have not identified any specific facts that the Court needs to hear at a trial to determine the constitutional challenges to the law in this matter,

[¶16] When the Court inquired of Plaintiffs' counsel at the hearing on the *Motion for Summary Judgment*, what factual disputes needed to be addressed at trial, counsel did not identify factual disputes, but instead indicated that it was important for the Court to hear testimony from witnesses to judge credibility. To the extent there are factual disputes that Plaintiffs feel need to be presented to the Court for the Court to determine the constitutionality of the law in this case – a question of law - those facts have not been clearly identified. It appears to the Court that a trial would simply re-state, through live testimony, the information the parties have already presented in written filings.

[¶17] Therefore, the Court concludes this matter is appropriate for resolution on a pending summary judgment motion and the filings submitted by the parties.

2. Standing

[¶18] The State Defendants first argue that Plaintiffs Access Independent Health Services, Inc. and Dr. Kathryn Eggleston lack standing in this matter because neither can allege a redressable injury caused by the statute since they no longer practice and/or operate in North Dakota.

[¶19] "A party is entitled to have a court decide the merits of a dispute only after

demonstrating he has standing to litigate the issues placed before the court." *State v. Tibor*, 373 N.W.2d 877, 879 (N.D. 1985) (citing *State v. Carpenter*, 301 N.W.2d 106 (N.D. 1980)). However, so long as one plaintiff has standing, a court may proceed as if all plaintiffs raising the same issues and requesting the same relief have standing. *See, e.g., N.D. Legis. Assembl. V. Burgum*, 2018 ND 189, ¶ 38, 916 N.W.2d 83 ("Because the issues raised and the relief requested by the Governor and the Attorney General are identical, we need not resolve whether the Attorney General has standing in his own right to bring the cross petition.").

[¶20] In this case the State challenges only Dr. Eggleston's and the Clinic's standing. However, the State does not argue that those two Plaintiffs raise different arguments or seek different relief from the other Plaintiffs. The issues raised and the relief requested by all of the Plaintiffs are identical. Since the "issues raised and the relief requested" by the North Dakota physicians is identical to that of Dr. Eggleston and the Clinic, the Court "need not resolve" whether two out of the five plaintiffs have standing in their "own right." *See Burgum*, 2018 ND 189 at ¶ 38.

3. Due Process/Void for Vagueness

[¶21] Plaintiffs argue that N.D.C.C. ch. 12.1-19.1 is void for vagueness in violation of the "North Dakota Constitution's guarantee that a person will not be deprived of their fundamental rights without due process of law, as guaranteed by N.D.Const., art. I, § 12." *Docket No. 151 (Amended Complaint)* at ¶ 70. Plaintiffs generally argue the Amended Abortion Ban does not provide physicians with adequate notice of what the law allows and forbids, and physicians do not know against which standard their conduct will be tested and their liability determined. *See Docket No. 551 (Plaintiffs' Opposition to the State's*

Motion for Summary Judgment) at pp.9-22.

[¶22] "A law is void for vagueness if it lacks ascertainable standards of guilt, such that it either forbids, or requires 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "Vague laws offend due process because they violate the two essential values of fair warning and nondiscriminatory enforcement:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222 (1972). [Footnotes omitted.]

State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1985).

[¶23] "A law is not unconstitutionally vague if: (1) the law creates minimum guidelines for the reasonable police officer, judge, or jury charged with enforcing the law, and (2) the law provides a reasonable person with adequate and fair warning of the prohibited conduct." *State v. Ness*, 2009 ND 182, ¶ 6, 774 N.W.2d 254.

[¶24] In this case, Section 12.1-19.1-02 of the North Dakota Century Code establishes that "[i]t is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion." N.D.C.C. § 12.1-19.1-02. Section 12.1-19.1-03, N.D.C.C., provides for several exceptions to the general ban on abortions, including "[a]n abortion deemed necessary based on reasonable medical judgment which

was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶25] The Plaintiffs argue that this exception fails to provide physicians with adequate notice of what the law allows and forbids because it combines both an objective "reasonable medical judgment" standard, with a subjective "which was intended to prevent death or a serious health risk" standard.

[¶26] The concern the Court has in this case is not with the "reasonable medical judgment" standard currently required by the exception. That standard is not new, nor is it unique to the abortion context and is a common term in medical malpractice actions. The Court's concern stems from the dual standard of both subjective and objective elements currently required in the exception. As currently written, a North Dakota physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held criminally liable if, after the fact, other physicians deem that the abortion was not necessary or was not a reasonable medical judgment.

[¶27] The Defendants cite extensively to *State v. Zurawski*, 2024 WL 2787913, 67 Tex. Sup. Ct. J. 843 (Texas, 2024), to argue that a similarly-worded statute in Texas has been upheld as constitutional on very similar arguments. The Defendants heavy reliance on this case is misplaced.

[¶28] First, the *Zurawski* court was not asked to determine if the Texas statute was unconstitutionally void for vagueness, and the decision itself did "not address, and in turn does not foreclose, such a [vagueness] challenge" in Texas, much less in North Dakota. *Id.* at *47. Texas also has not recognized a fundamental right to life-saving or health preserving abortions under its state constitution, whereas North Dakota has. *See Wrigley v.*

Romanick, 2023 ND 50, at ¶ 40. And perhaps most importantly, the Texas statute's medical exception has significant differences from North Dakota's. The Texas statute at issue in *Zurawski* employs a purely objective standard, while the plain language of the North Dakota exception depends in part on what the physician subjectively "intended." N.D.C.C. § 12.1-19.1-03(1).

[¶29] The Court finds the *Zurawski* decision, which is not binding authority on this Court, distinguishable in nearly every critical respect. Nothing in the Texas Supreme Court's decision interpreting a different law, in a different state, that employs different language "provides an adequate and fair warning of the prohibited conduct" to North Dakota citizens under North Dakota law. That is the job of the North Dakota Legislature, not the Texas Supreme Court.

[¶30] With both subjective and objective elements, the North Dakota medical exception, as currently written, simply does not allow a physician to know against which standard his conduct will be tested and his liability determined. Due process is violated when physicians cannot know the standard under which their conduct will ultimately be judged. On its face, before even considering potential as-applied challenges, the law is confusing and vague. As written, it can have a profound chilling effect on the willingness of physicians to perform abortions, even where the North Dakota Supreme Court has already said there is a fundamental right to do so to preserve a woman's life or health.

[¶31] The statute also includes an exception for rape or abuse, and specifically does not apply to "[a]n abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest . . . if the probable gestational age of the unborn child is six weeks or less."

N.D.C.C. § 12.1-19.1-03(2).

[¶32] This provision does not make clear what information a physician must require or receive to determine if this exception applies and permits a legal abortion. It allows for termination of a pregnancy that based on reasonable medical judgment resulted from a crime. Physicians have no way of reliably determining, with reasonable medical judgment or otherwise, whether or not gross sexual imposition, sexual abuse of a ward, or incest occurred, other than what a patient or others report to them. Patients can be untruthful in what they report to their doctors, and from this Court's own experience in a vast number of criminal cases, there are oftentimes no physical or medical signs or injuries to support allegations of rape or abuse. There are also a number of victims who become pregnant as a result of rape or abuse and do not report it as such, to their physician or otherwise.

[¶33] The determination of whether a pregnancy resulted from rape or abuse is fraught with uncertainty and highly susceptible to being subsequently disputed by others. Indeed, jurors often come to differing conclusions when these cases are charged out in a criminal court. Physicians are not law enforcement officers, investigators, judges, or jurors. They have no way of reliably determining, again with reasonable medical judgment or otherwise, if an individual's pregnancy was the result of a criminal act. Put simply, such a determination is a legal judgment, not a medical one.

[¶34] As currently written, physicians are compelled to guess the law's meaning and application. This lack of clarity in the law – forcing physicians to make a medical judgment regarding the factual circumstances of how a patient became pregnant, with no way of reliably or consistently making that determination medically, and charging them with a felony if they get it wrong – simply cannot and does not comport with the

requirements of due process.

[¶35] The Court concludes the law is impermissibly vague on its face, and as currently written it threatens to inhibit the exercise of constitutionally protected rights for both North Dakota physicians and North Dakota patients.

4. Fundamental Rights

[¶36] Article 1, Section 1 of the North Dakota Constitution provides:

> **Section 1.** All individuals are by nature equally free and independent and have certain **inalienable rights**, among which are those of enjoying and defending **life** and **liberty**; acquiring, possessing and protecting **property** and reputation; pursuing and obtaining **safety** and **happiness**; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which *shall not be infringed.*

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

[¶37] Article 1, Section 25 of the North Dakota Constitution also provides:

> **Section 25.** To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role throughout the criminal and juvenile justice systems, and to ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than the protections afforded to criminal defendants and delinquent children, all victims shall be entitled to the following rights, beginning at the time of their victimization:
>
> a. The right to be treated with fairness and respect for the victim's dignity.
> b. The right to be free from intimidation, harassment, and abuse.
> c. The right to be reasonably protected from the accused and any person acting on behalf of the accused.
> . . .
> f. The right to privacy. . . .

N.D.Const. art. I, § 25(1). "The granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims." *Id.* at § 25(3).

[¶38] Courts use the following framework for interpreting constitutional provisions:

> In interpreting constitutional provisions, we apply general principles of statutory construction. *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision. *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 8, 601 N.W.2d 247. The intent and purpose of constitutional provisions are to be determined, if possible, from the language itself. *Thompson*, at ¶ 7. In construing constitutional provisions, we ascribe to the words the meaning the framers understood the provisions to have when adopted. *Kadrmas v. Dickinson Pub. Schs.*, 402 N.W.2d 897, 899 (N.D.1987). We may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions. *See State v. Orr*, 375 N.W.2d 171, 177–78 (N.D.1985) (interpreting right to counsel provision of state constitution in view of statutes in effect when constitution adopted); *City of Bismarck v. Altevogt*, 353 N.W.2d 760, 764–65 (N.D.1984) (interpreting right to jury trial under state constitution in view of territorial statutes defining right to jury trial).

MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 25, 855 N.W.2d 31, 41. "This Court has recognized the due process language in N.D. Const. art. I, § 12 protects and insures the use and enjoyment of the rights declared by N.D. Const. art. I, § 1." *Id.* at ¶ 26 (citing *Cromwell*, 72 N.D. at 574-75, 9 N.W.2d at 919) (internal quotations omitted).

[¶39] "[T]he North Dakota Constitution must be read in the light of history." *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974). However, the Court has also stated that the Constitution is "a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted." *State v. Norton*, 255 N.W. 787, 792 (N.D. 1934). "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.*

[¶40] This Court will not spend a significant amount of time addressing the history and laws surrounding abortion, women's rights, and women's health in North Dakota at the time the Constitution was drafted and enacted in 1889. Indeed, this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the

laws at that time, likely would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that "individuals" did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests. It quite simply was not the "tradition" of the time, and therefore was not reflected in the laws or in the state constitution.

[¶41] The inalienable rights guaranteed to North Dakota citizens under article 1, section 1 of the North Dakota Constitution did not even include women until 1984 when the language of the state constitution itself was amended from "men" to "individuals." If the reader finds this insignificant, consider it stated another way: women were not explicitly included in the North Dakota Constitution's enumerated protections until only approximately 40 years ago, during this Court's lifetime.

[¶42] The Court also recognizes and notes that in 1889 medical knowledge was not as advanced as it is today. The framers of our state constitution may not have recognized mental health as an important component of health for men or for women. Again, it quite simply was not the tradition and understanding of the time. The fact that mental health, and other medical conditions, were not recognized in the same manner and context in 1889 does not mean those conditions cannot and should not be recognized today, and in the light of the more-advanced medical knowledge we have today.

[¶43] The Court simply cannot conclude that because North Dakota laws, North Dakota history, and North Dakota traditions in and around 1889 would have, and in fact did, deprive women of significant liberty interests and interests regarding their health, that the

same view must be taken today. This does not mean that history and tradition do not matter, but if we can learn anything from examining the history and prior traditions surrounding women's rights, women's health, and abortion in North Dakota, the Court hopes that we would learn this: that there was a time when we got it wrong and when women did not have a voice. This does not need to continue for all time, and the sentiments of the past, alone, need not rule the present for all time.

[¶44] "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Such issues "involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Id.* at 853. The United States Supreme Court previously explained how reasonable individuals have different opinions and views on these matters:

> One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

Casey, 505 U.S. 833 at 853.

[¶45] Included within the realm of liberty is "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 851 "Our precedents have respected the private realm of family life which the state cannot enter."

Id. (internal quotations omitted). "These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

[¶46] The Court then recognized:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. 833, at 852.

[¶47] The North Dakota Supreme Court has said "the language in N.D.Const. art I, § 1, embodies the essence of 'self-evident truths,' and the term 'liberty' includes 'in general, the opportunity to do those things which are ordinarily done by free men [and now also women].'" *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197 at ¶ 27 (quoting *Cromwell*, 72 N.D. at 573-74). "'Liberty' as used in the Constitution embraces the free use by all citizens of their powers and faculties subject only to the restraints necessary to secure the common welfare." *State v. Cromwell*, 72 N.W. 565, 9 N.W.2d 914 (N.D. 1943). The North Dakota Supreme Court has previously held that individuals have both a federal and state constitutional liberty interest in refusing unwanted medical treatment, and that "a person's interest in personal autonomy and self-determination . . . is a fundamentally commanding one. . . ." *State ex rel. Schuetzle*, 537 N.W.2d at 362 n. 2.

[¶48] The North Dakota Supreme Court has also previously explained the constitutional right to pursue happiness as:

> This latter expression (the pursuit of happiness) is one of a general nature, and the right thus secured is not capable of specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of 'liberty'. The happiness of men [and now also women] may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home. The search for happiness is the mainspring of human activity. And a guarantied constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars thus mentioned, except in so far as may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most indefinite, is also one of the most comprehensive to be found in the constitutions.

State v. Cromwell, 72 N.D. 565, 574, 9 N.W.2d 914, 918–19 (1943) (quoting *Blacks Constitutional Law*, section 145.

[¶49] Although not stated explicitly, implicit in the right to personal autonomy- liberty- and implicit in the right to happiness, is a woman's right and responsibility to decide what her pregnancy demands of her in the context of her life and in the context of her health. Prior to viability, a woman must retain the ultimate control over her own destiny, her own body, and ultimately the path of her life. A woman's choice of whether or not to carry a pregnancy to term shapes the very nature and future course of her life, on nearly every possible level. The Court finds that such a choice, at least pre-viability, must belong to the individual woman and not to the government. The inalienable rights to life, liberty, and happiness demand it.

[¶50] And make no mistake: if the government is permitted near-unlimited power to tell women when they are prohibited from having an abortion, the government also has the same near-unlimited power to tell women when they *must* have an abortion. The Court recognizes that the laws at issue in this case do not go there. However, in determining whether certain laws infringe on North Dakotan's liberty interest in procreative autonomy, the Court is ever mindful in recognizing that the government can and often will use its power both ways. In other words, if the government can force a woman to carry a pregnancy to term where it would not otherwise be the woman's choice, it is not farfetched to assume the government can then also force a woman to have an abortion where it would not otherwise be the woman's choice.

[¶51] This Court holds that such unlimited governmental overreach, both ways, is restricted by the liberty interest guaranteed to all North Dakota citizens in article 1, section 1 of the North Dakota Constitution. Such governmental overreach is also restricted by the fundamental constitutional right to pursue and obtain safety and happiness.

[¶52] All North Dakota citizens, including women, have the right to make fundamental, appropriate, and informed medical decisions in consultation with a physician and to receive their chosen medical care among comparable alternatives. Such a choice is a fundamental one, central to personal autonomy and self-determination. Those choices belong to the individual, not the government. That is the essence of what liberty and happiness require.

[¶53] The Court concludes that article 1, section 1 of the North Dakota Constitution guarantees each individual, including women, the fundamental right to make medical judgments affecting his or her bodily integrity, health, and autonomy, in consultation with

a chosen health care provider free from government interference. This section necessarily and more specifically protects a woman's right to procreative autonomy – including to seek and obtain a pre-viability abortion.

5. Strict Scrutiny Analysis

[¶54] "A statute which restricts a fundamental right is subject to strict scrutiny standard of review, which will only be justified if it furthers a compelling government interest and is narrowly tailored to serve that interest." *Wrigley v. Romanick*, 2023 ND 50 at ¶ 28. "The State has a compelling interest in protecting women's health and protecting unborn human life, as these interests are at least of the same importance as compelling interests previously identified by this Court." *Id.* at ¶ 29. "Nevertheless, the State must still show [the law] is necessary to achieve the compelling state interests." *Id.* at ¶ 30. "While we note the legislature can regulate abortion, it must do so in a manner that is narrowly tailored to achieve the compelling interest." *Id.*

[¶55] Having concluded that there is a fundamental liberty interest for a woman to seek and obtain a pre-viability abortion, this Court must consider whether the Amended Abortion Ban is narrowly tailored to achieving the State's expressed compelling interests.

[¶56] The compelling interests identified by the State are protecting women's health and protecting unborn human life. On its face, the Amended Abortion Ban unnecessarily restricts a woman's right to procreative autonomy. The law currently allows a woman to obtain an abortion to preserve her life or health under a standard that the Court has already determined is facially vague and unclear. Additionally, even assuming the law is clear, it takes away a woman's right to choose and access abortion even pre-viability, other than in the very limited (and currently vague) exceptions identified by the law.

[¶57] The State has not identified a compelling government interest prior to viability, and certainly has not identified a compelling interest that outweighs a woman's fundamental right to pre-viability procreative autonomy. As currently drafted, unless a limited exception to the law applies, the State would force a woman to carry a pregnancy to term regardless of the circumstances and regardless of the harm it would cause to her, her family, her unborn child, and the course of her life. The law takes away her liberty and deprives her of the right to pursue and obtain safety and happiness.

[¶58] Unborn human life, pre-viability, is not a sufficient justification to interfere with a woman's fundamental rights. Criminalizing pre-viability abortions is not necessary to promote the State's interests in women's health and protecting unborn human life. The law simply is not narrowly tailored to achieving compelling government interests.

[¶59] The State has also not identified how Section 12.1-19.1-03(2), the exception for cases of rape or abuse, is narrowly tailored to achieving the promotion of women's health and the protection of unborn human life. The exception in cases of rape, incest, or sexual abuse currently only allows for an abortion after a doctor using "reasonable medical judgment" determines that such abuse occurred, regardless of what actually happened to the pregnant woman or girl. Even then, the exception only allows for an abortion "if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶60] This is not in any way narrowly tailored to achieving the state's compelling interests. For women and girls who have been raped or sexually abused, they often do not tell anyone – sometimes for years - including their physician, even if they find out that the abuse resulted in a pregnancy. The exception as currently drafted certainly does not

achieve the compelling interest of promoting women's health, but instead completely disregards it.

[¶61] It is also unclear to the Court why the Legislature chose six weeks or less as the cutoff for this exception. Unborn human life is no different at six weeks gestational age or less as the result of sexual abuse, incest, or rape than unborn human life at six weeks gestational age or less as the result of consensual sexual activity. The State is silent as to why unborn human life is less important in the context of rape, incest or abuse, than it is otherwise. In choosing six weeks, however, it appears to the Court that the State concedes that at least at the stage of six weeks or less gestational age, a woman's interests outweigh the interest of unborn human life. This arbitrary determination (six weeks gestational age or less) in the limited context provided (pregnancy resulting from rape, incest, or sexual abuse of a ward) is not narrowly tailored to achieve the State's purported interests.

[¶62] Again, the State has not even identified what compelling interest the State has, pre-viability, in forcing a woman or a girl to carry a pregnancy to term when that pregnancy was the result of rape, incest, or sexual abuse. Victims of crimes have comprehensive constitutional rights under N.D.Const. art I, section 25, including a right to privacy. The State certainly has not identified how the exception is narrowly tailored to achieving its interests by only allowing abortion in such circumstances until six weeks or less gestational age, and only when a health care provider determines based on reasonable medical judgment that the pregnancy resulted from rape, sexual abuse of a ward, or incest. Prior to viability, unborn human life is not a sufficient justification to interfere with crime victim's rights to liberty and privacy in cases of rape, incest, and sexual abuse.

[¶63] Regarding women's life and health, the law also currently provides a definition for

"serious health risk" that explicitly excludes a woman's mental health. The statute defines a serious health risk as:

> [A] condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitated an abortion to prevent substantial physical impairment of a major bodily function, not including and psychological or emotional condition. The term may not be based on a claim or diagnosis that the woman will engage in conduct that will result in her death or in substantial physical impairment of a major bodily function.

N.D.C.C. § 12.1-19.1-01.

[¶64] The Court concludes that this provision impermissibly limits a physician's discretion to determine whether an abortion is necessary to preserve the woman's health because it limits the physician's consideration to only physical health conditions. It also impermissibly infringes on a woman's fundamental right to a life-saving and health-preserving abortion. As the United States Supreme Court has previously explained:

> [M]edical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All of these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operated for the benefit, not the disadvantage of the pregnant woman.

Doe v. Bolton, 410 U.S. 179, 192 (1973).

[¶65] Again, the State has not identified what compelling interest it has in forcing a woman to carry a pregnancy to term when it would be detrimental to her mental health and well-being, particularly pre-viability. The State has also not identified what compelling interest it has in prohibiting physicians from considering a woman's mental health as a part of her overall health and well-being in the context of abortion.

[¶66] The law currently infringes on a physician's ability to even provide a reasonable medical judgment and good medical care to a pregnant woman by excluding a significant

part of the woman's health - psychological and emotional conditions. It is not narrowly tailored to achieving the State's purported interests. Before viability, unborn human life is not a sufficient justification to interfere with a woman's fundamental right to happiness, to preservation of her own mental health and well-being, and to life-saving and health-preserving medical care.

[¶67] The abortion statutes at issue in this case infringe on a woman's fundamental right to procreative autonomy, and are not narrowly tailored to promote women's health or to protect unborn human life. The law as currently drafted takes away a woman's liberty and her right to pursue and obtain safety and happiness. The law also impermissibly infringes on the constitutional rights for victims of crimes. Therefore Chapter 12.1-19.1, N.D.C.C. is unconstitutional.

CONCLUSION

[¶68] For the foregoing reasons, the Court concludes that (1) the Amended Abortion Ban set forth in Chapter 12.1-19.1, N.D.C.C., as currently drafted, is unconstitutionally void for vagueness; and (2) pregnant women in North Dakota have a fundamental right to choose abortion before viability exists under the enumerated and unenumerated interests protected by the North Dakota Constitution for all North Dakota individuals, **including women** – specifically, but not necessarily limited to, the interests in life, liberty, safety, and happiness enumerated in article [I], section 1 of the North Dakota Constitution.

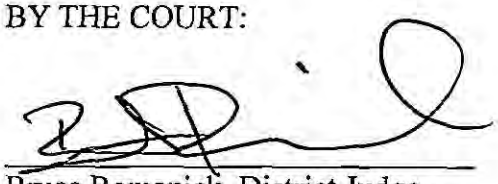
[¶69] The Court concludes Chapter 12.1-19.1, N.D.C.C., violates the Constitution of the State of North Dakota and is void for vagueness and of no effect.

[¶70] Plaintiffs shall prepare and file a proposed judgment consistent with this Order within 14 days of the date of this Order.

IT IS SO ORDERED.

Dated this 12 day of September, 2024.

BY THE COURT:



Bruce Romanick, District Judge
South Central Judicial District