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STATE OF NORTH DAKOTA

No. 20220260

In the Supreme Court of North Dakota

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,

Plaintiffs–Respondents,

vs.

Drew H. Wrigley, in his official capcity as Attorney General for the State of North Dakota; Birch P. Burdick, in his official capacity as the State Attorney for Cass County,

Defendants–Petitioners.

On Petition for a Writ for a Supervisory Order under Rule 21 to Review Preliminary Injunction Entered by the District Court, South Central Judicial District, County of Burleigh, No. 08-2022-CV-01608, the Hon. Bruce Romanick, Presiding Judge

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BRIEF *AMICUS CURIAE* OF THE NORTH DAKOTA CATHOLIC CONFERENCE IN SUPPORT OF DEFENDANTS–PETITIONERS' REQUEST FOR ISSUANCE OF A SUPERVISORY WRIT UNDER RULE 21 TO REVIEW PRELIMINARY INJUNCTION AND IN SUPPORT OF REVERSAL

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Application for *Pro Hac Vice
Admission Granted
Identification No. P01299

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Interest of the *Amicus*

[¶1] The North Dakota Catholic Conference is the entity through which the Roman Catholic Bishops of the State act together on matters of public policy. The Conference promotes the social teaching of the Catholic Church in such diverse areas as education, marriage and family life, health care, social welfare, immigration, civil rights, criminal justice, the economy, and the sanctity of human life from conception to natural death.

[¶2] This case concerns the constitutionality of N.D. Cent. Code § 12.1-31-12, which prohibits abortion. The Conference supported the legislation enacting § 12.1-31-12. The district court entered a preliminary injunction against enforcement of the statute without determining whether plaintiffs had demonstrated a substantial probability of succeeding on the merits of their challenge. That was a clear error of law. This brief is submitted in support of defendants-petitioners' request that this Court exercise its supervisory jurisdiction under Rule 21 of the North Dakota Rules of Appellate Procedure. Whether the preliminary injunction was properly issued presents a strictly legal issue that does not turn on the resolution of any disputed issues of fact. For the reasons set forth herein, *amicus curiae* submits that plaintiffs were not entitled to an injunction because nothing in the North Dakota Constitution confers a right to abortion. Accordingly, for the reasons set forth in the defendants-petitioners' request for a writ and in this brief, *amicus* submits that this Court should grant the writ and reverse the district court.[*]

[*] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the *amicus curiae* or its counsel, contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

NOTHING IN THE INALIENABLE RIGHTS GUARANTEE (ART. I, § 1) OR THE DUE PROCESS GUARANTEE (ART. I, § 12) OF THE NORTH DAKOTA CONSTITUTION CONFERS A RIGHT TO ABORTION.

[¶3] Plaintiffs argued below that N.D. Cent. Code § 12.1-31-12, which prohibits abortion, violates a state constitutional right to abortion. That right, plaintiffs claim, is conferred by art. I, § 1, and art. I, § 12, of the North Dakota Constitution. Article I, § 1, provides, in part, that "[a]ll 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; [and] pursuing and obtaining safety and happiness. . . ." N.D. CONST. art. I, § 1. And § 12 provides, in part, that "[n]o person shall . . . be deprived of life, liberty or property without due process of law." N.D. CONST. art. I, § 12. *Amicus curiae* responds that neither art. I, § 1, or art. I, § 12, confers a right to abortion. Because plaintiffs cannot demonstrate that they are likely to prevail on the merits in their challenge to § 12.1-31-12, the district court erred in entering a preliminary injunction enjoining its enforcement. *See Black Gold OilField Services, LLC v. City of Williston*, 2016 ND 30, ¶ 27, 875 N.W.2d 515, 526 (where a party "fail[s] to establish a substantial probability of succeeding on the merits of its lawsuit, we need not address the other factors for granting or denying a preliminary injunction"). Accordingly, the preliminary injunction should be reversed.

[¶4] This Court has said that "the due process clause protects and insures the use and enjoyment of the rights declared by section 1 of the Constitution," and that "there cannot be a violation of section 1 unless there be also a violation of section 13 [now § 12]." *State v. Cromwell*, 72 N.D. 565, 573, 575, 9 N.W.2d 914, 918, 919 (1943).

[¶5] In *Cromwell*, the court, quoting a law text, observed that the expression "the pursuit of happiness" is not susceptible 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 guarantee of 'liberty.'" 72 N.D. at 574, 9 N.W.2d at 918 (citation and internal quotation marks omitted). Insofar as the happiness of persons "is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, . . . liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home." *Id.*, 9 N.W.2d at 918-19 (citation and internal quotation marks omitted). Citing a legal encyclopedia, the court explained that the term "liberty" includes, in addition to a number of specific rights, "in general, the opportunity to do those things which are ordinarily done by free men." *Id.* at 573, 9 N.W.2d at 918 (citation and internal quotation marks omitted). Contrary to plaintiffs' understanding, nothing in *Cromwell* supports a state right to abortion.

[¶6] As an initial matter, it must be noted that the actual *holding* in *Cromwell*—that the State could not require the licensing of photographers—was called into question in *Johnson v. Elkin*, 263 N.W.2d 123, 128–30 (N.D. 1978). In *Johnson*, the court criticized *Cromwell* and held that "there is no general constitutional prohibition against legislation limiting entry into occupations or professions. Any occupation or profession may be subject to the police power." *Id.* at 130. More significantly, the plaintiffs never even attempt to explain how one is to derive specific rights (*e.g.*, a right to abortion) from the general language in *Cromwell* referring to "personal freedom" and "the opportunity to do those things which are ordinarily done by free men," or what criteria might be appropriate for determining what "inalienable rights" are guaranteed by art I, § 1, as secured by the

due process clause of art. I, § 12.

A Methodology for Evaluating Liberty Interests under the North Dakota Constitution

[¶7] This Court has not developed a formal methodology for determining whether an asserted interest is protected by the inalienable rights language of art. I, § 1, as secured by the due process guarantee of § 12.[1] The court *has* held that, taken together, art. I, § 1, and art. I, § 12, protect, among other "liberty" interests, "the right to enjoy the domestic relations and the privileges of the family and the home," as well as the "fundamental, natural right" of parents "to the custody and companionship of their children" and "[to] mak[e] decisions" regarding their upbringing. *Hoff v. Berg*, 1999 ND 115, ¶ 10, 595 N.W.2d 285, 289 (internal quotation marks omitted).[2] These rights have long been recognized in English and American law. "'The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of

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[1] In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis, the Supreme Court applies a two-prong test: First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted). Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id*. at 710. In recently overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court relied heavily on the *Glucksberg* methodology. *See Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2242, 2246, 2247 (2022).

[2] Apart from the specific privacy interests secured by the search and seizure provision of the North Dakota Constitution (art. I, § 8), "no statutory or constitutional right of privacy . . . has yet been recognized under the North Dakota Constitution." *City of Grand Forks v. Grand Forks Herald*, *Inc*., 307 N.W.2d 572, 579 (N.D. 1981) (public disclosure of contents of former police chief's personnel file did not constitute an impermissible invasion of his privacy). *See also Hovet v. Hebron Public School District*, 419 N.W.2d 189, 192 (N.D. 1988) (same). Thus, privacy theory does not support plaintiffs' argument. Even assuming, however, that art. I, § 1, or art. I, § 12, considered separately or together, confers a right of privacy in certain circumstances, there is no basis for concluding that such a right would include a specific right to abortion.

their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'" *Hoff,* 1999 ND 115, ¶ 8, 595 N.W.2d at 288 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)). This Court's reliance in *Hoff* upon the "strong tradition" recognizing the rights of parents in raising their children suggests that the presence (or absence) of such a tradition is of critical importance in determining whether an asserted liberty interest (or right) will be recognized under art. I, §§ 1 and 12, of the North Dakota Constitution.[3] That suggestion is confirmed by the court's statement that "[i]n construing a constitutional provision we must undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted." *Kadrmas v. Dickinson Public Schools*, 402 N.W.2d 897, 899 (N.D. 1987) (citation omitted), *aff'd*, 487 U.S. 450 (1988). "In so doing, it is appropriate to consider contemporaneous and long-standing practical interpretations of the provision by the Legislature where there has been acquiescence by the people in such interpretations." *Id*. (citations omitted). *See also State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974) (provisions of state constitution "must be read in the light of history").

[¶8] This Court has also recognized that "[a] competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment," *State ex rel. Schuetlze v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995), citing *Cruzan v. Director, Missouri Dep't of*

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[3] *See*, *e.g*., *State v. Odegaard*, 165 N.W.2d 677, 678–80 (N.D. 1969) (law requiring the operator of or passenger on a motorcycle to wear a crash helmet did not violate art. I, § 1, or § 13 (now § 12); *State v. Goetz*, 312 N.W.2d 1, 7-9 (N.D. 1981) (no fundamental right under art. I, § 1, "to use commercial paper in a commercial setting") (rejecting challenge to statute requiring person who sells or offers for sale securities to be registered as a dealer in securities).

Health, 497 U.S. 261, 278 (1990), but that liberty interest derives from the common law which regarded medical treatment to which one had not consented (outside the context of an emergency) as an actionable battery. *See*, *e.g*., *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). That "negative" right cannot be transformed by some strange legal alchemy into an "affirmative" right to obtain a particular drug or undergo a particular procedure or course of treatment, particularly one that is prohibited by an otherwise constitutional law. *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (patient did not have a right "to obtain laetrile [for cancer treatment] free of the lawful exercise of government police power"); *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) ("federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering"); *Montana Cannabis Industry Ass'n v. State*, 286 P.3d 1161, 1166 (Mont. 2012) (no state constitutional right to use medical marijuana); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider"); *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007) (*en banc*) ("there is no fundamental right 'deeply rooted in this Nation's history and tradition' of access to experimental drugs for the terminally ill").[4]

[4] In overruling *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court held that neither the right to bodily integrity nor the right to refuse unwanted medical treatment supports a federal constitutional right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. at 2257–58 (distinguishing cases recognizing such rights from the right to abortion). *See also*, *id*., at 2303 (Thomas, J., concurring). Nor does either right support a state constitutional right to abortion.

Application of the Methodology to the Issue of Abortion

[¶9] Unlike the right of parents to the custody and control of their children, or the right of competent persons to refuse unwanted medical treatment, there is no longstanding tradition of permitting abortion in North Dakota law, nor is there any evidence that either the drafters or the ratifiers of the North Dakota Constitution intended or understood that they were incorporating such a right into art. I, § 1, or art I, § 12 of the state constitution.

[¶10] North Dakota enacted its first abortion statutes in 1877, twelve years *before* the 1889 Constitution was adopted and North Dakota was admitted as a State. Act of Feb. 17, 1877, § 337, *codified at* Dakota (Terr.) Penal Code § 337 (1877). One provision prohibited abortion upon a pregnant woman at any stage of her pregnancy except when the procedure was necessary "to preserve her life. . . ." *Id*. A second provision prohibited a woman from soliciting an abortion or allowing an abortion to be performed upon her (subject to the same exception). *Id*. § 338 (no prosecutions were reported under this section). These statutes remained on the books until after *Roe v. Wade* was decided. Dakota (Terr.) Compiled Laws §§ 6538, 6539 (1887), *recodified at* N.D. Rev. Codes §§ 7177, 7178 (1895), *recodified at* N.D. Rev. Codes §§ 8912, 8913 (1905), *recodified at* N.D. Compiled Laws §§ 9604, 9605 (1913), *recodified at* N.D. Rev. Code §§ 12-2501, 12-2504 (1943), *recodified at* N.D. Cent. Code §§ 12-25-01, 12-25-04 (1970), *repealed by* 1973 N.D. Laws 215, 300, ch. 116, § 41. And on November 7, 1972, less than three months before *Roe v Wade* was decided, the people of North Dakota, by a margin of more than three-to-one, rejected a ballot initiative that would have permitted under a broader range of reasons than had theretofore been allowed. *Official Abstract of Votes Cast at the General Election Held November 7*, *1972*; Office of the Secretary of State, Nov. 21, 1972

(Measure No. 1: Yes: 62,604; No: 204,852).

[¶11] In determining the meaning and scope of guarantees secured by the North Dakota Constitution, this Court has repeatedly relied upon contemporary legal practices at the time when the Constitution was adopted. *Compare State v. Orr*, 375 N.W.2d 171, 177-79 (N.D. 1985) (recognizing state constitutional right to counsel in all criminal prosecutions based upon statutes in effect when Constitution was adopted), and *City of Bismarck v. Altevogt*, 353 N.W.2d 760, 764-66 (N.D. 1984) (same with respect to state constitutional right to jury trial), *with Martian v. Martian*, 328 N.W.2d 844, 845 (N.D. 1983) (no state constitutional right to a jury trial in divorce proceedings where, when Constitution was adopted, "jury trials were [not] available in divorce cases under common law []or by statute"). The consistent prohibition of abortion, from territorial days until *Roe v. Wade* was decided in 1973, is fatal to plaintiffs' argument that the North Dakota Constitution confers a right to abortion.

[¶12] Following the Supreme Court's decision in *Roe v. Wade*, North Dakota enacted the Abortion Control Act (N.D. Cent. Code § 14-02.1-01 *et seq*.), a comprehensive scheme of abortion regulation, the purpose of which is "to protect unborn human life and maternal health within present constitutional limits." *Id.*§ 14-02.1-01. As "[b]etween normal childbirth and abortion, it is the policy of the state of North Dakota that normal childbirth be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of North Dakota citizens." *Id*. § 14-02.3-01. The Act "reaffirms the tradition of the state of North Dakota to protect every human life whether unborn or aged, healthy or sick." *Id*. § 14-02.1-01. That tradition—of protecting every human life, including unborn human life—is reflected in a

variety of contexts outside of abortion, including criminal law, tort law, health care law, property law, and guardianship law.

[¶13] In criminal law, the State has defined the killing of an unborn child (outside the scope of abortion) as a form of homicide, N.D. Cent. Code §§ 12.1-17.1-02 to -04, and the injury of an unborn child as an assault. *Id*. §§ 12.1-17.1-05, -06.

[¶14] In tort law, North Dakota recognizes a common law cause of action for (non-lethal) prenatal injuries, without regard to the stage of pregnancy when the injuries were inflicted. *See Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1985) (adopting Restatement (Second) of the Law of Torts § 869(1) (1979), in context of wrongful death action). A statutory cause of action for wrongful death may be brought for prenatal injuries resulting in stillbirth where the injury causing death (or the death itself) occurs after viability. *Hopkins*. 359 N.W.2d at 864–65. And North Dakota prohibits wrongful life causes of action. N.D. Cent. Code § 32-03-43.[5]

[¶15] In health care law, North Dakota prohibits, subject to limited exceptions, the withdrawal or withholding of life-sustaining treatment from a pregnant patient under the authority of an advance directive. N.D. Cent. Code § 23-06.5-09(5).

[¶16] In property law, a posthumous child—a child conceived before the death of a

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[5] A "wrongful life cause of action is a claim brought on behalf of a child who is born with a physical or mental disability or disease that could have been discovered before the child's birth (or, in some cases, before the child was conceived) by genetic testing, amniocentesis or other medical screening. The gravamen of the action is that, as a result of a physician's failure to inform the parents of the child's disability or disease (or at least of the availability of tests to determine the presence of the disability or disease) or of the possibility that any child they would conceive might suffer from such a condition, they were deprived of the opportunity to abort the child (or of preventing the child's conception in the first place), thus resulting in the conception and birth of a child suffering permanent physical or mental impairment.

parent who dies intestate (without a will) but born thereafter—inherits as if he or she had been born during the lifetime of the decedent. N.D. Cent. Code § 30.1-04-04(1)(b). And, subject to certain exceptions, if a person fails to provide in his or her will for a child born after the will is executed, the omitted child receives a share in the estate equal in value to what he or she would have received if the testator had died intestate or a share that is equal to that given to children named in the will. *Id*. § 30.1-06-02.

[¶17] In guardianship law, North Dakota permits a guardian *ad litem* to be appointed to represent the interests of an unborn child in various matters including estates and trusts. N.D. Cent. Code § 30.1-03-03(5). Finally, "A child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth." *Id*. § 14-10-15.

[¶18] A right to abortion cannot be found in the text, structure or history of the North Dakota Constitution. There is no evidence that the framers or ratifiers of the North Dakota Constitution intended to limit the Legislature's authority to prohibit abortion. *See* Proceedings & Debates of the First Constitutional Convention of North Dakota 357–71 (debate on Declaration of Rights in Committee of the Whole); 531–37 (debate on Declaration of Rights in Convention) (Bismarck, N.D. 1889). Such an intent would have been remarkable in light of the contemporaneous and longstanding prohibition of abortion except to save the life of the mother.

Analysis of the Opinions in MKB Management v. Burdick

[¶19] In *MKB Management v. Burdick*, 2014 ND 197, 855 N.W.2d 31, this Court considered a challenge to the 2011 amendments to the North Dakota Abortion Control Act regulating medication abortions (H.B. 1297). Two justices concluded that H.B. 1297

violated both the state and federal constitutions. 2014 N.D. 197, ¶¶ 62–156 (Op. of Kapsner, in which Maring, J., joined); one justice concluded that H.B. 1297 violated neither the state nor the federal constitution, *id*. at ¶¶ 4-61 (Op. of VandeWalle, C.J.); one justice concluded that H.B. 1297 did not violate the state constitution, and that the federal constitutional issue was not properly before the court, *id*. at ¶¶ 168–185 (Op. of Sandstrom, J.); and one justice concluded that H.B. 1297 violated the federal constitution and that that conclusion made it "unnecessary and doctrinally improper" to reach the state constitutional issue, *id*. at ¶¶ 157–167 (Op. of Crothers, J.). Although a majority of the court agreed that H.B. 1297 violated the federal constitution, art. VI, § 4, of the North Dakota Constitution requires a super-majority vote of four of the five justices to declare a law unconstitutional. N.D. Const. art. VI, § 4. Accordingly, the judgment of the district court permanently enjoining enforcement of H.B. 1297 was reversed. 2014 ND 197, ¶ 1.

[¶20] In her opinion, Justice Kapsner concluded that art. I, § 1, interpreted in conjunction with art. I, § 12, creates a "fundamental right to choose abortion before viability." 2014 ND 197, ¶ 97. Because no other justice on this Court has ever so concluded, *amicus curiae* believes that the reasoning that led to her conclusion must be carefully analyzed. Upon such analysis, Justice Kapsner's reasoning simply does not support her conclusion that the North Dakota Constitution creates a right to abortion.

[¶21] First, Justice Kapsner expressed the view that the North Dakota Constitution must be construed to protect a right to abortion because the United States Constitution has been construed to protect a right to abortion and "'our state constitution may grant greater, but not lesser, protections'" than the federal constitution'" 2014 ND 197, ¶ 92 (quoting the district court opinion). Whatever merit that view may have generally, it quite obviously

no longer has any application to the issue of abortion in light of the Supreme Court's decision in *Dobbs* overruling *Roe v. Wade* and *Planned Parenthood v. Casey*, and holding that there is no federal constitutional right to an abortion.

[¶22] Second, Justice Kapsner cited the very broad and general language discussing "liberty" that appears in *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914 (1943), 2014 ND 197, ¶¶ 90-91, but she failed to develop any principled methodology to guide the court in determining what specific "liberty" interests that language protects (a failure common to the plaintiffs' briefing below, as well). Justice Kapsner did not cite any examples of *fundamental* liberty interests this Court has recognized, apart from those that traditionally have been protected by the law, *e.g.*, the "fundamental right to parent children," and the "liberty interest to refuse unwanted medical treatment." *Id.*, ¶ 90.[6] For the reasons set forth in the previous section of this brief, however, there is no such tradition protecting a right to abortion in North Dakota.

[¶23] Third, Justice Kapsner also took note of the district court's observation that "at least eleven states [have] recognized [that] their state constitutions protect a woman's right to abortion." 2014 ND 197, ¶ 93. Ten of those state court decisions, however, were based upon an express or implied right of privacy that has not been recognized under the

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[6] Justice Kapsner cited two decisions in support of the proposition that there is a right to *choose* medical treatment, as well as a right to *refuse* such treatment. 2014 ND 197, § 98. Neither decision, however, stands for the proposition that a person has a right to choose a treatment that is prohibited by an otherwise constitutional law of the State. *Hondroulis v. Schumacher*, 553 So.2d 398 (La. 1988), was an informed consent case and did not involve a patient's right to insist upon obtaining a specific medical treatment. And Justice Kapsner's reliance on *Matter of Guardianship of Ingram*, 689 P.2d 1363 (Wash. 1984), was misplaced as the Washington Supreme Court later held, in a case involving medical marijuana, that "the selection of a particular treatment or medicine is not a constitutionally protected right." *Seeley v. State*, 940 P.2d 604, 612 (Wash. 1997).

North Dakota Constitution.[7] And, in the eleventh case, the New Mexico Supreme Court, in striking down an abortion funding restriction on the basis of the state equal rights amendment, expressly did *not* decide whether the state constitution protects a right to abortion. *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 845 (N.M. 1998) (declining to decide whether "a woman's right to reproductive choice is among the inherent rights guaranteed by Article II, Section 4 of the New Mexico Constitution").

[¶24] In sum, nothing in Justice Kapsner's opinion in *MKB Management* provides any basis for recognizing a right to abortion under the North Dakota Constitution.

[¶25] *Amicus curiae* submits that the opinion in *MKB Management* that is most consistent with this Court's interpretation of the North Dakota Constitution is Chief Justice VandeWalle's, in which Justice Sandstrom concurred. That opinion set outs a principled methodology for evaluating constitutional claims. That methodology takes into account the "language" of the constitutional text, "the meaning the framers understood the provisions to have when adopted," and "contemporary legal practices and laws in effect when the people adopted the constitutional provisions," so that this Court may "give effect to the intent and purpose of the people adopting the constitutional provision." 2014 ND 197, ¶ 25. When that methodology is applied to the issue of abortion, it is clear, for the reasons set forth in Chief Justice VandeWalle's opinion, *id*. ¶¶ 22–38, and in this brief, that "our state constitutional provisions [art. I, §§ 1, 12] were *not* intended to encompass a fundamental right to abortion . . . ." ¶ 38 (emphasis added).

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[7] *See* n. 2, *supra*. The ten state court decisions based upon a right of privacy are the Alaska, California, Florida, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, New York and Tennessee cases opinions cited in ¶ 93 of Justice Kapsner's opinion.

Conclusion

[¶26] The North Dakota Constitution "must be interpreted in light of the rights and liberties it was created to uphold, and not the philosophical viewpoints of the judiciary who hold the responsibility of interpretation. *State v. Herrick*, 1999 ND 1, ¶ 22, 588 N.W.2d 847, 851. Nothing in the state constitution was intended to create or recognize a right to abortion, which was a crime under the laws of the Dakota Territory and under the statutes of North Dakota from its admission to the Union until 1973. Accordingly, *amicus curiae* respectfully requests that this Court grant the defendants-petitioners' request that this Court exercise its supervisory jurisdiction under Rule 21 and reverse the preliminary injunction the district court entered enjoining enforcement of N.D. Cent. Code 12.1-31-12.

[¶ 27] Dated: October 10, 2022

Respectfully submitted,

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*Application for *Pro Hac Vice*
Admission Granted
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Certificate of Compliance

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned certifies that the foregoing brief was prepared in a proportionally spaced, 12-point type, and complies with the page limitation applicable to *amicus curiae* briefs under Rule 29(a)(5). Excluding this certificate and the certificate of service, the foregoing brief in 19 pages in length.

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In the Supreme Court of North Dakota

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,

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Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota; Birch P. Burdick, in his official capacity as the State Attorney for Cass County,

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on October 10, 2022, the **MOTION OF THE NORTH DAKOTA CATHOLIC CONFERENCE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS–PETITIONERS' REQUEST FOR ISSUANCE OF A SUPERVISORY WRIT UNDER RULE 21 TO REVIEW PRELIMINARY INJUNCTION AND IN SUPPORT OF REVERSAL** and accompanying **BRIEF** were filed electronically with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and was served electronically through the North Dakota Supreme Court E- Filing Portal upon Plaintiffs/Appellees, 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, by and through their attorneys, and Defendants/Appellants 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 State Attorney for Cass County, by and through their attorneys, as follows:

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