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STATE OF NORTH DAKOTA

No. 20130259

IN THE SUPREME COURT OF NORTH DAKOTA

MKB Management Corp, d/b/a/ Red River Women's Clinic, **Tammi Kromenaker**, and **Kathryn L. Eggleston**, M.D.,
Plaintiffs-Appellees,

v.

Birch Burdick, in his official capacity as State Attorney for Cass County, and **Terry Dwelle**, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health,

Defendants-Appellants.

On Appeal from the East Central Judicial District, Cass County Hon. Wickham Corwin (No. 09-2011-cv-02205)

BRIEF OF AMICUS CURIAE
STEVEN R. MORRISON,
PROFESSOR OF CONSTITUTIONAL LAW,
NORTH DAKOTA WOMEN'S NETWORK, AND
NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES
IN SUPPORT OF APPELLEES
MKB MANAGEMANT CORP. ET AL.
AND AFFIRMANCE OF THE DISTRICT COURT'S OPINION

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STATEMENT OF IDENTITY AND INTEREST

[¶1] Pursuant to N.D.R. App. P. 29(c)(3-4), the amici curiae submit the following statements.

[¶2] The amici curiae are Steven R. Morrison, the North Dakota Council on Abused Women's Services, and the North Dakota Women's Network.

[¶3] Steven R. Morrison is an Assistant Professor of Law at the University of North Dakota School of Law, where he teaches Constitutional Law. He has written a number of law review articles, newspaper editorials, and legal memoranda on constitutional law issues, including the First Amendment, Equal Protection, and abortion rights. He has appeared on numerous local, regional, and national media to discuss abortion rights in North Dakota and nationwide. Professor Morrison is a signatory in his individual capacity as a constitutional law expert.

[¶4] The North Dakota Council on Abused Women's Services is a non-profit membership-based organization incorporated in the state of North Dakota in 1978 to advocate for the rights of domestic violence and sexual assault victims. As a coalition representing twenty domestic violence and rape crisis centers in the state, the North Dakota Council on Abused Women's Services submitted testimony in opposition to N.D. Cent. Code § 14-02.1-01 *et*

seq. (hereinafter the "abortion law" or the "law") in the 2011 North Dakota legislative session because the law limits or eliminates access to the medication form of abortion for victims of rape and incest.

[¶5] The North Dakota Women's Network is a statewide private non-profit advocacy organization whose mission is to improve the lives of women in North Dakota through communication, legislation and increased public activism. The Women's Network submitted testimony in opposition to N.D. Cent. Code § 14-02.1-01 *et seq.* in the 2011 North Dakota legislative session to highlight the discriminatory nature of the legislation.

[¶6] The amici's interest in this case is that of a constitutional law expert and advocates for women who believe that the abortion law does not satisfy rational basis review, and is therefore unconstitutional, because it affirmatively harms patients, prevents doctors from providing adequate and industry standard medical care, and arbitrarily and irrationally discriminates against both women who seek an abortion and the doctors who provide abortions.

[¶7] None of the amici has represented either party in this case. No signatory to this brief contributed any money intended to fund the preparation or submission of this

brief. No other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

I. Strict scrutiny is the appropriate standard of review

[¶8] In its order of July 15, 2013, the district court invalidated N.D. Cent. Code § 14-02.1-03.5(2)&(4-5) and § 14-02.1-02(3)&(5) by applying the strict scrutiny standard of review. (Mem. Op. 55, *passim*).[1] The appellant argues that the correct standard is rational basis. (Blue Br. 17).[2] Amici assume that the appellee will argue that strict scrutiny is the appropriate standard. Strict scrutiny is, in fact, the appropriate standard because it imposes a de facto ban, (Mem. Op. 19-23), on women's fundamental right to obtain an abortion. Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 851 (1992); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427 (1983); Planned Parenthood Minn. V. Rounds, 653 F.3d 662, 668 (8th Cir. 2011); In re L.T., 2011 ND 120, 798 N.W.2d 657, 660. Indeed, the North Dakota legislature included in the law itself its de facto purpose of denying women this fundamental right. N.D. Cent. Code § 14-02.1-01 (2013)

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[1] (Mem. Op. __) will be used throughout this brief to refer to the district court's Memorandum Opinion and Order for Permanent Injunction, and the listed page number.

[2] (Blue Br. __) will be used throughout this brief to refer to the appellant's principle brief, and the listed page number.

("The purpose of this chapter is to protect unborn human life.").

[¶9] The district court found the law to effect a ban, and this Court should give deference to this factual finding. See State v. Gagnon, 2012 ND 198, ¶7, 821 N.W.2d 373; Lies v. Director, North Dakota Dept. of Transp., 2008 ND 30, ¶9, 744 N.W.2d 783. This Court should apply strict scrutiny and affirm the district court's order.

II. If this Court does not apply strict scrutiny, it should apply heightened scrutiny

[¶10] This Court applies heightened scrutiny in the equal protection context when a "substantive right" is involved. Hovland v. City of Grand Forks, 1997 ND 95, ¶14, 563 N.W.2d 384. This standard requires a "close correspondence between statutory classification and legislative goals." Id. This Court, furthermore, applies heightened scrutiny to laws that involve classifications based on sex, Bolinske v. Jaeger, 2008 ND 180, ¶14, 756 N.W.2d 336, and where "human life and safety" are implicated. State v. Nording, 485 N.W.2d 781, 784 (N.D. 1992).

[¶11] If this Court declines to apply strict scrutiny to the abortion law, which criminalizes the exercise of a fundamental right, it must apply heightened scrutiny. This

is so because the law prevents only women – not men - from using safe, legal medications that are prescribed by doctors pursuant to accepted medical standards and as required to ensure patient health.

[¶12] The law forces doctors to violate their ethical duty of care by requiring that they provide to their patients treatment regimens that carry an increased risk of complications compared to mifepristone – a safe, effective, and proven drug. Johnson v. Bronson, 2013 ND 78, ¶17, 830 N.W.2d 595 (Receiving care below the standard is malpractice); (Mem. Op. 27-29) (MKB's use of abortion drugs at issue represent the standard of care). The law also implicates human life and health, and it undermines the stated intent of the law - the health of the woman. Far from corresponding to its stated purpose, the law clearly undermines that purpose.

[¶13] In one stroke, the abortion law both bans the exercise of a fundamental right and lets men - but not women - continue to obtain the safest, most effective health care available. This Court should find that the law is unconstitutional under heightened scrutiny.

III. Even if this Court applies rational basis, the abortion law is still unconstitutional

[¶14] Under the rational basis test, a law will be upheld unless it is "patently arbitrary and bears no rational relationship to a legitimate government purpose." Haugland v. City of Bismarck, 2012 ND 123, ¶42, 818 N.W.2d 660.

[¶15] Over the course of this litigation, the state abandoned the abortion law's textually explicit purposes - protecting unborn human life and maternal health, N.D. Cent. Code § 14-02.1-01 - and adopted maternal health and maintaining medical standards as the purposes. (Mem. Op. 9). While disingenuous, this shift to new purposes was also necessary, because the state knows that "protecting unborn life" in the context of the abortion law entails a de facto ban on the exercise of a woman's fundamental right to choose. Because the purpose is to deny a fundamental right, the law is subject to strict scrutiny. See Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting); Vacco v. Quill, 521 U.S. 793, 799 n.5 (1997); State v. Leppert, 2003 ND 15, ¶21, 656 N.W.2d 718 (Maring, J., concurring).

[¶16] The state is left with two admittedly legitimate purposes - maternal health and maintaining medical

standards. The abortion law, however, is arbitrary and irrational because it actually threatens women's health and criminalizes doctors' exercise of their ethical duty to provide the safest, most effective care possible to their patients.

[¶17] Finally, the law's driving force is a bare "desire to harm a politically unpopular group." Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

a. The law is arbitrary and irrational because it endangers women's health and undermines accepted medical standards

[¶18] A law is arbitrary and irrational where it "bears [no] rational relationship to a legitimate governmental interest." State v. Ennis, 334 N.W.2d 827, 834 (N.D. 1983). The abortion law is the poster child for such laws, because it affirmatively and obviously works *against* its explicit purpose.

[¶19] First, it prohibits off-label use of certain drugs. N.D. Cent. Code, § 14-02.1-03.5(2) (2013). Such off-label use is industry standard among doctors, and it is even ethically and legally compelled when drugs are found to have off-label benefits for patients. (Mem. Op. 25). Far from protecting a pregnant woman's health, the law mandates unnecessarily dangerous medical care.

[¶20] Second, the law requires that a doctor who performs an abortion find *another* doctor who will agree *exclusively* to handle any resulting emergencies, and designate one hospital where any emergency will be treated. N.D. Cent. Code. § 14-02.1-03.5(4) (2013). This requirement would mean that the doors of only one of North Dakota's forty-three emergency care facilities, (Mem. Op. 37), are open to a woman who needs immediate medical help. It would also mean that only one of North Dakota's hundreds or thousands of trained, qualified doctors could treat a woman whose life is in danger. See id. at 38. Where "[d]elay can have serious or fatal consequences," id. at 38, in the extremely rare cases in which a woman needs emergency care, the abortion law amounts to a death penalty.

[¶21] Fourth, the patient must be in the same room with the doctor who prescribes any abortion-inducing drugs. N.D. Cent. Code. § 14-02.1-03.5(5) (2013). This undermines the current standard of care and prohibits doctors from following what is "universally recognized as a safe and most appropriate approach." (Mem. Op. 29). This requirement, the "absurdity of [which] is self-evident," id. at 32, has nothing to do with a woman's health, and everything to do with making the exercise of a

constitutional right more expensive, discomforting, id. at 32, and impossible. Id. at 40.

[¶22] It is estimated that one in three women have experienced rape or sexual assault. One of the physical results of sexual violence is unintended pregnancies. Women who have been raped may choose medication abortion instead of undergoing an invasive surgical procedure for deeply held personal reasons. Access to the medication form of abortion has had a demonstrably positive impact on minimizing victims' trauma and facilitating their psychological recovery. The abortion law would prevent these women from obtaining the constitutionally-protected medical treatment they need to address what for many will be the most horrific experience of their lives.

[¶23] The abortion law ultimately prohibits pregnant women from accessing an extremely safe and effective, constitutionally-protected medical procedure, and will force them to undergo dangerous, illegal abortions, id. at 15-16, enter into "dangerous and untenable predicaments," id. at 35, or forego altogether the exercise of their constitutional right to an abortion.

[¶24] The district court found that the law prohibits "extremely safe and very effective" abortions, id. at 10, and is "counterintuitive and counterproductive," forcing

doctors to "depart from well-established standards of care . . . abandon the fundamental tenets of their profession, and," most importantly, "provide patients with illogical and potentially tragic instructions." Id. at 10. This Court should give deference to these factual findings, see State v. Gagnon, 2012 ND 198, ¶7, 821 N.W.2d 373; Lies v. Director, North Dakota Dept. of Transp., 2008 ND 30, ¶9, 744 N.W.2d 783, and affirm the district court's opinion. Indeed, numerous other courts have invalidated laws that had the intentional or unintentional effect of prohibiting safe and effective abortion methods. (Mem. Op. 22).

b. The law is not supported by any conceivable legitimate purpose

[¶25] As the district court found, the abortion law is not designed to express the state's interest in potential life, inform women of the consequences of abortion, or persuade them to continue their pregnancy. Id. at 21. Given multiple opportunities, neither the legislature in passing this law nor the state in litigating it has suggested these other purposes. More importantly, these are not conceivable purposes for the law. Based on what the law requires, any argument to the contrary is obviously illogical.

c. The law represents a desire to harm two politically unpopular groups: pregnant women who seek an abortion and doctors who provide them

[¶26] A number of courts have observed that anti-abortion laws are designed to discriminate against unpopular groups - women who seek an abortion and doctors who provide them. Tucson Woman's Clinic v. Eden, 371 F.3d 1173, 1187 (9th Cir. 2004) (Court recognizing "that abortion providers can be a politically unpopular group."); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 205 (4th Cir. 2000) (Hamilton, J., dissenting) (Considering a law that "singles out and places additional and onerous burdens upon abortion providers" and is "directed towards a politically unpopular group."); Planned Parenthood of Minn. v. Minnesota, 612 F.2d 359, 361 (8th Cir. 1980) (Planned Parenthood's unpopularity does not justify withholding grants from organizations that perform abortions); Planned Parenthood Greater Memphis Region v. Dreyzehner, 853 F.Supp.2d 724, 737 (M.D.Tenn. 2012) (defunding Planned Parenthood a desire to harm a politically unpopular group); Planned Parenthood of Cent. North Carolina v. Cansler, 877 F.Supp.2d 310, 327 (M.D.N.C. 2012) (Considering, under Romer v. Evans, a law passed "for the purpose of penalizing Planned Parenthood and its affiliates.")

[¶27] This discrimination has manifested itself in a number of anti-abortion laws passed, which are thinly veiled attempts to stop women from exercising their fundamental right to choose and doctors from participating in that choice. See Mo. Min. Stds. of Operation for Abortion Facilities § 203.2 (2013) (Every clinic employee must have a pre-employment physical, to be repeated annually and more often "if indicated to ascertain freedom from communicable diseases"); 10 N.C. Admin. Code 3E.0206 (2013) (Procedure and recovery rooms must cycle air six times per hour, all air must be delivered near the ceiling, and must pass through "a minimum of one filter bed with a minimum filter efficiency of 80 percent"); Neb. Rev. Stat. § 71-2017.01(9) (2013) (Clinics must perform ten or more abortions per week to be eligible for licensing); S.C. Reg. 61-12 § 606 (2013) (Clinic outside areas must be free of "rubbish, grass, and weeds"); 25 Tex. Admin. Code § 139.8(a) (2013) (Clinics must have a minimum-four-person quality assurance committee, which must meet at least quarterly).

[¶28] Women are already a suspect class. See B.H. v. K.D., 506 N.W.2d 368, 375-76 (N.D. 1993). Women who seek an abortion can only be more unpopular. Their doctors, in turn, have been surrounded in their homes, Doe v.

Prosecutor, Marion County, Indiana, 705 F.3d 694, 698 (7th Cir. 2013), discriminated against in the context of tort liability, see generally Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001), and even targeted and murdered. See generally Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002). The abortion law at issue in this case represents nothing more than a bare desire to discriminate against these unpopular groups whose only interest is in exercising a fundamental constitutional right.

CONCLUSION

[¶29] Whether this Court applies strict, intermediate, or rational basis scrutiny, § 14-02.1-01 *et seq.*, for the reasons set forth above and in the district court's order of July 15, 2013, is unconstitutional. This Court should therefore affirm that order.

Respectfully,
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Dated: November 15, 2013

CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on November 15, 2013, I filed the foregoing with the Clerk of the Court for the Supreme Court of the State of North Dakota by email. On the same day and in the same manner, I served this corrected brief (with corrected table of contents) on all parties in this matter named below. This brief conforms to the requirements set forth in N.D. R. App. P and N.D. Admin R. 14.

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I hereby certify that on November 12, 2013, I filed the foregoing with the Clerk of the Court for the Supreme Court of the State of North Dakota by email. On the same day and in the same manner, I served this brief on all parties in this matter named below. This brief conforms to the requirements set forth in N.D. R. App. P and N.D. Admin R. 14.

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