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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

MKB MANAGEMENT CORP, d/b/a RED RIVER WOMEN'S CLINIC, KATHRYN L. EGGLESTON, M.D., Plaintiffs and Appellees, vs. BIRCH BURDICK, in his official capacity as State Attorney for Cass County, TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Defendants, TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Appellant.	**Supreme Ct. No. 20130259** **District Ct. No. 09-2011-CV-02205**

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

BRIEF OF PLAINTIFFS AND APPELLEES MKB MANAGEMENT CORP, d/b/a RED RIVER WOMEN'S CLINIC AND KATHRYN L. EGGLESTON, M.D.

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I. ISSUES PRESENTED

[¶1] Did the Trial Court correctly construe HB 1297 to ban a safe and effective first-trimester abortion method?

[¶2] Did the Trial Court correctly determine that the North Dakota Constitution protects individual rights to the same extent, or a greater extent, than the United States Constitution?

[¶3] Did the Trial Court err in ruling HB 1297 unconstitutional under the North Dakota Constitution?

II. COUNTER-STATEMENT OF THE CASE

[¶4] The Court should uphold the Trial Court's conclusion, reached after a full trial on the merits, that House Bill 1297 ("HB 1297" or the "Act") violates the protections of the North Dakota Constitution. The Trial Court found that HB 1297 effectively bans all abortions performed using medication (rather than by surgery), no matter how early in the pregnancy. Accordingly, the Act's only practical consequence is to force women who seek to terminate a pregnancy in the first trimester to undergo a surgical procedure even though a safe, effective, non-surgical alternative is available. After hearing the evidence, the Trial Court concluded that HB 1297 furthers no important or even legitimate state interest and instead would harm the health of North Dakota women. The Oklahoma Supreme Court, the only other court to evaluate a similar statute, reached the same conclusion as the Trial Court, finding Oklahoma's medication abortion statute "**so completely at odds with the standard that governs the practice of medicine** that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against women who do." *Cline v. Okla. Coal. for Reprod. Justice*, 2013

OK 93, ¶ 27 (Okla. 2013) (quoting trial court ruling), *cert. dismissed as improvidently granted,* No. 12-1094, 2013 BL 305383 (U.S. Nov. 4, 2013).

[¶5] The State does not argue that banning medication abortion is constitutional. Rather, the State urges this Court to rewrite the Act's text as a restriction on medication abortion rather than a ban. But the plain text of the Act is clear, and the Court cannot rewrite unambiguous language. And even if it could do so, the Act's arbitrary restrictions would remain unconstitutional because they would compel physicians to violate the standard of care and their own ethical obligations, and deprive women of the benefits of medical advances by mandating an inferior and outdated treatment protocol.

[¶6] This Court has always interpreted the North Dakota Constitution to protect individual rights to the same or greater extent as the federal constitution. Under the latter, a woman's right to decide whether to continue a pregnancy to term is protected by two separate strands of liberty jurisprudence: the right to make intimate decisions about family and parenthood, and the right to bodily integrity. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 915 (1992). Similarly, under well-settled precedent, the North Dakota Constitution's guarantees of "liberty" and "pursuing and obtaining safety and happiness" encompass the right to make deeply personal decisions, including decisions about family life and medical treatment. N.D. Const. Art. I, §§ 1, 12. The right to decide whether to continue a pregnancy must be one of the deeply personal decisions protected by the North Dakota Constitution. Because the Act does not pass constitutional muster under any applicable standard of review, the Court should affirm the Trial Court's judgment.

III. STATEMENT OF FACTS

[¶7] The State does not contest any facts on appeal. State's Br. 3. Therefore, the Trial Court's findings of fact should not be subject to review. *See Sykeston Twp. v. Wells Cnty*., 356 N.W.2d 136, 137-38 (N.D. 1984). Further, the Trial Court's factual findings are crucial to interpreting the Act and its practical effect, and so the Court should reject the State's attempt to construe the Act with total disregard for these key facts.

A. Approval and Use of Mifeprex

[¶8] For a woman who wishes to terminate a pregnancy early in the first trimester, the use of prescription medications is often preferable to undergoing surgery. App. 181. Two medications are required for this purpose: Mifeprex (generically named mifepristone) followed by Cytotec (generically named misoprostol). *Id*. at 173. Women in the United States have been safely and legally using these two medications under their physicians' care since 2000, when the Federal Food and Drug Administration ("FDA") approved Mifeprex for marketing purposes as an effective alternative to surgical abortion in early pregnancy. *Id*. at 57.

[¶9] As with many drugs, medical knowledge of mifepristone has continued to evolve, reflecting further scientific research and clinicians' experiences. *Id*. at 58. At least 99% of physicians, including the Clinic's, currently prescribe mifepristone using a different protocol than the one listed in its FDA-approved Final Printed Labeling ("FPL"). *Id*. at 179, n.15. This common practice is known as "off-label" use. *Id*. at 58. As the Trial Court noted, "[o]nce a new drug is approved for marketing and distribution, its subsequent use by physicians is in no manner restricted by the FDA approval process." *Id*. at 162, n.9. Thus, "all decisions regarding the appropriate dosage, administration, and use of the medication are left to the professional judgment and discretion of the physician

who prescribes it." *Id*. (citing *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 349-50 (2001)); *accord Cline*, 2013 OK 93, ¶ 20 ("FDA-approved labeling is 'not intended to limit or interfere with the practice of medicine nor to preclude physicians from using their best judgment in the interest of the patient.'") (citing *Weaver v. Reagan*, 886 F.2d 194, 198 (8th Cir. 1989)).

[¶10] The FDA itself acknowledges that "[g]ood medical practice and the best interests of the patient require that physicians use legally available drugs, biologics and devices according to their best knowledge and judgment." App. 357. When off-label use is supported by the most current medical research and clinical evidence, it is known as "evidence-based" medicine, *id*. at 323, which is the gold standard of patient care. The North Dakota Legislature has protected the practice of evidence-based medicine in areas other than abortion, *see* N.D.C.C. § 26.1-36-06.1(2) (requiring health insurance policies to cover off-label prescriptions when supported by the medical literature), thus recognizing, as the Trial Court did, that North Dakota physicians are "professionally, ethically, and legally obligated to follow current medical standards." App. 178.

B. The Clinic's Patient Population, Safety Record, and Protocols

[¶11] The Clinic has provided comprehensive reproductive health care, including abortions, since 1998. *Id*. at 155. Approximately 20% of the Clinic's patients opt for a medication abortion: some feel it is more natural or private, by permitting them to experience the abortion at home rather than in a medical facility; others have certain anatomical conditions that make medication abortion medically-indicated; and some who have experienced domestic abuse or sexual assault choose medication abortion to protect their physical and emotional health. *Id*. at 110.

[¶12] All medication abortion protocols require administration of both mifepristone and misoprostol. *Id*. at 173. Leading medical organizations, including the American College of Obstetricians and Gynecologists and the World Health Organization, have endorsed evidence-based protocols for administering them. *Id*. at 169, 182-83. These protocols offer several advantages over the Mifeprex FPL protocol, by (1) allowing women to take one-third the dosage of mifepristone; (2) permitting self-administration of misoprostol in the privacy of a woman's home, rather than in her physician's office; and (3) extending the effective use of the medications from 49 to 63 days of pregnancy. *Id*. at 178-79, 179 n.15, 186. Like nearly all abortion providers, the Clinic's physicians follow an evidence-based protocol, which the Trial Court determined is "extremely safe and very effective." *Id*. at 163.

[¶13] All the Clinic's medication abortion patients receive counseling on how to monitor their health during and after the abortion, and can access the Clinic's medical staff 24/7 by toll-free hotline. *Id*. at 165, 299-305. It is very rare for a medication abortion patient to experience a true medical emergency: since it began providing medication abortion in 2007, the Clinic knows of only one patient who needed emergency care, which she promptly received at a hospital near her Minnesota home. *Id*. at 190-91. The Clinic advises all patients to immediately proceed to a nearby hospital if they need emergency treatment. *Id*. at 191. Indeed, there are 43 North Dakota hospitals that provide emergency care, most if not all of which are capable of treating women experiencing complications of medication abortion. *Id*. at 189-91, 291, 294.

IV. STANDARD OF REVIEW

[¶14] The Trial Court determined factual issues and made legal conclusions. In determining that HB 1297 is unconstitutional, the court made predicate factual findings

that the State does not contest and therefore are not reviewable for purposes of this appeal. *See Sykeston*, 356 N.W.2d at 137-38. The Trial Court's conclusions of law are fully reviewable. *Gajewski v. Taylor*, 536 N.W.2d 360, 362 (N.D. 1995).

V. LEGAL ANALYSIS

[¶15] The Trial Court correctly found that HB 1297 is an effective ban on medication abortion in North Dakota. This ruling was based on record evidence and factual findings that are undisputed by the parties, and should be affirmed by the Court. Specifically, the Trial Court found that HB 1297 is an effective ban because it (1) conditions the provision of medication abortion on a physician entering into an emergency back-up contract, which no physician has been willing to enter and no reasonable physician ever would, and (2) bans the use of misoprostol.

[¶16] Rather than defending HB 1297's medication abortion ban as constitutional, the State urges this Court to adopt a saving interpretation incompatible with the Act's plain language, in violation of N.D.C.C. § 1-02-05 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit"), and this Court's precedent, *see Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 14, 829 N.W.2d 453. The Court should reject the State's arguments.

A. The Emergency Contract Provision Bans Medication Abortion

[¶17] HB 1297 creates an unprecedented requirement that physicians who provide medication abortions "enter a signed contract with another physician who agrees to handle emergencies associated with [medication abortion]" (the "Emergency Contract"). App. 236-37, § 6(4). "The physician who *contracts to handle emergencies* must have active admitting privileges and gynecological and surgical privileges at *the* hospital designated to handle any emergencies," and every patient "must be provided the name

and telephone number of *the* physician who *will be handling emergencies* and *the* hospital at which any emergencies *will be handled*." *Id*. (emphasis added). The signed contract must be produced "on demand" to "patients, the department of health, or a criminal justice agency." *Id.*

[¶18] After reviewing the evidence, the Trial Court found there was "no logical, much less compelling" justification for the Emergency Contract requirement, and even if there were, "the requirement would be impossible to meet." *Id*. at 191. First, it would require the contracting physician to agree to be "continuously on call;" even the State's expert agreed such a requirement would be impossible to fulfill. *Id*. The court also concluded that the potential for adverse consequences arising from being associated with abortion in a document given to hundreds of people every year significantly dissuaded physicians from agreeing to enter such contract. *Id*. at 192. Moreover, giving patients the name and telephone number of "*the* physician" and "*the* hospital" that would handle any emergencies directly conflicts with the Clinic's instruction that patients experiencing an emergency should immediately proceed to the nearest hospital. As a result, the Emergency Contract provision imposes a "confusing, time delaying, [and] ineffective step" that could jeopardize women's safety by delaying their ability to receive prompt, high-quality care. Transcript 345:21-347:22. Second, and critically, this provision imposes an impossible requirement because the trial record established that, despite diligent efforts by the Clinic, no physician was willing to enter into such contract. App. 192.

[¶19] The State attempts a saving construction, asserting the contract physician simply has to "*agree* to handle emergencies," but is not required to "*actually* handle any or all

emergencies." State's Br. 26 (emphasis added). In other words, the State argues that the contractual term "will" actually means "not required to." The Court should not rewrite the Act in this way. In any event, such a revision would be plainly irrational because if the contract physician is not required to handle "any" emergencies, the Emergency Contract would be pointless.

B. The Act Bans Medication Abortion by Prohibiting the Use of Misoprostol

[¶20] The Act also bans medication abortion by prohibiting the use of misoprostol, the second drug in the Mifeprex FPL protocol. As explained below, HB 1297's definition of "abortion-inducing drug" is unambiguous, and the State's construction of the term is unsupported by the Act's text, the uncontested record, and the State's own prior interpretation.

1. Misoprostol is "an abortion-inducing drug," and the plain language of the statute prohibits its use.

[¶21] HB 1297 defines "abortion-inducing drug" as "a drug, medicine, or any other substance prescribed or dispensed with the intent of causing an abortion." App. 231 § 1(2). The Trial Court determined that, under the Act's plain language, misoprostol is an abortion-inducing drug. *Id*. at 173-74, 176. This finding was supported by evidence offered by both parties at trial.[1] HB 1297 prohibits the administration of an "abortion-inducing drug" except according to the "protocol … outlined in the label for the abortion-

[1] Transcript 40:3-12 (testimony of Dr. Eggleston confirming that misoprostol is an abortifacient); 214:12-21 (testimony of Dr. Grossman explaining mifepristone alone is not an effective abortifacient, and thus a pregnancy can be ongoing when misoprostol is administered); 471:15-472:12 (testimony of Dr. Harrison confirming that misoprostol is an "abortion-inducing drug" under the Act's requirement that "abortion-inducing drugs" be administered in the physical presence of the physician); App. 264 (Cytotec FPL warning that the drug is as an "ABORTIFACIENT").

inducing drug." *Id*. at 236, § 6(2). The Cytotec FPL does not include abortion as an approved use. State's Br. 21. Therefore, misoprostol, which is an abortion-inducing drug under the uncontroverted record of this case, may not be legally used in a medication abortion under the Act. Indeed, the State previously argued that HB 1297's prohibition on off-label use of abortion-inducing drugs banned misoprostol. App. 98; 406 ("[T]he FDA *could, at some point,* approve the use of misoprostol or a similar drug specifically for the purposes of ending pregnancy. *If* that happens, the use of this drug *would* meet the requirements of HB [1297]."") (emphasis added).

2. The State's statutory construction is infirm.

[¶22] By using the definite article "the" throughout, Section 6(4) of the Act connects drugs to *their own* labels and requires that an abortion-inducing drug be provided in accordance with the label for *that* drug. *Id*. at 236. The State asks this Court to transform the definite article "the" in the statute to mean "any," suggesting the statute be read as follows: "it is unlawful to … prescribe *any* abortion-inducing drug … unless … the provision … of *the* abortion-inducing drug satisfies the protocol … outlined in the label for [*any*] abortion-inducing drug" (emphasis added). But this would lead to an absurd result, because it would permit a physician to prescribe mifepristone in accordance with *any* abortion-inducing drug's label, not just its own. That cannot be what the Legislature had in mind. The State's argument simply makes no sense as a matter of logic or grammar. *See United States v. Garreau*, 658 F.3d 854, 858 (8th Cir. 2011) ("The use of the definite article shows that the concluding sentence refers back to the same search described in the first sentence."); *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the

indefinite or generalizing force of 'a' or 'an.'" (citation omitted)). In construing an almost identical statute, the Oklahoma Supreme Court recently reached the same conclusion: "Misoprostol, when used in either the protocol described in the FDA-approved label for mifepristone or an evidence-based regimen, is an abortion-inducing drug as defined by subsection A because it is prescribed or dispensed with the intent of terminating the clinically diagnosable pregnancy of a woman." *Cline*, 2013 OK 93, ¶ 17.

[¶23] Further, the language of Section 1 of HB 1297 corroborates the Trial Court's finding that misoprostol is an abortion-inducing drug whose use is prohibited by the Act. Prior to HB 1297's passage, the Abortion Control Act carved out an exception whereby the administration of drugs to complete an abortion or miscarriage was not considered an "abortion." App. 231, § 1(1). However, Under HB 1297's amendments, only drugs used to complete a miscarriage are excluded from the definition of "abortion," clearly expressing the Legislature's intent that administration of misoprostol as part of a medication abortion protocol be included within the Act's definition of "abortion." *Id*.

[¶24] The State next argues that this Court should adopt its implausible reading of the statute to avoid rendering other portions of the statute meaningless. This argument is unpersuasive. First, the provisions are not meaningless; as the State has previously explained, they would take effect if "the FDA [], at some point, approve[s] the use of misoprostol or a similar drug specifically for the purposes of ending pregnancy." App. 406. Legislatures can enact laws based on contingencies; indeed, the North Dakota Legislature has done so in the past, for example, by banning human cloning, which remains technologically unachievable. N.D.C.C. § 12.1-39-01 *et seq*. Second, as the Trial Court explained, rewriting the Act's provisions to "comply with legislative intent"

is not permissible where the statute "is not susceptible to this interpretation." App. 176. The Legislature could have drafted and passed a law requiring medication abortion to be provided in accordance with the protocol outlined in the Mifeprex FPL, but it did not. It is not this Court's role to rewrite the law for the Legislature to salvage it from invalidation. *Estate of Christeson*, 2013 ND 50, ¶ 14, 829 N.W.2d 453 ("[W]e will not correct an alleged legislative 'oversight' by rewriting unambiguous statutes to cover the situation at hand.") (citation omitted).

C. The Right to Terminate a Pregnancy Is Fundamental Under the North Dakota Constitution

[¶25] The Trial Court correctly found that "the inalienable rights protected by the Constitution of North Dakota must include a woman's right to terminate a pregnancy," App. 161, and the State's assertions to the contrary – based on the legality of abortion at the time of the Constitution's adoption – are untenable. The Court has recognized that the rights protected by the state constitution are not frozen in time, and has consistently held that state constitutional protections, including protections of personal liberty, are at least as robust as those of the federal constitution.

[¶26] The United States Supreme Court and the highest courts of at least 13 states[2] have affirmed that a woman's right to decide whether and when to bear or beget a child is

[2] *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981) (citing *People v. Belous*, 458 P.2d 194, 199-200 (Cal. 1969)); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634-35 (Fla. 2003); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 397-99 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 27, 30-31 (Minn. 1995); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 653-54 (Miss. 1998); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 925, 933, 936 (N.J. 1982); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 855-57 (N.M. 1998); *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14-17 (Tenn. 2000); *State v. Koome*, 530 P.2d 260, 263 (Wash. 1975); *Beecham v. Leahy*, 287 A.2d 836, 839-41 (Vt. 1972). Lower

constitutionally guaranteed. As the U.S. Supreme Court held, a woman's right to choose to terminate a pregnancy, "involving the most intimate and personal choices … central to personal dignity and autonomy," is a vital component of the liberty protected by the due process clause. *Casey*, 505 U.S. at 851. This right to liberty has long been understood under federal law to protect an individual's fundamental right to make important and private life choices concerning sex, procreation, contraception, and child-rearing. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851). Given North Dakota's proud tradition of protecting liberty to the same or greater extent than the federal constitution, such protections must be available to North Dakota women under the state constitution.

1. The principle that the North Dakota Constitution protects individual liberties to the same or a greater extent than the federal constitution is stare decisis.

[¶27] This Court has repeatedly construed the North Dakota Constitution to protect individual civil liberties to the same or a greater extent than the federal constitution. *See Se. Cass Water Resource Dist. v. Burlington Northern R. Co.*, 527 N.W.2d 884, 890 (N.D. 1995) ("[W]e cannot interpret our state constitution to grant narrower rights than guaranteed by the federal constitution."); *State v. Herrick*, 1997 ND 155, ¶ 19, 567 N.W.2d 336 ("It is now axiomatic that the state may grant greater but not lesser protections than the United States Constitution."); *see also State v. Nordquist*, 309 N.W.2d 109, 113 (N.D. 1981) ("[A] State may provide its citizens greater protection than the safeguards guaranteed in the Federal Constitution"); *State v. Matthews*, 216 N.W.2d

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courts in two additional states have recognized a state constitutional right to abortion. *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993), *cert. denied*, 624 N.E.2d 194 (Ohio 1993); *Doe v. Maher*, 515 A.2d 134, 150 (Conn. Super. Ct. 1986).

90, 93 (N.D. 1974) ("It is within the power of this court to apply higher constitutional standards than the minimal standards required of the States by the Federal Constitution"). Over the past 124 years, this Court has never found the Constitution to afford *less* protection of individual liberties than its federal counterpart. Thus, under the principle of *stare decisis*, the federal constitution establishes a floor for state constitutional protections, and to hold otherwise here would undermine the rationale of these and numerous other decisions of this Court.[3] *Dickie v. Farmers Union Oil Co. of LaMoure*, 2000 ND 111, ¶ 13, 611 N.W.2d 168 ("The rule of *stare decisis* is grounded upon the theory that when a legal principle is accepted and established rights may accrue under it, security and certainty require that the principle be recognized and followed thereafter.") Accordingly, the Court should conclude that the North Dakota Constitution protects a woman's right to decide whether to continue a pregnancy, given the protection for this right under federal law.[4]

[¶28] Since the federal standard sets the minimum protection that North Dakota must afford its citizens, this Court has held on multiple occasions that analogous state and federal provisions should be interpreted identically, absent evidence of the framers' contrary intent. *See, e.g., State v. Schmalz*, 2008 ND 27, ¶ 22, 744 N.W.2d 734; *State v.*

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[3] The State agreed with this proposition below. *See* App. 566, 45:5-18 ("THE COURT: … I think we're saying the same thing. But the federal constitution and the federal cases construing federal constitutional rights set the floor. MS. FRANZEN: Correct."); *Id.* at 402, 405 (urging application of federal "undue burden" standard under the North Dakota Constitution).

[4] While the State argues that the Trial Court erred in applying strict scrutiny because there is no fundamental right to abortion under the North Dakota Constitution, State's Br. 16-17, it does not argue against application of strict scrutiny to laws that infringe fundamental rights under the North Dakota Constitution. Indeed, application of strict scrutiny is settled law. *E.g., Hoff v. Berg*, 1999 ND 115, ¶ 13, 595 N.W.2d 285; *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 564-67 (N.D. 1993).

Jacobson, 545 N.W.2d 152, 153 (N.D. 1996); *State v. Ackerman*, 499 N.W.2d 882, 884 n.3 (N.D. 1993); *State v. Klosterman*, 317 N.W.2d 796, 800 & n.4 (N.D. 1982); *Matthews*, 216 N.W.2d at 99-104. Some justices of this Court have noted that the entire Constitution was framed with the intention to provide *greater* protections than the federal constitution. *State v. Herrick*, 1999 ND 1, ¶ 45, 588 N.W. 2d 847 (Maring, J., concurring in part and dissenting in part) ("The history of our state constitution shows that the framers and the people of North Dakota intended to grant an array of basic individual rights broader than that guaranteed by the federal constitution."); *State v. Jacobson*, 545 N.W.2d 152, 160 (N.D. 1996) (Levine J., dissenting) (same).

[¶29] Indeed, this Court has not hesitated to protect individual rights to a greater extent than the United States Supreme Court, especially where the Constitution's language suggests that the framers so intended. *E.g.*, *Hoff*, 1999 ND 115, ¶¶ 9-13, 595 N.W.2d 285; *K.A.S.*, 499 N.W.2d at 564-65; *Nordquist*, 309 N.W.2d at 113; *King v. Stark Cnty.*, 271 N.W. 771, 773-74 (N.D. 1937). The right to make intimate personal decisions – grounded in North Dakota's constitutional rights to liberty and to pursue happiness – provides one such example. As the Trial Court explained, the liberty guarantee of Article I, Section 1 "is not an afterthought that was added by amendment. Instead … our state constitution has always recognized liberty as one of the foremost of the 'inalienable rights' that must be zealously protected." App. 156. "The same is true of the pursuit of happiness," which encompasses "the personal freedom to make choices regarding work and family life 'without restriction or obstruction.'" *Id*. at 156-57 (quoting *State v. Cromwell*, 9 N.W.2d 914, 918-19 (N.D. 1943)).

[¶30] Thus, in *K.A.S.*, this Court determined that parents' "fundamental constitutional right to parent their children" was part of the "right to enjoy 'the domestic relations and the privileges of the family and the home' … embraced by the liberty and pursuit of happiness guarantees contained in Article I, Section 1." 499 N.W.2d at 564-65 (quoting *Cromwell*, 9 N.W.2d at 919). This Court applied strict scrutiny and struck the challenged law as unconstitutional, even though the U.S. Supreme Court had applied a less strict balancing test. *Id.* at 565. In *Hoff*, this Court again affirmed that parents' "right to their children" is fundamental and applied strict scrutiny to strike down a statute that would have survived federal review. 1999 ND 115, ¶¶ 10, 15, 18, 595 N.W.2d 285. Finally, this Court has recognized that an individual's right to make personal medical decisions "is a fundamentally commanding one, with well-established legal and philosophical underpinnings." *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995).

[¶31] Based on this Court's precedents, the Trial Court correctly concluded that the state constitution, like its federal counterpart, "guarantees the right to personal autonomy and self-determination." App. 159 (citing *Hoff*, 1999 ND 115, ¶ 8, 595 N.W.2d 285; *Cromwell*, 9 N.W.2d at 918-19; *Schuetzle*, 537 N.W.2d at 360). The court further found that "[t]he connections between child-bearing and child-raising are obvious and inextricable," and that "a woman's personal freedom and autonomy require both the right to make parenting decisions, and the right to control whether and when to have children." App. 82. The court's uncontested findings of fact demonstrate that, in order to pursue and obtain happiness and safety in North Dakota, and as a central component of their liberty, autonomy and self-determination, women must be able to decide whether to continue a pregnancy. *Id*. at 160. The Trial Court found that abortion is "very common,"

with one-third of American women choosing it at some point in their lives. *Id*. at 164, n.3. It further found that childbirth is much more likely to lead to maternal mortality and morbidity than abortion, that "[t]he alternative to safe and legal abortion is … illegal abortion," and "[i]f medical abortions are no longer legal, safe and available in North Dakota … some women will feel compelled to resort to self-help." *Id*. at 168, 171, 188. As explained *infra* at 16-21, the legality of abortion at the time of the Constitution's adoption does not preclude this Court from finding that a woman's right to decide whether to continue a pregnancy is constitutionally protected in the present day.

2. This Court recognizes the Constitution must be interpreted in light of changed circumstances.

[¶32] This Court has observed 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). Precisely because it is "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," application of its principles can and should be adapted in light of societal change. *Id*. The major legal scholars of the time of the Constitution's adoption shared this view: Professor Black, whose writings have been frequently cited by this Court (including the *Cromwell* Court in interpreting N.D. Const. Art. I, § 1), stated, "while the historical interpretation of these words [i.e. "due process of law"] is of value, it is not to be relied on exclusively. Regard must be had to the principles of liberty which it was intended to perpetuate." HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 417 (West Publ'g Co. 1895). Similarly, Thomas Cooley, who addressed the North Dakota Constitutional Convention, defined due process expansively as "such liberty as

the government of every civilized people would be expected by law to define and protect." THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 225 (The Lawbook Exchange 2001) (1880).

[¶33] The principle that the Constitution was framed to take into account changed circumstances is of longstanding application. For example, while the Constitution's framers clearly intended to enshrine the principle of equality under the law, *see* Art. I, § 21, that right was not applied to prohibit laws based on gender stereotypes until decades later. *Compare State v. Ehr*, 221 N.W. 883, 884 (N.D. 1928) (holding that protection of the "maternal functions of women" justified unequal labor laws) *with State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D. 1977) (holding sex-based classifications to be "inherently suspect" and subject to strict scrutiny). Although the *language* of Article I, Section 21 has not changed since 1889, our understanding of the right to equal protection as a society has evolved, which this Court has clearly recognized.[5]

[¶34] This Court again embraced an evolving, rather than static, view of the Constitution's protections in *Norton*, a case involving a defendant's challenge to his conviction by a mixed-sex jury. 255 N.W. at 792-93. The Court found that, although the Constitution provided for a jury of "twelve men," the qualifications for voting and jury service at the time were linked, so "[e]vidently" the framers' intent was that juries be composed of "electors," rather than males. *Id.* Likewise, in *Ferch v. Hous. Auth. of Cass Cnty.*, 59 N.W.2d 849 (N.D. 1953), this Court affirmed the State's power to condemn private property for the construction of housing projects and further held, "[t]he purpose

of the State Act must be determined in view of the situation that now exists. The changes in North Dakota since the constitution was enacted must be taken into consideration. The constitution is unchanged but the needs over which it may control have changed." *Id.* at 856. Again in *Johnson v. Hassett*, 217 N.W.2d 771, 779 (N.D. 1974), this Court considered the constitutionality of a "guest statute" and observed at the outset, "[i]n constitutional law, as in other matters, times change and doctrines change with the times." In finding the statute unconstitutional, the Court relied in substantial part on the fact that many of the justifications that could have rendered the statute rational at the time it was passed – when cars were still a relative novelty – were no longer applicable. *Id.* at 780. And in *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 580 (N.D. 1981) (Vande Walle, J., concurring), a justice of this Court asserted that, although the "Constitution contains no express right of privacy," and such a right had not yet been expressly recognized by this Court, a "right of privacy in a personnel record of a [public employee] … might exist in the future."

[¶35] Here, there are several changed circumstances akin to those in *Hassett*, *Ferch*, and *Norton*. One is the equal participation of women in society, and this Court's rejection of discrimination based on gender-based stereotypes that "bear no relationship to an individual's qualifications or ability to perform or contribute to society." *City of Mandan v. Fern*, 501 N.W.2d 739, 744 (N.D. 1993). Having the autonomy to make reproductive health decisions is critical to North Dakota women's ability to "participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Another changed

[5] If the scope of the Constitution's protections must be determined by whether a law was on the books at the time its adoption, then, *inter alia*, racially-restrictive voting laws,

circumstance is the safety of abortion. Nineteenth century abortion was frequently dangerous, and laws criminalizing abortion, including North Dakota's, sought to protect women's health. *See Roe v. Wade*, 410 U.S. 113, 148-152 (1973); *State v. Belyea*, 83 N.W. 1, 4 (N.D. 1900). But this is no longer true, as legal abortion is one of the safest medical procedures performed in the United States, and restrictions or bans on abortion, rather than the abortion procedure, pose the greatest threat to the health of women seeking to terminate a pregnancy. App. 168, 171. Consistent with the rule of *stare decisis* and this Court's history of interpreting the North Dakota Constitution as more protective of decision's concerning one's family than the federal constitution, this Court should apply North Dakota's constitutional guarantees in light of North Dakota society as it exists today, not as it did in 1889.

3. The overwhelming weight of authority from other states further supports the existence of a fundamental right to abortion under the North Dakota Constitution.

[¶36] Over the course of more than forty years, not a single state's highest court has ruled that its constitution does not protect a woman's right to terminate a pregnancy.[6] Instead, every high court presented with the question has ruled that due process, or the rights to liberty, privacy, and/or happiness, encompass this decision. For example, in *Right to Choose v. Byrne*, 450 A.2d 925, 933-34, 936 (N.J. 1982), the New Jersey

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N.D. Pol. Code §§ 479-480 (1895) and indentured servitude of indigent children, N.D. Civ. Code § 2834 (1895) would still be constitutional.

[6] *See supra* n.2. In contrast, the State cites a single case from an intermediate Michigan court. The *Mahaffey* court adopted reasoning that the United States Supreme Court, thirteen state high courts, and two lower state courts have all rejected. Additionally, the *Mahaffey* court's analysis is inapplicable because in Michigan, constitutional analysis "does not begin from the conclusive premise of a federal floor." *Mahaffey v. Attorney General*, 564 N.W.2d 104, 109 (Mich. Ct. App. 1997) (quoting *Sitz v. Dep't of State Police*, 506 N.W.2d 209 (Mich. 1993)).

Supreme Court ruled that language in its state constitution—identical in relevant part to North Dakota's Article I, Section 1—protects the "fundamental right of all pregnant women" "to choose whether to have an abortion," and applied strict scrutiny to a law infringing that right.

[¶37] Moreover, the U.S. Supreme Court and other state courts have rejected the State's static view of fundamental constitutional protections. *See, e.g., Casey*, 505 U.S. at 848 ("[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment [do not mark] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"). Thus, in *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000), the Tennessee Supreme Court found that the more expansive provisions of its state constitution "imply protection of an individual's right to make inherently personal decisions," including the right to terminate a pregnancy. It further held that, although abortion was criminalized shortly after the state constitution's adoption, it is nevertheless protected as a fundamental right under that constitution because its framers "foresaw the need to protect individuals from unwarranted governmental intrusion into matters … involving intimate questions of personal and family concern." *Id.* at 10, 15 (citation omitted). Similarly, in finding the right to abortion to be a necessary part of its state constitutional guarantees of privacy and autonomy, the Mississippi Supreme Court noted, "[i]t is a mistake to suppose that a constitution is to be interpreted only in the light of things as they existed at the time of its adoption." *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 651-53 (Miss. 1998) (citation omitted). Likewise, the California Supreme Court, observing that "the validity of the law in 1850 does not resolve the issue of whether the law is constitutionally valid today,"

ruled that its 1850 statute, intended "to protect women from serious risks to life and health" had "in modern times become a scourge," and struck it down under that state's due process clause. *People v. Belous*, 458 P.2d 194, 202 (Cal. 1969).

[¶38] In accordance with this Court's precedent and the decisions of other state high courts that have considered the issue, this Court should find that the guarantees of Sections 1 and 12 – which "are to be expansively construed and strictly protected," App. 157 – encompass a woman's right to decide the number, timing, and spacing of her children by deciding whether to carry a pregnancy to term.

D. The Trial Court Did Not Err by Considering HB 1297's Constitutionality Under the "Undue Burden" Standard

[¶39] Plaintiffs bring claims solely under the North Dakota Constitution. However, because the scope of protection of the right to choose abortion under the federal constitution provides a starting point for analysis under the state constitution, the Trial Court properly analyzed HB 1297 under the "undue burden" standard. Indeed, the State has repeatedly asserted that the undue burden standard "must be applied in this case." App. 402, 405.

[¶40] This Court regularly relies on federal constitutional law when analyzing the state constitution. *E.g., Wild Rice River Estates v. City of Fargo*, 2005 ND 193, ¶ 16, 705 N.W. 2d 850 ("[T]his Court has looked to both state and federal precedents in construing takings claims under the state constitution …."); *Hoff*, 1999 ND 115, ¶¶ 6-10, 595 N.W. 2d 285 (looking to other state courts as well as applicable federal law to determine whether challenged law violated state constitution). *Cf. Moses v. Burleigh Cnty.*, 438 N.W.2d 186, 197 (N.D. 1989) (Levine, J., concurring and dissenting) ("[W]here federal

law has ironed out some wrinkles, we should take advantage of that experience. … Federal law is a rich resource which we would be foolish to ignore.").

[¶41] HB 1297 is unconstitutional under the undue burden standard because (1) it does not promote the State's interest in maternal health, and (2) it imposes a substantial obstacle for a woman seeking to terminate her pregnancy. Notably, the State does not seek to defend the Act as a *de facto* ban.

[¶42] The factual record plainly establishes that, instead of advancing women's health, HB 1297 would *endanger* it, by imposing "insurmountable barriers that effectively eliminate" a safe and common method of early pregnancy termination. App. 163. The Oklahoma Supreme Court reached a similar conclusion after reviewing an almost identical statute, finding it facially unconstitutional pursuant to the U.S. Supreme Court's decision in *Casey*, and basing its ruling on "[t]he plain language of the statute and the manner in which [it] restricts the long-respected medical discretion of physicians in the specific context of abortion." *Cline*, 2013 OK 93, ¶¶ 2, 27.

[¶43] The Act is clearly unconstitutional because it imposes a "substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. Two separate provisions of the Act prohibit medication abortions: the Emergency Contract provision, since no physician has agreed to enter into the required contract; and the provision requiring compliance with the abortion-inducing drug's label, since misoprostol is an abortion-inducing drug not labeled as such. Indeed, no court has ever upheld an effective ban on a common method of abortion in the first trimester. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 135, 156 (2007) (distinguishing between common first trimester abortion methods and other rarely used methods, and upholding federal ban on the uncommon

intact dilation and extraction method because it would not "prohibit the vast majority of D&E abortions," "the usual abortion method" in the second trimester).

[¶44] In determining whether a law imposes an undue burden, the Court must consider the group for whom the law operates as a restriction, not the group for whom the law is irrelevant. *Casey*, 505 U.S. at 894. HB 1297 imposes multiple undue burdens on all women for whom it is relevant: the approximately 20% of patients who choose medication abortion for medical, physical, or psychological reasons and who will be prevented from choosing this safe and effective non-surgical alternative. Even if this Court finds the Act to permit misoprostol's use under the "flawed and outmoded" Mifeprex protocol, App. 188, at a minimum, women who elect medication abortion will be required to ingest triple the dosage of mifepristone for no medically valid reason and make three trips to the Clinic, requiring more time off from work and family obligations and additional expenses. *Id.* at 179. Further, requiring women to take misoprostol at the Clinic makes it far more likely that they will begin to experience bleeding and cramping while traveling (often a great distance) back home. *Id*. at 182. Moreover, women between seven and nine weeks of pregnancy will be prevented altogether from choosing the non-surgical option. Inevitably, the burdens of these restrictions would fall hardest on women who are poor, live far from the Clinic, or have suffered from abuse or trauma. *Id*. at 168, 180-82, 201. In addition, adherence to the Mifeprex FPL protocol would force physicians "to depart from well-established standards of care, to abandon the most fundamental tenets of their profession, and to provide patients with illogical and potentially tragic instructions regarding the availability of any follow-up treatment that may be required on an emergent basis." *Id*. at 163. Thus, even if the Court adopts the

undue burden standard under the North Dakota Constitution, the provisions of HB 1297 cannot stand.[7]

E. The Act Is Also Unconstitutional Because There Is No Justification for Banning a Safe, Effective, and Commonly Used Method of Early Pregnancy Termination

[¶45] The State seeks remand to "determine the constitutionality of HB 1297 … [and] SB 2305 under the rational basis standard of review." State's Br. 32. The Court should reject the State's view that rational basis review is applicable here. Strict scrutiny is the appropriate standard for infringements of fundamental rights; however, if the Court declines to apply strict scrutiny, it should apply an intermediate standard of review because women's "important substantive rights to life and safety" are at issue. *Hanson v. Williams Cnty.*, 389 N.W.2d 319, 328 (N.D. 1986). Under intermediate scrutiny, a statute will be struck down if the available evidence fails to "demonstrate a close

[7] The decisions in *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012) and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-CV-862-LY, 2013 WL 5781583 (W.D. Tex. Oct. 28, 2013) are inapposite for at least three reasons. First, the Ohio statute applied *only* to mifepristone (not all abortion-inducing drugs) and did not include an emergency contract requirement. *DeWine*, 696 F.3d at 504. Similarly, the Texas statute explicitly permits medication abortion in compliance with the Mifeprex regimen and includes a dosage exception to this regimen. *Abbott*, 2013 WL 5781583, at *8. Second, based on a different evidentiary record, the *DeWine* court did not determine that the commonly used evidence-based regimen is safer than the FPL regimen. Finally, the Sixth Circuit erred by applying the undue burden standard to *all* women, as opposed to those for whom the restriction was actually a burden (*i.e.* the 31% of Ohio women who choose medication abortion). *DeWine*, 696 F.3d at 509 (Moore, J. dissenting in part). The Texas court also erred by failing to consider whether a law prohibiting physicians from following the "standard of care" can ever be medically necessary. *Abbott*, 2013 WL 5781583, at *7. In both cases, the medication abortion restrictions remain partially enjoined pending determination of whether the statutes – like HB 1297 – lack adequate health exceptions. Here, the State has not contested the Trial Court's ruling that HB 1297 lacks adequate exceptions to protect women's health, so this issue is not before the Court.

correspondence between the legislative goals and the classification created." *Dickie*, 2000 ND 111, ¶ 13, 611 N.W.2d 168. *See also Hoff*, 1999 ND 115, ¶ 14, 595 N.W.2d 285. As explained *supra* at 6-11, HB 1297 imposes a ban on medication abortions, and is unconstitutional on that basis.

[¶46] Moreover, even if this Court adopts the State's illogical interpretations of the Act's requirements, it must nonetheless be struck down because the State has failed to articulate any rational connection, much less a "close correspondence," between its asserted interest in protecting women's health and the harmful restrictions imposed by the Act. In fact, Dr. Harrison, the State's only expert witness, believes the FDA should revoke its approval of Mifeprex entirely (Transcript 468:13-16), yet irrationally insists that the FPL protocol "should be legislatively mandated as a means of safeguarding women's health." App. 167. Both before and after the FDA's approval, she submitted extensive comments on behalf of the American Association of Pro-Life Obstetricians and Gynecologists in opposition, including a 2002 petition which argued that the Mifeprex Regimen, even when "used as directed in the approved labeling," is inherently dangerous, and further, that it "creates the false impression that misoprostol is approved for use as an abortifacient." *Id*. at 468, 511. For this reason, as well as the fact that her opinions "have shifted dramatically over time … lack scientific support, tend to be based on unsubstantiated concerns, and are generally at odds with solid medical evidence," the Trial Court concluded Dr. Harrison was not a credible witness. *Id*. at 167. The Trial Court further found that the State failed to show a "single aspect of [the Mifeprex] protocol was even beneficial or advantageous." *Id*. at 188. Indeed, the uncontested factual record demonstrates that HB 1297 will actively *harm* women by compelling

adherence to a protocol which would "increase the potential for side effects, … significantly lower the odds of an ultimately successful result… . [and] force patients to experience the process of expulsion in a very uncomfortable and inappropriate location." *Id*. at 185 n.20, 186-87, 202.

[¶47] Further, the State's asserted interest in protecting women's health is undercut by the lack of any exception for cases where, in the physician's considered judgment, a medication abortion is safer than a surgical abortion. For women with contraindications to surgical abortion, elimination of the medical option would force them to travel out-of-state and undergo a procedure that poses a higher risk to their health. *Id*. at 195-96. Equally problematic, HB 1297's requirements indiscriminately apply to victims of rape, incest, and domestic violence. As the Trial Court explained, "not all pregnancies result from consensual acts. Some are the products of rape, incest, or other forms of abuse. … It would be unconscionable for the state to force further emotional trauma, when safe and effective options exist." *Id*. at 78. The Trial Court also found that, if medication abortions become unavailable, some women "will feel compelled to resort to self-help" by seeking an unlicensed provider or drugs over the internet, which could be extremely dangerous to their health and safety. *Id*. at 168.

[¶48] In sum, the Trial Court found HB 1297's asserted purpose and "the means selected to advance that purpose [to be] contrived and pretextual." *Id*. at 163. The State has failed to demonstrate how legislation that compels physicians to provide patients with inferior treatment in terms of safety, effectiveness, cost, and convenience; violate their ethical obligations; and depart from the standard of care is constitutional under any level of scrutiny. In light of the uncontested record, remand is unnecessary.

F. The Act Is Unconstitutional on at Least Five Additional Grounds

[¶49] Plaintiffs hereby incorporate by reference the legal arguments set forth in the Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment [Doc. #52], demonstrating that HB 1297 violates women's right to autonomy and bodily integrity by taking away their ability to elect, from among the safe and effective treatment options available, the procedure most appropriate for them. HB 1297 further violates women's right to bodily integrity by forcing them to undergo a more invasive procedure, regardless of each individual woman's medical circumstances. The State has articulated no interest sufficient to justify this substantial infringement of women's rights. The Act is also unconstitutional because it denies women seeking medication abortions, and physicians providing them, equal protection under the law; constitutes an impermissible special law; and violates physicians' free speech guarantees. Plaintiffs further incorporate by reference the arguments set forth in the Memorandum in Support of Plaintiffs' Motion for Temporary Injunction [Doc. #4] maintaining that the Act impermissibly delegates legislative authority to a federal agency and to private companies, without setting forth any standards or guidelines as to how the delegated authority should be executed. For the reasons explained therein, Plaintiffs seek affirmance of the Trial Court's ruling on each of those grounds.

VI. THIS COURT SHOULD DECLINE TO REVIEW THE APPEAL FROM THE TRIAL COURT'S PRELIMINARY INJUNCTION

[¶50] "An appeal from an intermediate order must meet two separate and distinct jurisdictional requirements." *Mitchell v. Sandborn*, 536 N.W.2d 678, 681 (N.D. 1995). First, the order must satisfy the requirements of N.D.C.C. § 28-02.7-02; "[s]econd, the

trial court must certify the appeal under [N.D. R. Civ. P.] 54(b)." *Id.*[8] Here, the State's appeal meets the first criterion, but not the second.

[¶51] Although this Court retains discretion to review interim orders even where the requirements of Rule 54(b) have not been met, such authority should be exercised "rarely and cautiously to rectify errors or prevent injustice in extraordinary cases when no other adequate alternative remedy exists." *Id.* at 683. The State has not made the requisite showing to justify a departure from the default rule that interlocutory appellate review is unavailable.

[¶52] The preliminary injunction enjoining enforcement of Senate Bill 2305 ("SB 2305") simply maintains the *status quo*. Prior to that act's passage, abortions were provided in a safe and effective manner, and postponing enforcement until after a full hearing on the merits will not, as the State insists, serve an active purpose, nor will it harm the State. Moreover, ruling on the interlocutory appeal now, before the parties have had an opportunity to fully develop the factual record, would result in the kind of piecemeal appeal that Rule 54(b) seeks to avoid. *Sargent Cnty. Bank v. Wentworth*, 434 N.W.2d 562, 564 (N.D. 1989). Trial is scheduled to take place in 90 days; thus, with only a brief delay, this Court can review the full merits of the Trial Court's reasoning.

VII. CONCLUSION

[¶53] For the foregoing reasons, this Court should affirm the Trial Court's ruling that HB 1297 is unconstitutional under the North Dakota Constitution. Plaintiffs further request that, in the event this Court grants the State's request for a remand, the

[8] Even when a trial court certifies an appeal pursuant to Rule 54(b), this Court must still review such certification to determine whether "out-of-the-ordinary circumstances" or "unusual hardships" exist to "warrant[] the extraordinary remedy of an otherwise interlocutory appeal." *Mitchell*, 536 N.W.2d at 681-82.

injunctions against enforcement of HB 1297 and SB 2305 remain in effect pending further proceedings below.

Dated this 15th day of November, 2013.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MKB MANAGEMENT CORP, d/b/a RED RIVER WOMEN'S CLINIC, KATHRYN L. EGGLESTON, M.D., Plaintiffs and Appellees, vs. BIRCH BURDICK, in his official capacity as State Attorney for Cass County, TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Defendants, _____ TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20130259** **District Ct. No. 09-2011-CV-02205**

1. The undersigned certifies that, pursuant to N.D. R. App. P. 32(a)(7)(A)-(B) and the Court's November 7, 2013 E-mail granting Plaintiffs/Appellees' request for a word extension, the text of Plaintiffs/Appellees' Brief (excluding the caption, table of contents, table of authorities, and signature blocks) contains 8,656 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Times New Roman 12 point font.

Dated this 15th day of November, 2013.

/s/ Joseph Turman

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

MKB MANAGEMENT CORP, d/b/a RED RIVER WOMEN'S CLINIC, KATHRYN L. EGGLESTON, M.D., Plaintiffs and Appellees, vs. BIRCH BURDICK, in his official capacity as State Attorney for Cass County, TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Defendants,	Supreme Ct. No. 20130259 District Ct. No. 09-2011-CV-02205
TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Appellant.	

AFFIDAVIT OF SERVICE

Autumn Katz, being first duly sworn upon oath, deposes and says that she is of legal age; that on November 13, 2013, she served the attached:

1. BRIEF OF PLAINTIFFS AND APPELLEES MKB MANAGEMENT CORP, D/B/A RED RIVER WOMEN'S CLINIC AND KATHRYN L. EGGLESTON, M.D.

2. SUPPLEMENTAL APPENDIX

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By electronically sending the above documents to the e-mail addresses noted above, pursuant to all parties' consent to electronic service.

Dated this 13th day of November.

AUTUMN KATZ

Subscribed and sworn to before me on November 13, 2013.

NOTARY PUBLIC
State of New York
No. 02TO6265377
Qualified in Kings County
Commission Expires: July 9, 2016

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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TERRY DWELLE, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Appellant.	

AFFIDAVIT OF SERVICE

Autumn Katz, being first duly sworn upon oath, deposes and says that she is of legal age; that on November 15, 2013, she served the attached, as requested by the Court, with a corrected Table of Contents and Table of Authorities:

1. BRIEF OF PLAINTIFFS AND APPELLEES MKB MANAGEMENT CORP, D/B/A RED RIVER WOMEN'S CLINIC AND KATHRYN L. EGGLESTON, M.D.

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By electronically sending the above documents to the e-mail addresses noted above, pursuant to all parties' consent to electronic service.

Dated this 15th day of November.

AUTUMN KATZ

Subscribed and sworn to before me on November 15, 2013.

NOTARY PUBLIC

STEPHANIE TOTI
NOTARY PUBLIC-STATE OF NEW YORK
No. 02TO6265377
Qualified in Kings County
My Commission Expires July 09, 2016