

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

MKB Management Corp, dba 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  
HONORABLE WICKHAM CORWIN**

**REPLY BRIEF OF DEFENDANT/APPELLANT  
TERRY DWELLE, M.D., IN HIS OFFICIAL CAPACITY**

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## LAW AND ARGUMENT

### **I. Factual findings based on misinterpretations of law are erroneous.**

Many of the district court's "factual findings" are based on misinterpretations of HB 1297. Because the predicate legal interpretations are wrong, the ultimate findings are likewise wrong.

To the extent the district court's factual findings are based on its legal misinterpretations, the findings are erroneous and cannot be relied upon to support the district court's holding.

### **II. No right to abortion exists in the North Dakota Constitution.**

#### **A. Ratifiers' intent controls.**

A North Dakota constitutional provision will not always be construed the same as a similar provision in the United States Constitution. State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996) (Vande Walle, C.J., concurring). In fact, a state constitutional provision will only be construed the same as a federal constitutional provision if it is determined "the framers of the North Dakota Constitution intended nothing more or nothing less . . . than the construction intended by the framers of the United States Constitution when that construction has been announced by the United States Supreme Court." Id. (emphasis added). Thus, it is the Court's "duty to independently interpret" state constitutional provisions. Id. at 156 (Levine, J., dissenting). "It is not a 'revolutionary idea' that we should interpret our constitution independently, 'but one that is founded in the most fundamental principles of federalism and in the history of state constitutions.'" Id. at 160 (quoting State v. Caraher, 653 P.2d

942, 950 n.13 (Or. 1982)). "If we deny our state constitution a life of its own, it becomes a mere appendage to the federal constitution." Id.

Contrary to MKB's argument, the North Dakota Constitution should not be "reduced . . . to an echo of the federal constitution . . ." Jacobson, 545 N.W.2d at 156 (Levine, dissent). Rather, it should be given the life and meaning its drafters and ratifiers intended, even when they intended it to provide fewer rights than the United States Supreme Court has found the Federal Constitution to provide.

B. The people create constitutional rights.

MKB Management Corporation (MKB) does not dispute that "it is a cardinal rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it . . . . In short, the question is always one of intent, and, where the intent is clear, it . . . will prevail." Barry v. Truax, 99 N.W. 769, 772 (N.D. 1904). Despite this, MKB makes no attempt to ascribe to the words of Article I, Section 1 (Section 1) and Section 12 (Section 12) the meaning their adopters understood them to have. Rather, MKB conspicuously avoids any discussion of the contemporary legal practices and laws in effect when Sections 1 and 12 were adopted. By doing so, they tacitly admit the drafters and ratifiers of the North Dakota Constitution did not intend to create a constitutionally protected right to an abortion.

Because it is undisputed the drafters and ratifiers of the North Dakota Constitution did not intend to create a constitutional right to have an abortion by adopting Sections 1 and 12, MKB invites this Court to rewrite Sections 1 and 12

to conform to MKB's views of an "evolved" society. MKB's Br. ¶ 33. It argues this Court should ignore the intent of the drafters and ratifiers of the North Dakota Constitution and rewrite the provisions due to "societal change." Id. ¶ 32. But it is role of the people, not the courts, to amend the Constitution. The North Dakota Constitution specifically includes a process for the people, if they so choose, to establish new rights in the Constitution. See N.D. Const. art. III, §§ 1, 9; see also N.D. Const. art. IV, § 16. This Court should not usurp the people's rights by judicially fashioning a new, unintended constitutional right through case law.

C. The ratifiers did not intend Sections 1 and 12 to create a right to an abortion.

There is a significant distinction between applying an established constitutional right to changed circumstances and constructing a constitutional right where one was not intended. For example, this Court must decide how to apply the established constitutional right to be secure against unreasonable searches and seizures based on new inventions and developing technology, such as automobiles, cell phones, and drones. But applying an established constitutional right to changed circumstances is significantly different than rewriting the Constitution, based on allegedly changing societal viewpoints, to create an unintended right.

The drafters' and ratifiers' intent of Section 1 is determined by looking at the right as "known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it." Barry, 99 N.W. at 771. In doing so, the North Dakota Constitution "shall be held to be prepared and adopted in

reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation.” Id. (citations omitted). Courts “are bound to presume that the people adopting a constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption.” Id. The Court’s “duty in this case is therefore to ascertain whether it was the understanding of the framers of the Constitution, and the people who adopted it, that the right of” liberty included the right to have an abortion. Barry, 99 N.W. at 772. The unequivocal answer is the right to liberty, “as that right was known at the time of the adoption of the Constitution, did not include” a right to an abortion. Id. at 771.

For twelve years before and decades after the 1889 Constitution was adopted, the Dakota Territory and North Dakota criminalized abortion. See State’s Br. 11. Thus, “liberty,” as understood at the time of adoption of Section 1, did not include the liberty to have an abortion. “Liberty” meant the opportunity to do those things ordinarily done by free men and women. State v. Cromwell, 9 N.W.2d 914, 918 (N.D. 1943). At the time Section 1 was adopted, men and women were not at liberty to have an abortion.

This Court should decline MKB’s request to create a new right that is in direct conflict with and contrary to the intent of the drafters and ratifiers of Section 1.

D. No changed circumstances.

MKB has identified no changed circumstances justifying this Court to



ignore the drafters' and ratifiers' intent of Section 1 and to rewrite it to include a right to an abortion. Abortion is not new; it was not developed after the North Dakota Constitution was ratified. Had the drafters and ratifiers of the Constitution intended to create a right to an abortion, they could have done so; they did not.

Advancements in medical technology do not justify ignoring the drafters' and ratifiers' intent. The historical purpose of North Dakota's abortion law is to protect unborn children. See State v. Munson, 201 N.W.2d 123, 126 (S.D. 1972) (determining the abortion law enacted in territorial days was to protect the life of the embryo or fetus), vacated and remanded on other grounds, 410 U.S. 950 (1973).<sup>1</sup> Advancements in medical technology have no bearing on the drafters' and ratifiers' intent to protect unborn children.

E. The cited cases provide no assistance.

MKB's citation to state and federal cases does not assist this Court in determining the drafters' and ratifiers' intent. Interpretation of Sections 1 and 12 is controlled by the intent of their drafters and ratifiers, not judicial decisions issued decades later based on other constitutions.

The state court cases cited by MKB, MKB Br. ¶ 23 n.2, are easily distinguishable. Some do not stand for the proposition cited for, and most are based on an express or implied right to privacy (which, apart from search and seizure jurisprudence, this Court has never recognized).

Despite this being a state constitutional law issue, MKB also heavily cites

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<sup>1</sup> This Court considers South Dakota cases addressing Dakota Territory laws. See Riemers v. Eslinger, 2010 ND 76, ¶ 23, 781 N.W.2d 632; Barker v. Ness, 587 N.W.2d 183, 187 (N.D. 1998); Renz v. Renz, 256 N.W.2d 883, 884-85 (N.D. 1977).

federal case law. But in doing so, MKB both misstates and ignores federal case law. For example, MKB relegates the two federal cases most on point to a footnote. See MKB Br. ¶ 41 n.7. Yet the Sixth Circuit Court of Appeals and Texas federal district court evaluated statutes similar to HB 1297 and addressed similar issues this Court will be required to address if it decides to rely on federal precedent. See Planned Parenthood Region v. DeWine, 696 F.3d 490 (6<sup>th</sup> Cir. 2012) (upholding constitutionality of statute requiring distribution of mifepristone to comply with FDA protocols); Planned Parenthood v. Abbott, 2013 WL 5781583 \*10 (W.D. Tex. Oct. 28, 2013) (holding, as applied to most women, restrictions on medication abortions did not impose undue burden for women), staying injunction, in part, 2013 WL 5857853 \*6 (5<sup>th</sup> Cir. 2013) (concluding “the State has made a strong showing of likelihood of success on the merits, at least in part, as to its appeal of the injunction pertaining to medication abortions”), denying application to vacate stay, 2013 WL 6080269 (U.S. Nov. 19, 2013).<sup>2</sup> It is understandable why MKB relegates DeWine and Abbott to a footnote – those cases rejected the arguments MKB raises in this case.

While relegating federal cases on point to a footnote, MKB relies heavily on Cline v. Oklahoma Coalition for Reproduction Justice, 2013 OK 93 (Okla. 2013), a state case interpreting a statute materially different than HB 1297. For example, unlike HB 1297, the Oklahoma statute’s definition of “abortion-inducing drug” does not refer back to the definition of “abortion” and specifically identifies

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<sup>2</sup> The Texas statute is very similar to HB 1297 and, contrary to MKB’s assertion, does not explicitly permit medication abortions in compliance with the Mifeprex regimen. See Abbott, 2013 WL 5781583 \*8.

Misoprostol as an “abortion-inducing drug.” Id. ¶¶ 17, 19. Misoprostol, however, is not an “abortion-inducing drug” as defined in HB 1297 when used in accordance with the Mifeprex FPL.

In the limited space permitted in a reply brief, the State cannot meaningfully respond to MKB’s inaccurate and incomplete statements of state and federal case law. The State offers to file a separate brief addressing those cases if requested.

**III. HB 1297 only regulates abortion methods.**

The North Dakota Constitution does not protect the right have an abortion. Even if it did, that right would not include the right to choose a particular abortion method. Even the federal courts have not found such a right. See Gonzales v. Carhart, 550 U.S. 124 (2007); DeWine, 696 F.3d at 514-15; Abbott, 2013 WL 5781583 \*9. Thus, even if this Court creates a right to abortion under the North Dakota Constitution, that right would not be violated by HB 1297’s regulation of abortion methods.

**IV. Misoprostol is not an abortion-inducing drug.**

The use of abortion-inducing drugs raised questions regarding when an abortion legally occurs. Section 6(1) of HB 1297 was adopted to resolve that issue, providing “an abortion” is deemed to occur when the abortion-inducing drug is administered or prescribed. App. 236.

Under the Mifeprex FPL,<sup>3</sup> the physician administers Mifeprex and then administers Misoprostol two days later. App. 249, 255. Thus, if Misoprostol is an abortion-inducing drug under the Mifeprex FPL, as argued by MKB, the administration of Misoprostol to remove a dead unborn child, caused by the prior administration of the abortion-inducing drug Mifeprex, also constitutes an abortion. In other words, MKB argues a medication abortion is, in fact, two abortions--the first when Mifeprex is administered to cause the death of the unborn child, and the second when Misoprostol is administered to expel the contents of the uterus. That is an absurd interpretation of HB 1297. Only one abortion occurs during a medication abortion--when the abortion-inducing drug Mifeprex is administered.

MKB's argument regarding the use of "the" in Section 6(2) is circular because it assumes Misoprostol is an abortion-inducing drug when administered under the Mifeprex FPL. The State agrees under Section 8(2) an abortion-inducing drug may only be used in accordance with its FDA protocol and label.<sup>4</sup> But that ignores the issue—Misoprostol is not an abortion-inducing drug when administered under the Mifeprex FPL. See State's Br. 19-21.

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<sup>3</sup> The FDA approved Mifeprex's application under 21 C.F.R. § 314 Subpart H. DeWine, 696 F.3d at 495. Under § 314.520, if FDA concludes that a drug product shown to be effective can be used safely only if distribution or use is restricted, FDA requires post-marketing restrictions. The eight heightened restrictions are set forth in the prescriber's agreement. App. Ex. 24. Physicians who distribute mifeprex have to sign a form indicating they meet the qualifications required and will observe and follow the guidelines outlined in the form. Id.

<sup>4</sup> States may limit off-label use, see DeWine, 696 F.3d at 496; Abbott, 2013 WL 5781583 \*10, which is what the Legislature did by passing HB 1297. The Abbott court found medication abortion under the FDA protocol to be a safe and effective procedure. See Abbott, 2013 WL 5781583 \*9.

**V. The contract provision benefits the patient.**

The emergency contract provision ensures the patient there is a physician to assist her in an emergency. Some patients may not have their own physician or know who to contact in an emergency. Or some local physicians or facilities may conscientiously object to providing medical services related to an abortion. The contract provision provides the patient an additional option.

The emergency contract provision also helps protect patient privacy, a purported concern of MKB. A patient may not want her local hospital, clinic, or physician to know she had an abortion. The contract physician is someone she can contact without disclosing to individuals within her community the fact she had an abortion.

If the Court accepts MKB's assertion Section 6(4) of HB 1297 requires a contract physician to handle any emergency, legislative intent can be accomplished by only striking the third sentence.

**VI. MKB may not incorporate by reference other briefs.**

For good reason, this Court has "disapproved the practice of incorporating by reference in an appellate brief arguments previously presented to the district court." Daniels v. Ziegler, 2013 ND 157, ¶ 13, 835 N.W.2d 852. When a party attempts to do so, as MKB does here, the Court has found the issues inadequately briefed and declined to address them. Id.

MKB should not be permitted to ignore the word limit for principal briefs, see N.D.R. App. P 32(a)(7), by incorporating by reference briefs filed with the

district court. The Court should find MKB did not adequately brief the issues it attempts to raise in Section V(F) of its brief and decline to address them.

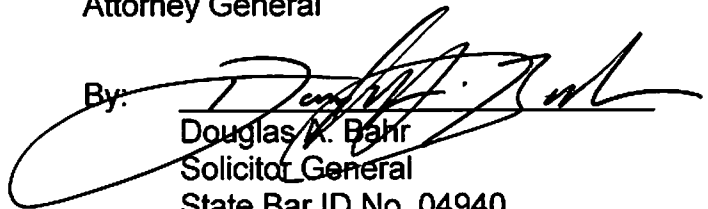
**CONCLUSION**

The district court's July 15, 2013 Rule 54(B) Judgment should be reversed.

Dated this 29<sup>th</sup> day of November, 2013.

State of North Dakota  
Wayne Stenehjem  
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Defendants.

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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**

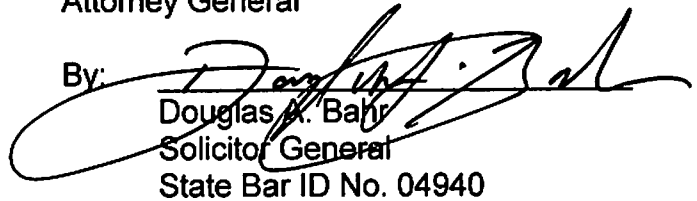
The undersigned certifies pursuant to N.D.C.C. § 32(a)(7)(A) that the text of Defendant/Appellant's Reply Brief (excluding the table of contents and table of authorities) contains 2,482 words.

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

Dated this 29<sup>th</sup> day of November, 2013.

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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 BY MAIL**

**Supreme Ct. No. 20130259**

**District Ct. No. 09-2011-CV-02205**

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**NOV 29 2013**

**STATE OF NORTH DAKOTA**

STATE OF NORTH DAKOTA )

) ss.

COUNTY OF BURLEIGH )

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

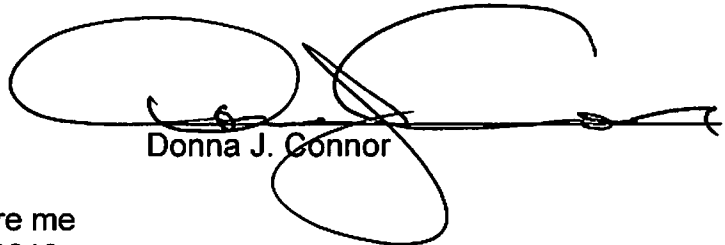
2. I am of legal age and on the 29<sup>th</sup> day of November, 2013, I served the attached, **REPLY BRIEF OF DEFENDANT/APPELLANT TERRY DWELLE, M.D., IN HIS OFFICIAL CAPACITY**, by placing a true and correct copy thereof in an envelope addressed as follows:

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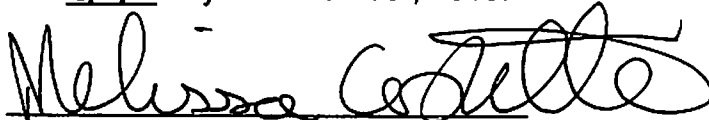
Birch P. Burdick  
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Cass County Courthouse  
P.O. Box 2806  
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and depositing the same, with postage prepaid, in the United States mail at  
Bismarck, North Dakota.



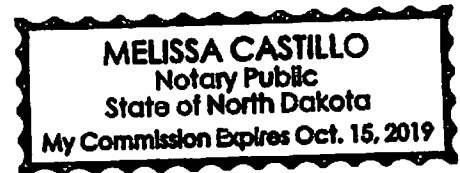
Donna J. Connor

Subscribed and sworn to before me  
this 29<sup>th</sup> day of November, 2013.



Notary Public

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Plaintiffs and Appellees,

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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.

**AMENDED  
CERTIFICATE OF SERVICE**

**Supreme Ct. No. 20130259**

**District Ct. No. 09-2011-CV-02205**

I hereby certify that on November 29, 2013, the following document: **REPLY BRIEF OF DEFENDANT/APPELLANT TERRY DWELLE, M.D., IN HIS OFFICIAL CAPACITY** was filed with the North Dakota Supreme Court and a copy of the forgoing document was served by mailing a true and correct copy thereof to the following:

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P.O. Box 2806  
Fargo, ND 58108

with postage prepaid, in the United States mail at Bismarck, North Dakota this 29<sup>th</sup> day of November, 2013.

I hereby further certify that on December 3, 2013, a copy of the forgoing document was served upon the following by email:

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