IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a RED RIVER WOMEN'S CLINIC, on behalf of itself and its patients; KATHRYN L. EGGLESTON, M.D., on behalf of herself and her patients, ANA TOBIASZ, M.D., on behalf of herself and her patients; and ERICA HOFLAND, M.D., on behalf of herself and her patients; and COLLETTE LESSARD, M.D., on behalf of herself and her patients,

Plaintiffs/Appellees,

v.

DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota,

Defendant/Appellant,

and

KIMBERLEE JO HEGVIK, in her official capacity as the State's Attorney for Cass County, JULIE LAWYER, in her official capacity as the State's Attorney for Burleigh County, AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County, and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County,

Defendants.

Supreme Ct. No. 20240291

District Ct. No. 08-2022-CV-01608
South Central Judicial District

On Appeal from Judgment dated October 10, 2024
The Honorable Bruce Romanick, District Court Judge
Burleigh County District Court, South Central Judicial District

Amicus Curiae Brief of 40 Days for Life in Support of Defendant – Appellant

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***Presly v. Newport Hospital*, 117 R.I. 177, 187, 365 A.2d 748, 753 (1976)** **¶35**

STATEMENT OF INTEREST AND IDENTITY

[¶1] Pursuant to Rule 29(a)(4)(C) of the North Dakota Rules of Appellate Procedure, 40 Days for Life offers this statement of interest and identity: Amicus, 40 Days for Life, is the largest pro-life organization in the world, through which over one million (1,000,000) participants annually conduct peaceful, prayerful and lawful prayer vigils in some one thousand five hundred (1,500) locations in over sixty (60) countries, since the organization's founding in 2007. 40 Days for Life conducts biannual campaigns in which individuals, families, churches and other groups engage in prayer, fasting and community outreach.

[¶2] These campaigns have saved the lives of over twenty-five thousand (25,000) unborn children from abortion and inspired more than two-hundred and sixty (260) abortion facility workers to leave the abortion industry.

[¶3] The focus of 40 Days for Life is peaceful, prayerful, lawful education and outreach. The organization shares the tragic reality of abortion and offers positive, loving alternatives such as support and adoption. The goal of 40 Days for Life is to end the injustice of abortion and the disparate treatment of unborn human beings. At issue in the instant case is legislation regulating abortion and the denial of basic human rights to the unborn human being and the marginalization of women.

STATEMENT OF AUTHORSHIP

[¶4] Pursuant to Rule 29(a)(4)(D) of the North Dakota Rules of Appellate Procedure, April S. Wood, Director of Litigation for the Institute of Law and Justice with 40 Days for Life, affirms that she authored this brief. No other party, party's counsel or other person contributed money to support the preparation or submission of this brief.

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS APPROACH TO CONSTITUTIONAL LAW

[¶5] The District Court erroneously implies a right to abortion into an entirely unrelated 1984 state Constitutional amendment, doing grave injustice to Constitutional interpretation, sound legal reasoning, the rights of the unborn and women. In 1984, the North Dakota State Constitution was amended to include a personal right to keep and bear arms for self-defense and other purposes. North Dakota Constitution art. I, §1. The 1984 amendment also replaced the phrase "all men" with "all individuals" at the beginning of Article I, Section 1 of the North Dakota Constitution. In the instant case, the District Court states that this 1984 change included women in the North Dakota Constitution for the first time in history. (R603:14 ¶41) "This Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case." (R603:13-14 ¶40).

[¶6] The District Court continues: "The inalienable rights guaranteed to North Dakota citizens under article 1, section 1 of the North Dakota Constitution did not even include women until 1984 when the language of the state constitution itself was amended from 'men' to 'individuals.' If the reader finds this insignificant, consider it stated another way: women were not explicitly included in the North Dakota Constitution's enumerated protections until only approximately 40 years ago, during this Court's lifetime." (R603:14 ¶41).

[¶7] Further, the District Court states, "This does not mean that history and tradition do not matter, but if we can learn anything from examining the history and prior traditions surrounding women's rights, women's health, and abortion in North Dakota, the Court

hopes that we would learn this: that there was a time when we got it wrong and when women did not have a voice." (R603: 15 ¶43).

[¶8] However, the district court wants to rely on the history and tradition of North Dakota's law by rejecting the reasoning in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). The Court states: "The United States Supreme Court has decided to overturn its longstanding prior precedent in *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215, 218 (2022), whereby it overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. (1992). In doing so, the United States Supreme Court determined there to be no fundamental right to abortive care under the United States Constitution,…" (R603: 4 ¶10). "This Court sees no reason to do the same under North Dakota precedent and the North Dakota Constitution." (R603: 4 ¶11).

[¶9] The district court's rationale rejects the current Constitutional law of the land and North Dakota's Constitutional history. By rejecting the history of the Constitutional law in North Dakota and rejecting federal Constitutional law, the district court runs roughshod over sound legal precedent and the law's intent. A simple review of the Constitutional process in North Dakota makes clear that the 1984 Amendment did not add women's rights for the first time and certainly did not include abortion. In looking at the current federal Constitutional law, it is clear that the prior analysis of the meaning of the Due Process Clause has been applied erroneously.

II. THE DISTRICT COURT ERRED IN ITS UNDERSTANDING OF NORTH DAKOTA'S PROCESS OF AMENDING ITS CONSTITUTION AND THE 1984 AMENDMENT

[¶10] North Dakota has a process to amend its state's Constitution. One it has exercised one hundred and sixty-seven (167) times in its history. North Dakota Constitution,

"amendments", https://ndconst.org/amendments. It is important to understand the history and legal process of how the North Dakota Constitution is amended to understand the validity of an amendment. The process can be initiated in three ways: 1) citizen-initiated petition, 2) legislative initiated and 3) Constitutional Convention. North Dakota Constitution, Article III and North Dakota Constitution Article IV, Section 16. The 1984 amendment referenced by the district court was a legislative initiative and is cited by the Assembly under chapter 702 of its official records. The measure was approved and then placed on the ballot for approval by the people.

[¶11] In North Dakota, the procedure to amend the Constitution legislatively is laid out in Section 202 as follows:

> *Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislative assembly voting thereon, such amendment or amendments shall become a part of the Constitution of this state. If two or more amendments shall be submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.*

North Dakota Constitution Section 202, as cited in *State of North Dakota ex. rel. Twichell v. Thomas Hall,* 171 N.W. 213, 44 N.D. 459 (1918).

[¶12] Under North Dakota law, "The secretary of state shall cause to be printed a statement of the estimated fiscal impact of the constitutional amendment or initiated or referred measure and a concise statement of the effect of an affirmative or negative vote on the constitutional amendment or initiated or referred measure written in plain, clear, understandable language using words with common, everyday meaning." N.D.C.C. §16.1-06-09. The object of publication is to familiarize the voter with the provision of the proposed constitutional amendment. *State v. Twichell,* 171 N.W. 213, 44 N.D. 459 (1918).

[¶13] The title of any ballot initiative must put the people on notice of what they are voting to change, amend or enact. The title appears as the "Statement of Intent" which accompanies the official ballot information. The information is made available to voters through publication and other outlets. It must be drafted by the secretary of state in consultation with the attorney general. N.D.C.C. §16.1-06-09 *as cited* in Paul Benjamin Linton, The Legal Significance of Gender Inclusive Language in the North Dakota Constitution, U. Cal. L. Const. Q., Vol. 52, Issue 4 (forthcoming), available at http://ssrn.com/abstract_id=5109324.

[¶14] The following Statement of Intent was published on the 1984 Amendment accompanying the official ballot: "This amendment to Article 1 of the North Dakota Constitution, provides for the right of individuals to keep and bear arms for lawful purposes. This includes but is not limited to the defense of their person, family, property, the state, and for lawful hunting and recreational purposes. The Amendment further provides that this right shall not be infringed." *See* Daily News, October 24, 1984, page 8 (cited in Paul Benjamin Linton, The Legal Significance of Gender Inclusive Language in the North

Dakota Constitution, U. Cal. L. Const. Q., Vol. 52, Issue 4 (forthcoming), available at http://ssrn.com/abstract_id=5109324). As shown in the legislative initiative for the 1984 Amendment, the title of the measure was the RIGHT TO BEAR ARMS. Initiated Measure, Approved, Chapter 702, p 2289. The measure and the ballot contained no language stating or implying that the amendment related in any way to women's rights, unborn children, or abortion.

[¶15] If the district court's interpretation is adopted in this case to carve out some unmentioned and unbridled right to terminate the lives of unborn children, this would run entirely counter to what the legislature, the Secretary of State, and the people understood the Amendment's purpose to be in 1984. If that were true, this should call into question the validity of the entire Amendment.

[¶16] There is no evidence that the published information or the title on the ballot for the 1984 Amendment on the Right to Bear Arms was an amendment to include women in the amendment or provide for the right to an abortion. Interpreting the 1984 Amendment to include women for the first time also would reject the longstanding legal history in North Dakota that the State Constitution provides greater protection than the federal Constitution.

[¶17] "Although as a matter of state constitutional law we may provide the citizens of our state greater protection in interpreting our State Constitution than the safeguards guaranteed by a parallel provision of the federal Constitution, see *State v. Thompson,* 369 N.W.2d 363; *State v. Stockert*, 245 N.W.2d 266 (N.D.1976); *State v. Matthews,* 216 N.W.2d 90 (N.D.1974); *State v Ringquist*, 433 N.W.2d 207 (N.D. 1988)." United States Constitution Amendment 19, Section 1; United States Constitution Annotated: https://constitution. congress.gov.

[¶18] To accept the argument of the District Court, North Dakota would need to acknowledge that it provided less protection to its citizens from 1920 until 1984. This seems improbable and highlights the error in attempting to legislate from the bench and imply something that the authors of the 1984 Amendment never intended. This interpretation appears to be an astounding and unprecedented act of impermissible judicial activism, usurping the role of the people and legislature.

[¶19] The purpose of the 1984 Amendment to include the Right to Bear Arms is substantive. However, the language to include all individuals in the 1984 Amendment is stylistic based on the history of the use of the term "men" or "man" instead of "people" or "individuals." In *Wrigley v. Romanick*, 988 N.W.2d 231, 247-249 (N.D. 2023), this Court attempts to impute substantive meaning to the change in language. As laid out above, there is no evidence to support this contention. The district court has relied on this interpretation as well. This attempted reference is not supported by history, tradition or evidence and should be rejected by this Court.

[¶20] The Rules of Statutory Construction in North Dakota have historically meant that "words of one gender include other genders" as stated in N.D.C.C. §1-01-34. The legal construction and interpretation supports this in Constitutional language as well. This Court's precedent applies Article I, §1 equally to mothers and fathers in a case decided fourteen (14) years after the 1984 Amendment.

[¶21] In *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999), this Court struck down a "grandparent visitation" statute because it interfered with the fundamental liberty interest of parents. This Court made no reference to the 1984 amendment as a source of authority to apply the right equally. In fact, the Court relied on *State v. Cromwell*, 9 N.W.2d 914, 919

(N.D. 1943), citing the language, in relevant part, "No person shall… be deprived of life, liberty or property without due process of law." North Dakota Constitution art. 1, §1; *Id* at 289. (cited in The Legal Significance of Gender Inclusive Language in the North Dakota Constitution by Paul Benjamin Linton, Esq.).

[¶22] To further support the rights of women in the North Dakota Constitution, the evidence goes as far back as 1933 in which this Court referred to all the rights secured by the Declaration of Rights, including those set forth in art. 1, §1 as "rights secured to everyone, under all circumstances and under all crises…" *State ex rel. Cleveringa v. Klein*, 249 N.W. 118, 123 (N.D. 1933). It appears this Court believed that the rights secured by the North Dakota Constitution in Article I, §1 were not in conflict with the United States Constitution's inclusion of women's rights as far back as 1933.

[¶23] This Court has also applied the right of trial by jury to include a jury of men and women, despite arguments that the Constitution only provided that men could be jurors. *State v. Norton*, 255 N.W. 787, 788-793 (N.D. 1934). This Court rejected the argument that North Dakota Constitution art. I §7 was meant to limit jury duty to men alone by reference to "twelve men." *Id.* at 792. "We interpret the word 'men' in the thought of the convention and of the people of the day as meaning those persons who possessed the qualifications of jurors at the time, with no thought of sex." *Id*.

[¶24] The district court's current suggestion that women were excluded from the North Dakota Constitution until 1984 is therefore clearly inconsistent with the legal history cited and tradition of this Court cited above. The lack of any evidence to support the District Court's interpretation further negates the concept that the amendment provided a right to abortion.

III. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF INALIENABLE RIGHTS UNDER THE NORTH DAKOTA CONSTITUTION

[¶25] The legal history and tradition of North Dakota clearly convey that women and men have inalienable rights under the State Constitution, including the right to life. The North Dakota Constitution Article I, Section 1 states:

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

North Dakota Constitution art. 1 §1.

[¶26] Further, the North Dakota Constitution states that no person shall be deprived of life, liberty, or property without due process of law. North Dakota Constitution art 1, §12.

[¶27] North Dakota law establishes crimes against an unborn child under N.D.C.C. §12.1-17.1 titled Offenses Against Unborn Children that makes it a crime to take the life of an unborn child. The murder or negligent homicide of an unborn child is a crime which gives the unborn child the right not to be deprived of life, liberty, or property without due process of law.

[¶28] North Dakota criminal law allows an exception to murder for abortion, but only under limited circumstances:

> *"This chapter does not apply to acts or omissions that cause the death or injury of an unborn child if those acts or omissions are committed during an abortion performed by or under the supervision of a licensed physician to which the pregnant woman has consented, nor does it apply to acts or omissions that are committed*

> *pursuant to usual and customary standards of medical practice during diagnostic or therapeutic treatment performed by or under the supervision of a licensed physician."*

N.D.C.C. §12.1-17.1-07.

[¶29] The current law as it stands allows the termination of the unborn life through abortion under the revised statute that expressly permits abortions "to prevent the death or a serious health risk to the pregnant female." N.D.C.C. §12.1-19.1-03(1).

[¶30] This Court notes in *Wrigley v. Romanick*, 2023 ND 50, ¶33, 988 N.W.2d 231, that the State Constitution provides a fundamental right to an abortion in instances where a woman's life or health were endangered while also acknowledging that the State has a compelling interest in regulating the procedure and in protecting unborn children. *Id*.

[¶31] Although the unborn child is still not afforded full, inalienable rights under the current statute, N.D.C.C. §12.1-19.1., there is a form of due process that occurs before the child is murdered. Equalizing the application of due process, the State allows only life-saving measures to the pregnant woman but protects unborn human beings in all other instances.

[¶32] This Court must not reject the long-standing precedent, history and tradition of North Dakota Constitutional law and law on abortion to deny unborn children of North Dakota the inalienable right to life without due process of law.

[¶33] North Dakota law provides multiple instances where unborn life is protected. Under North Dakota law, it is considered child abuse to expose an unborn child to controlled substances or alcohol. The law requires mandated reporters to report such abuse. North Dakota Century Code Section 50-25.1-16 provides that prenatal exposure to controlled substances is reportable child abuse and is mandated reporting for professionals identified

under the code. It is nonsensical to suggest that a pregnant woman has a Constitutional "right" to end the life her unborn child but can simultaneously be reported for committing child abuse against that same child for exposing him or her to controlled substances.

[¶34] Moreover, civil law in North Dakota recognizes that the wrongful death of an unborn child is no different than the death of any other individual. The statute creating the legal claim for wrongful death in North Dakota states:

> *"Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tort-feasor, and although the death shall have been caused under such circumstances as amount in law to felony."*

N.D.C. C. § 32-21-01.

[¶35] This Court settled the issue that unborn children were included under civil tort law in December 1984. In *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984), this Court relied on a case decided by the Rhode Island Supreme Court, as follows: "We are persuaded by the rationale of the Rhode Island Supreme Court in *Presly v. Newport Hospital*, 117 R.I. 177, 187, 365 A.2d 748, 753 (1976), that death before birth is an arbitrary criterion for denial of a wrongful-death cause of action:

> *[I]f prenatal injury is wrongfully inflicted there is no perceptible reason why there should be a legally recognized difference between a death that occurs immediately before birth and one that occurs immediately after.... [I]t makes poor sense to sanction a legal doctrine that enables the tortfeasor whose deed brings about a stillbirth to escape liability but that renders one whose wrongdoing is less severe*

> *answerable in a wrongful death or other negligence action merely because his victim survives birth.*

Id at 864.

[¶36] This Court in *Hopkins* recognized that attempting to distinguish the rights attributed to an individual by virtue of the fact that a person is born is poor sense. *Id* at 865. The Court held that a tort committed against an unborn child had no less weight than a tort committed against any other individual. Under North Dakota's law of wrongful death, an unborn child is recognized to have rights.

[¶37] In addition to North Dakota law, the Federal Code has recognized that the death penalty cannot be executed upon a pregnant woman. Federal law, under 18 U.S.C. section 3596(b), prohibits the imposition of the death penalty on a pregnant woman who has been convicted of a capital crime. Federal law recognizes that the life of the unborn child cannot be terminated without due process of law like the pregnant woman was afforded prior to the death sentence being issued.

[¶38] Despite the clear recognition that an unborn human child has the right to life under the United States Constitution, federal laws, the North Dakota Constitution, and North Dakota law, the district court generated the erroneous concept that Inalienable Rights are conditional. This Court should reject such a condition for permissible murder.

[¶39] Inalienable rights cannot be applied conditionally or with exception. The clear language and history show that all individuals are entitled to the right of life and cannot be denied that life without due process of law.

[¶40] Under North Dakota law, unborn children have nearly the same rights as all individuals. The district court's finding of a right to an abortion for women while denying

the inalienable rights of unborn children, at least half of whom are female, lacks consistency and credibility.

[¶41] Furthermore, it is now settled law under *Dobbs* that the precedents of *Roe* and *Casey* have been overturned, there is no right to abortion under the federal Constitution, and the issue belongs to the states and specifically the people's elected representatives. *Dobbs* at 232. It is difficult to reconcile this reasoning in *Dobbs* and the concept that no right to abortion exists in the Federal Constitution with the district court's argument that a Right to Bear Arms amendment in the State Constitution somehow contemplates this right. To the contrary, the legislature in North Dakota has already taken action as the elected officials of the people and have found no such right. The people have spoken.

[¶42] This Court is now presented with the task of determining if the State's compelling interest conflicts with a fundamental, inalienable right.

[¶43] This Court should not accept the district court's misplaced invitation to craft a right to take the life of a vulnerable unborn child – a child whose inalienable right to life is already grounded in the state Constitution and state law. The stakes are the murder of the unborn children of North Dakota under the cloak of a Constitutional "right" to do so.

CONCLUSION

[¶44] Amicus 40 Days for Life respectfully requests the Court overrule the District Court's Judgment and issue an opinion upholding the constitutionality of N.D.C.C. ch. 12.1-19.1.

Date: January 30, 2025

Respectfully Submitted,

/s/April S. Wood

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