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NORTH DAKOTA SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients,

Plaintiffs/Appellees,

-vs-

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. 2024____

District Ct. No. 08-2022-CV-1608
South Central Judicial District

On Appeal from Judgment dated September 26, 2024
Burleigh County District Court, South Central Judicial District
The Honorable Bruce Romanick, District Court Judge

BRIEF IN SUPPORT OF EXPEDITED MOTION FOR STAY PENDING APPEAL

State of North Dakota
Drew H. Wrigley
Attorney General

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521
Email: dan@grandforkslaw.com
Email: jquinn@grandforkslaw.com
Email: marcus@grandforkslaw.com

Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Email: pjaxt@nd.gov
Email: ctitus@nd.gov

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota

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I. INTRODUCTION

[¶1] Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota (hereinafter the "State") respectfully submits this brief in support of the State's Expedited Motion for Stay Pending Appeal of the District Court's Judgment declaring the entirety of N.D.C.C. ch. 12.1-19.1 unconstitutional. (R617) (the "Judgment").

[¶2] A little over a year ago, this Court declared the State's prior abortion regulation statute, N.D.C.C. § 12.1-31-12, to be unconstitutional after determining that "the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." *Wrigley v. Romanick*, 2023 ND 50, ¶33, 988 N.W.2d 231.

[¶3] The Legislative Assembly took this Cout's direction to heart and soon thereafter enacted a revised abortion regulation statute, N.D.C.C. ch. 12.1-19.1, which expressly allows for abortions when they are "intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶4] However, despite the Legislative Assembly's responsiveness to this Court's ruling, the District Court has now declared that *any* restriction on abortions prior to fetal viability (or perhaps without any gestational age limit) would violate our State Constitution.

[¶5] A stay of the District Court's Judgment pending appeal is warranted in this case for many reasons.

[¶6] First, a stay pending appeal is warranted because this case presents serious, difficult, and unresolved constitutional questions that are of profound importance to the people of this State.

[¶7] Second, a stay pending appeal is warranted because the District Court's Judgment, and the Summary Judgment Order that preceded it, (R603) (the "SJ Order"), declared N.D.C.C. ch. 12.1-19.1 unconstitutional without undertaking any analysis of how the relevant constitutional provisions would have been understood when they were ratified. To the contrary, the District Court noted that it could "comfortably say" the State Constitution would not have been understood to include the abortion rights that it proclaimed to find, and that such rights "[were] not reflected in the laws or in the state constitution" at the time of ratification. *See* (R603:13-14:¶40). The District Court's refusal to read our State Constitution according to how it would have been understood at the time of ratification is a dramatic departure from how this Court has repeatedly stated our Constitution should be interpreted and understood.

[¶8] Third, a stay pending appeal is warranted because the District Court's Judgment and SJ Order repeatedly disregard the party presentation principle by creating several theories to justify declaring N.D.C.C. ch. 12.1-19.1 unconstitutional which were never argued by the parties—including a *sua sponte* assertion that if the State can restrict pre-viability abortions that are not necessary to save the life or health of the mother, then the State would also have the power to *compel* women to get abortions. *See* (R603:18:¶50). Such an argument was never made by the parties, does not appear to have any basis in law or fact, and is one of several examples indicating that the SJ Order and Judgment were not rendered through a process of neutrally adjudicating the arguments presented by the parties.

[¶9] Fourth, a stay pending appeal is warranted because the District Court declared N.D.C.C. ch. 12.1-19.1 facially unconstitutional for vagueness even though the record showed Plaintiffs Tobiasz, Lessard and Hofland not only understood the standard but

testified in support of the statute. *See* (R206-208); (R216). In fact, the record revealed communication among Plaintiffs stating that amendments made to the statute, based upon their testimony, were "probably better than what our ask was," "sufficient" and allowed "us to do what we need medically." (R561:1); (R562:5). Nonetheless, the District Court deemed the statute void for vagueness because the exception in N.D.C.C. § 12.1-19.1-03(1) has both an objective component—"reasonable medical judgment"—and a subjective component—"intended to prevent death or serious health risk." (R603:9-10:¶¶26, 30). But the District Court acknowledged the "reasonable medical judgment" standard is an understood term in the medical community, (R603:9:¶26), and subjective intent is a common *mens rea* that does not render statutes void for vagueness, *e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) ("[t]he existence of a *mens rea* is the rule of … the principles of Anglo-American criminal jurisprudence"). The District Court cites no authority for its broad pronouncement that including both components (thereby making it harder for the State to prove a violation) somehow makes the statute unintelligible.

[¶10] Fifth, a stay pending appeal is warranted because there are significant differences between the District Court's SJ Order and the District Court's Judgment which are likely to result in confusion unless stayed and eventually clarified by this Court. As the most concerning example, the District Court repeatedly stated in its SJ Order that our State Constitution provides a universal right to abortion *pre-viability*. *See, e.g.*, (R603:17, 19-23:¶¶49, 53, 55, 57, 62, 65, 68). Yet the District Court's Judgment made no mention of viability, suggesting that our State Constitution may contain a right to abortion at any stage of fetal development, and risking substantial confusion about the nature of the constitutional right the District Court purported to find. *See* (R617:2:¶4a). Even though

this discrepancy was pointed out by the State in its briefing to that court, the District Court's order denying a stay pending appeal does not mention or attempt to clarify this apparent discrepancy. (R623:4-5, 9-10:¶¶ 7, 12-13); (R629).

[¶11] Sixth, a stay pending appeal is warranted to protect the compelling interest of the State in protecting unborn human life—a compelling State interest which has been expressly recognized by this Court. *Wrigley*, 2023 ND 50, ¶ 29. That compelling interest risks destruction by the District Court's Judgment and SJ Order, the latter of which declares that the State did not identify a compelling state interest in protecting fetal life prior to viability, notwithstanding this Court recognizing such a State interest in *Wrigley v. Romanick*, and the State repeatedly asserting that interest in this case. *Compare* (R603:20:¶57) *with Wrigley*, 2023 ND 50, ¶29 and (R225:3, 8-9:¶¶10-11, 25), (R457:12-13:¶34); (R459); (R559:10-12:¶¶16-18).

[¶12] And seventh, a stay pending appeal is warranted to preserve the status quo. N.D.C.C. ch. 12.1-19.1 has been the law of this State for the last year and a half. Given the numerous legal infirmities of the District Court's Judgment and SJ Order, highlighted above and discussed in more detail below, it is highly likely the District Court's Judgment (and the SJ Order from which it derives) will be reversed in part or in full. A stay pending appeal would protect the public against the potential whiplash of N.D.C.C. ch. 12.1-19.1 being in effect, then not being in effect, then being in effect once again after this Court has received full briefing and argument on appeal.

II. STATEMENT OF THE CASE AND FACTS

[¶13] After this Court's decision in *Wrigley v. Romanick*, Senate Bill 2150 was passed during the 2023 North Dakota legislative session by a super-majority of both the House of

Representatives and Senate and became law in North Dakota on April 23, 2023. *See* (R203:5-10:¶¶10-19); (R205-224). Section 1 of Senate Bill 2150 provided for the enactment of N.D.C.C. ch. 12.1-19.1. *Id.*

[¶14] Plaintiffs filed an amended complaint in this action on June 12, 2023, with two claims for relief. (R151:31-33:¶¶69-75). Plaintiffs' first claim alleged that N.D.C.C. ch. 12.1-19.1 is void for vagueness under the due process provision of Article I, § 12 of the North Dakota Constitution. (R151:31-32:¶¶69-71). Plaintiffs' second claim alleged that a fundamental right to an abortion exists under Article I, § 1 of the N.D. Constitution (life and liberty, and safety and happiness) and under Article I, § 12 of the N.D. Constitution (life). (R151:32-33:¶¶72-75). Plaintiffs alleged no other clause of the North Dakota Constitution, nor identified any other alleged basis, as providing a purported fundamental right to an abortion. *Id.* Plaintiffs' amended complaint did not allege an unlimited right to abortion, whether before fetal viability or without any gestational limit. *Id.*

[¶15] In November 2023, three months after filing their amended complaint and seven months after N.D.C.C. ch. 12.1-19.1 became law, Plaintiffs sought a preliminary injunction to prevent the enforcement of N.D.C.C. ch. 12.1-19.1. (R183-R188, R239-240). The State opposed Plaintiffs' motion for a preliminary injunction, (R203-R226), and the District Court denied the motion. (R250). Accordingly, N.D.C.C. ch. 12.1-19.1 remained the law in North Dakota as the litigation progressed.

[¶16] After conducting discovery, the State presented a motion for summary judgment seeking to have Plaintiffs' complaint dismissed with prejudice. (R449-469, R473-477, R481-482, R559-566). Plaintiffs responded by arguing that there were issues of fact, but Plaintiffs did not themselves move for summary judgment or request the District Court

grant them any relief other than to deny the State's motion and proceed to a trial. (R552:2, 36:¶¶5, 77), *see also* (R551:2, 36:¶5, 77); (R553-557).

[¶17] On September 12, 2024, the District Court issued its SJ Order declaring the entirety of N.D.C.C. ch. 12.1-19.1 unconstitutional. (R603). In the SJ Order, the District Court stated N.D.C.C. ch. 12.1-19.1 was vague because it includes both an objective and a subjective standard, even though it acknowledged the objective standard—"reasonable medical judgment"—is a common term that is understood in the medical community. (R603:7-12:¶¶21-35). The District Court also concluded that under Article I, Section 1 of the North Dakota Constitution ("but not necessarily limited to" that provision) there is an unrestricted right to an abortion prior to fetal viability. (R603:23:¶68).

[¶18] Part of the reasoning given by the District Court for finding such a right was that men, not "individuals," drafted the North Dakota Constitution, and that if the government can limit when an abortion can be provided, it can likewise compel a woman to abort her unborn child under threat of criminal penalty.[1] (R603:13-14, 18:¶¶40, 50). However, the

[1] The State is deeply dismayed the District Court's SJ Order *sua sponte* raised the notion of an imagined future where the State coerces women into getting unwanted abortions. The District Court's statement to that effect conveys a fundamental misunderstanding of the interests that are at issue. The State's authority to restrict abortions does not include an authority to compel abortions for the same reason that its authority to restrict infanticide does not include an authority to compel it. The District Court's statement seems to entirely disregard that the State's compelling interest in restricting abortions is protecting the rights of the unborn life. *See Wrigley*, 2023 ND 50, ¶29.

District Court also recognized that its decisions on this matter were to be given no deference on appeal, and that the issues in this case would ultimately be resolved by this Court. *See* (R603:3-4:¶¶8-9).

[¶19] Two weeks later, on September 26, 2024, the District Court entered its Judgment. (R617). The Judgment diverges from the SJ Order in a few ways; however, the most notable divergence is that, unlike in the SJ Order, the Judgment is silent as to whether viability of the unborn child is a limit for the fundamental right to an abortion that the District Court found to exist under the North Dakota Constitution.

[¶20] The State, as required by N.D. R App. P. 8(a)(1), moved the District Court to stay the SJ Order and Judgment pending appeal. (R605); (R606). A hearing was held on that motion on October 10, 2024 and the district court issued an order denying the motion that same day. (R629). The State now files its notice of appeal to this Court and simultaneously moves this Court for a stay pending appeal pursuant to N.D. R. App. P. 8(a)(2).

III. LAW AND ARGUMENT

A. Standard for a Stay Pending Appeal

[¶21] The North Dakota Rules of Appellate Procedure permit this Court to issue a stay during the pendency of an appeal. *See* N.D. R. App. P. 8. This Court considers the following criteria when addressing an application for a stay pending appeal:

(1) a strong showing that the appellant is likely to succeed on appeal;
(2) that unless the stay is granted, the appellant will suffer irreparable injury;
(3) that no substantial harm will come to any party by reason of the issuance of the stay; and
(4) that granting the stay will do no harm to the public interest.

Cass Cnty. Joint Water Res. Dist. v. Aaland, 2020 ND 196, ¶ 4, 948 N.W.2d 829; *see also Bergstrom v. Bergstrom*, 271 N.W.2d 546, 549 (N.D. 1978). Each of these factors weigh in favor of a stay here.

[¶22] Additionally, even though it does not appear to have been expressly articulated by this Court as a factor for evaluating a stay pending appeal, another consideration favoring a stay is that the District Court declared a State statute unconstitutional based upon the recognition of a newly recognized constitutional right, and in a case that presents difficult and novel legal questions. As discussed herein, that factor has been recognized by other jurisdictions around the country as a basis for granting a stay pending appeal, and, if considered by this Court, would also weigh in favor of a stay pending appeal here.

B. A Stay Pending Appeal is Warranted Because a Single District Court Judge Declared a Statute Unconstitutional in a Case that Presents Difficult and Novel Legal Questions.

[¶23] "A stay of injunction pending appeal is frequently issued where the district court is charting new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review." 30 Am. Jur. 2d Executions, Etc. § 40 (Aug. 2024 update) (citing *Stop H-3 Ass'n v. Volpe*, 353 F.Supp.14, 16 (D. Haw. 1972)); *see also, e.g., Katana Silicon Technologies LLC v. Micron Technology, Inc*., 2023 WL 7283395, *3 (D. Idaho Nov. 2, 2023) ("a stay is more likely appropriate 'where the trial court is charting new and unexplored ground …'") (quoting *Stop H-3*, 353 F.Supp. at 16).

[¶24] While this Court doesn't appear to have expressly articulated the novelty or difficulty of the legal issues presented as a factor when considering whether to grant a stay pending appeal, that factor would weigh in favor of a stay if considered here. Notably, the *Stop H-3* case, which stands for that principle, was relied upon by this Court when it formulated

the factors to consider for a stay pending appeal in *Cass Cnty. Elec. Co-op., Inc. v. Wold Properties, Inc*., 253 N.W.2d 323, 326–27 (N.D. 1977).

[¶25] Related to staying a judgment pending appeal where it involves new and unexplored legal issues, courts from other jurisdictions have also noted that a stay pending appeal is appropriate in instances where, as here, a single judge declares a statute unconstitutional. *E.g., Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers) (stating it to be "unvarying practice" of the U.S. Supreme Court that when a single district judge declares a statute unconstitutional and the court noted probable jurisdiction "in virtually all of these cases the Court has also granted a stay if requested to do so by the Government"); *New Orleans Campaign For A Living Wage v. City Of New Orleans*, 814 So. 2d 1273, 1273 (La. 2002) (stating that the Louisiana Supreme Court "invariably grants [] a stay in cases in which a single judge has declared a law or ordinance unconstitutional") (citations omitted).

[¶26] In discussing why a stay is often warranted when a single district court judge declares a statute to be unconstitutional, former Chief Justice Rehnquist pointed to the presumption of constitutionality that attaches to duly enacted statutes, and noted that the presumption is "not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Bowen,* 483 U.S. at 1304. That same presumption of constitutionality applies under North Dakota law. *E.g., Capps v. Weflen*, 2014 ND 201, ¶15, 855 N.W.2d 637.

[¶27] Indeed, that presumption is so strong under North Dakota's Constitution that it takes a super-majority of this Court to declare a statute unconstitutional. N.D. Const. art. VI, § 4. "[O]nly upon agreement of four of the five judges of our State Supreme Court may

a statute enacted by our legislature be struck down as unconstitutional." *State v. Hanson*, 558 N.W.2d 611, 612 (N.D. 1996) (quoting *City of Bismarck v. Materi*, 177 N.W.2d 530, 537 (N.D. 1970)). And given that "[p]ermitting one district judge to have the final say on the constitutionality of a statute would 'offend the spirit of that section of our Constitution,'" *id.* (quoting *Materi*, 177 N.W.2d. at 537), so too should that spirit of our Constitution weigh in favor of staying a district court's judgment that a State statute is unconstitutional until this Court has had an opportunity to examine the issue on appeal.

[¶28] Notably, the District Court recognized this case presented new and unexplored legal issues under North Dakota law, acknowledged that its decision was to be given no deference on appeal, and remarked that the legal issues presented by this case were ultimately not for the District Court to decide. (R603:3-4:¶¶8-9). The District Court's own recognition that this Court would ultimately be the arbiter of the questions presented in this case is yet another reason for this Court to grant a stay pending appeal.

[¶29] Indeed, consistent with the practice of stays being granted pending appeal when a single judge declares a state statute unconstitutional in a case that presents difficult legal challenges, the Georgia Supreme Court recently granted a stay pending appeal of a lower court decision that had declared that state's statutes regulating abortion to be unconstitutional. *See* (R625) (copy of stay order in *State of Georgia v. Sistersong Women of Color Reproductive Justice Collective, et. al*., No. S25M0216 (Ga. Oct. 7, 2024).

[¶30] Consequently, the State suggests that because this case involves a statute having been declared unconstitutional by a single district court judge, based on a newly identified constitutional right, and involving difficult and novel legal questions, that by itself is a sufficient reason to grant a stay pending appeal.

C. A Stay Pending Appeal is Warranted Because of the State's Likelihood of Success on Appeal.

[¶31] If the Court determines it is necessary to also examine the State's likelihood of success on appeal, that factor tilts strongly in favor of a stay as well.

1. Standard for likelihood of success on appeal

[¶32] The likelihood of success on appeal factor does not require the Court to hold, at this early stage, that the District Court's order will be reversed. Instead, the Court need only find that the appeal presents "'serious legal questions or that there is a 'fair prospect' or 'reasonable probability' of success." *Katana Silicon Techs. LLC*, 2023 WL 7283395, at *3 (citation omitted); *accord, e.g.*, *Missouri v. Biden*, 112 F.4th 531, 536 (8th Cir. 2024) (when issuing an injunction pending an appeal, "a movant shows a likelihood of success on the merits when [he] demonstrates a fair chance, not necessarily greater than fifty percent, that [he] will ultimately prevail under applicable law") (citation omitted); 30 Am. Jur. 2d Executions, Etc. § 40 (Aug. 2024 update) (the court "is not required to find that ultimate success … is a mathematical probability, or is more probable than not, … [i]t ordinarily will be enough that the movant has raised serious legal questions going to the merits, so serious, substantial, and difficult as to make them a fair ground of litigation").

[¶33] Here, there is, at minimum, a "fair prospect" or a "reasonable probability" that the State will prevail on appeal.[2]

[2] For purposes of demonstrating a likelihood of success on appeal, the State highlights several infirmities with the District Court's SJ Order and Judgment in this brief. The issues identified in this brief, however, are not exhaustive, and nothing herein is a waiver or abandonment by the State of any issue on appeal.

2. **The State has a likelihood of success on appeal because the District Court's constitutional analysis refused to consider how the relevant constitutional provisions were understood at the time of their ratification.**

[¶34] One of the most glaring reasons why the State has a "fair prospect" or "reasonable probability" of success on appeal is the District Court's refusal to interpret North Dakota's Constitution in light of history and tradition. Contrary to this Court's repeated direction on constitutional interpretation, the District Court determined the North Dakota Constitution contains a fundamental right to abortion, unrelated to protecting the life or health of the mother, despite also recognizing that such a right would not have been understood as encompassed in the relevant provisions at the time of their ratification.

[¶35] To quote the District Court directly:

> This Court will not spend a significant amount of time addressing the history and laws surrounding abortion, women's rights, and women's health in North Dakota at the time the Constitution was drafted and enacted in 1889. Indeed, 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 …. It quite simply was not the "tradition" of the time, and therefore was not reflected in the laws or the state constitution.

(R603:13-14:¶40).

[¶36] The District Court's approach to constitutional interpretation is in stark contrast with, if not outright hostility to, the method of constitutional analysis that has been directed by this Court. As this Court said not very long ago:

> When interpreting constitutional provisions … We aim to give effect to the intent and purpose of the people who adopted the constitutional provision. … A constitution must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.

SCS Carbon Transport LLC v. Malloy, 2024 ND 109, ¶19, 7 N.W.3d 268 (cleaned up); *see also, e.g., Sorum v. State*, 2020 ND 175, ¶¶ 19-20, 947 N.W.2d 382 (similar); *MKB Management Corp. v. Burdick*, 2014 ND 19, ¶ 25, 855 N.W.2d 31 (similar); *State ex rel. Heitkamp v. Hagerty*, 1998 ND 122, ¶ 22, 580 N.W.2d 139 (similar).

[¶37] Decisions from this Court articulating that principle of constitutional interpretation are legion, and go back to our earliest days as a State. *See, e.g., Ex parte Corliss*, 16 N.D. 470, 481, 114 N.W. 962, 967 (1907) ("[I]n construing a Constitution, the same must be construed in the light of contemporaneous history … By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.") (referencing a decision from "that eminent author and jurist, Judge Cooley"). The District Court's disregard of that baseline principle of constitutional interpretation would appear to be significant error that is likely to be corrected by this Court on appeal.

[¶38] As the State will establish during merits briefing on this appeal (and indeed as the District Court itself seemed to recognize), North Dakota's history and traditions do not support interpreting Article I, Section 1, or any other provision of our State Constitution, as providing a constitutional right to abortion when doing so is not necessary to protect the life or health of the mother. However, for establishing a "fair prospect" or "reasonable probability" of success on appeal, it is perhaps sufficient simply to note that the District Court's entire analytical approach to the question was not only erroneous, but in fact contrary to this Court's explicit and repeated direction.[3]

[3] To justify its disregard for interpreting our Constitution in light of its history, the District Court quoted language from *State v. Norton*, 255 N.W. 787, 792 (N.D. 1934), stating the

[¶39] Consequently, the District Court's mistaken approach to how questions of constitutional interpretation should be analyzed and decided is the first, and perhaps most glaring, reason why the State has a likelihood of succeeding on appeal.

3. The State has a likelihood of success on appeal because the District Court disregarded the party presentation principle.

[¶40] "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance … distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

[¶41] While courts are not necessarily prohibited from raising new issues, "the principle that the parties, and not the judge, should frame cases is grounded upon the same values as those underlying the doctrine of standing. Both promote separation of powers by

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Constitution is "a living, breathing, vital instrument, adaptable to the needs of the day." (R603:13 ¶39). It has been noted "how unusual this statement is in comparison to the Court's other statements about constitutional interpretation." Jerod Tufte, *The North Dakota Constitution: An Originalist Approach Since 1889*, 95 N.D. L. Rev. 417 (2020). And the State is not aware of any judicial decision declaring a statute unconstitutional based on that language from *Norton*—not even *Norton* itself. To the extent that language from *Norton* was ever more than dicta to begin with, it has been clearly and repeatedly abrogated by this Court as an acceptable method of constitutional interpretation.

preventing courts from setting their own agendas … [a]nd both ensure that courts decide only those issues that are briefed and argued by stakeholders with an incentive to adequately represent their interests to the court." Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 455-69 (2008) (compiling authorities addressing the norm against judicial issue creation in American jurisprudence, and exceptions to that norm).

[¶42] The party presentation principle carries particular weight when it comes to declaring a statute unconstitutional. "Courts must … approach constitutional questions with great deliberation and the greatest possible caution, and even reluctance, and should never declare a statute void unless its invalidity is, in their judgment, beyond a reasonable doubt." *State v. Blue*, 2018 ND 171, ¶23, 915 N.W.2d 122.

[¶43] As a matter of North Dakota legal process, this Court has repeatedly enforced the party presentation principle, stating: "[r]ather than ruling on an issue not raised or briefed by the parties, the district court should have presumed the constitutionality of a statute until it is clearly shown otherwise." *Blue*, 2018 ND 171, ¶19; *see also, e.g., Denault v. State*, 2017 ND 167, ¶17, 898 N.W.2d 452 (reversing invalidation of statute where district court addressed its constitutionality "sua sponte and without the benefit of briefing from the State"); *Hazelton-Moffit Special Sch. Dist. No. 6 v. Ward*, 107 N.W.2d 636, 646 (N.D. 1961) ("[A] court will not pass upon a constitutional question, except when such question is properly before it and necessarily involved. The court should not of its own volition go outside of the record and search for reasons for annulling a statute, nor should they conjure up theories to overturn and overthrow.").

[¶44] As this Court explained in *State v. Hansen*:

> Our jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims, which

> … was not followed in this case. Rather, the district court raised the issue without briefing by any party and without notice to the attorney general. Defense counsel did raise the issue but only after embracing the court's invitation to do so. … Unfortunately the procedure employed by the district court not only leaves the impression that the issue was going to be decided whether or not raised by the parties but that the decision was predetermined. This procedure is not conducive to reasoned decision making. … Because the district court failed to follow established procedures … we exercise our supervisory jurisdiction to vacate the court's order determining that the [state statute] is unconstitutional.

2006 ND 139, ¶¶11-12, 717 N.W.2d 541.

[¶45] Unfortunately, the District Court's SJ Order and Judgment in this case similarly failed to follow the established procedure for resolving the constitutional questions that were presented and argued by the parties, and suggests at least a possibility that certain issues relating to this case "were going to be decided whether or not raised by the parties" or "that the decision was predetermined." *Hansen*, 2006 ND 139, ¶¶11-12.

[¶46] As noted *supra*, Plaintiffs' operative amended complaint claimed a fundamental right to an abortion only under Article I, § 1 (life and liberty, and safety and happiness) and Article I, § 12 (life); no other basis or clause of the North Dakota Constitution was alleged to confer such a right. (R151:32-33:¶¶72-75). Plaintiffs also did not allege an unlimited right to an abortion prior to fetal viability, or regardless of gestational age. *Id*. Instead, Plaintiffs alleged that N.D.C.C. ch. 12.1-19.1 was unconstitutional because it did not comply with the right to an abortion where it is necessary to protect a woman's life or health, as recognized by this Court in *Wrigley v. Romanick*. *Id*.

[¶47] In other words, although this Court in *Wrigley v. Romanick* may have left open the question of whether, and to what extent, the North Dakota Constitution provides a right to abortion beyond what may be necessary to protect the life and health of the mother, Plaintiffs did not plead any such claim. They alleged only that N.D.C.C. ch. 12.1-19.1 was

unconstitutional because it did not protect the right to an abortion to protect a woman's life or health as recognized in *Wrigley v. Romanick*. *See* (R151:32-33:¶¶72-75).

[¶48] Accordingly, the case presented to the District Court was whether N.D.C.C. ch. 12.1-19.1 was consistent with the fundamental right to an abortion found to exist under Article I, § 1 "where it is necessary to preserve her life or health"—nothing more. *Wrigley*, 2023 ND 50, ¶¶ 20-27; (R151:32-33:¶¶72-75).

[¶49] Despite this presentation of the issues, the District Court did not limit its analysis to whether N.D.C.C. ch. 12.1-19.1 was consistent with the right to an abortion to preserve a pregnant woman's life or health. (R603); (R617).

[¶50] Instead, without the Plaintiffs even moving for summary judgment, the District Court went well beyond what the Plaintiffs alleged in their amended complaint, declaring N.D.C.C. ch. 12.19-19.1 unconstitutional not because it deprives women of the right to an abortion where their life or health are threatened, but based upon an unlimited right to abortion prior to viability (as described in the SJ Order) or perhaps without any gestational age limit (as seemingly described in the Judgment). (R603:12-19:¶¶36-53); (R617). When the State raised this issue to the District Court in its motion to stay before that court, Plaintiffs did not dispute that the Court's SJ Order and Judgment gave them relief they had neither sought nor argued for in their amended complaint. (R619).

[¶51] Additionally, the District Court also relied on other provisions of the North Dakota Constitution to declare N.D.C.C. ch. 12.1-19.1 unconstitutional that were not alleged, or even mentioned, by the Plaintiffs in their amended complaint. For example, the District Court *sua sponte* declared N.D.C.C. ch. 12.1-19.1 unconstitutional for infringing on the rights of crime victims under Article I, § 25 of the N.D. Constitution, even though such an

allegation is nowhere to be found in Plaintiffs' amended complaint. *See* (R603:21, 23:¶¶62, 67); (R617:2¶4(a)).

[¶52] Moreover, as discussed *supra*, the District Court based its reasoning for determining there to be a fundamental right to abortion in the North Dakota Constitution on its conclusion that the State's authority to restrict abortions that are not necessary to the life or health of the mother is tantamount to a "near-unlimited power to tell women when they *must* have an abortion." (R603:18:¶50) (emphasis original). Such an argument was never made by the parties, is devoid of any legal or factual basis, and fundamentally misunderstands the State's compelling interest in protecting the lives of the unborn.

[¶53] In summary, the District Court's non-adherence to the party presentation principle and its decision to declare the statute unconstitutional on bases that were never alleged or argued by the parties is another reason why the State is likely to have at least a "fair prospect" or a "reasonable probability" of success on appeal. *Cf. Blue*, 2018 ND 171, ¶23, 915 N.W.2d 122 ("Courts must … approach constitutional questions with great deliberation and the greatest possible caution…").

4. <u>The State has a likelihood of success on appeal because the District Court's void for vagueness finding ignores record evidence that Plaintiffs understand the standard and cites no authority for its determination the statute is facially vague.</u>

[¶54] The District Court's SJ Order and the Judgment concluded that N.D.C.C. ch. 12.1-19.1 is unconstitutionally vague because Section 12.1-19.1-03(1) applies both an objective and subjective standard. (R603:8-9:¶¶24-26); (R617:2:¶4b).

[¶55] However, the record shows that Plaintiffs Tobiasz, Lessard, and Hofland all understood the provisions of N.D.C.C. ch. 12.1-19.1, and includes legislative testimony by Plaintiffs Tobiasz, Lessard, and Hofland given regarding Senate Bill 2150. (R206);

(R207); (R208); (R216). The record also shows that amendments to Senate Bill 2150 were made as a result of their legislative testimony. *See* (R203:7-8:¶¶12-14); (R205-208 & 213). And after those amendments were made, based on their legislative testimony, Plaintiff Tobiasz gave further testimony to the Legislative Assembly, stating: "I support SB 2150 as amended, adopted and passed by the Senate." (R216). And Plaintiff Lessard expressed that the Legislative Assembly's changes were "better than what our ask was." (R561:1:bates 219). Plaintiff Tobiasz also represented to her colleagues the statute "will allow us to do what we need medically"—a conclusion Tobiasz admitted was based on her medical knowledge. (R468:245:22-251:12); (R562:5:bates 509).

[¶56] The District Court did not discuss any of this undisputed evidence which shows Plaintiffs' vagueness challenge fails because Plaintiffs themselves understood the statute applied to the conduct they engage in. *See Parker v. Levy*, 417 U.S. 733, 756, (1974) ("one to whose conduct a statute clearly applies may not successfully challenge it for vagueness"); *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985) ("a litigant must almost always demonstrate that the statute in question is vague as applied to his own conduct, without regard to its potentially vague application in other circumstances"); *cf.* N.D.C.C. § 31-11-05(6) (Estoppel by declaration, act, or omission).

[¶57] Instead of addressing the record evidence showing Plaintiffs understood the statute (and indeed supported it before they opposed it), the District Court made a broad finding that the statute was void for vagueness because the exception under N.D.C.C. § 12.1-19.1-03(1) has both an objective component—"reasonable medical judgment"—and a subjective component—"intended to prevent death or serious risk." (R603:9-10, ¶¶26, 30).

[¶58] However, the District Court also acknowledged that the "reasonable medical judgment" standard is an understood term in the medical community. (R603:9:¶26). And subjective intentionality is a common form of *mens rea* that does not render a statute void for vagueness. *E.g.,* N.D.C.C. § 12.1-02-02(1)(a) (defining "intentionally" for purposes of a criminal statute); *State v. Carpenter*, 301 N.W.2d 106, 111 (N.D. 1980) (noting that "a requirement of mens rea or mental culpability" weighs *against* a statute being unconstitutionally vague)*; accord U.S. Gypsum Co.*, 438 U.S. at 436 ("[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"). So standing alone, neither the objective nor subjective elements of N.D.C.C. § 12.1-19.1-03(1) render it vague. Yet because the statute requires both elements to be met before a person is in violation of it, the District Court declared it unintelligible and facially void for vagueness. (R603:9-10, ¶¶26, 30).

[¶59] The District Court cited no caselaw, treatises, or any other authority to support its determination that a statute becomes facially void for vagueness simply because it has both a subjective and an objective component (which of course creates a higher burden for establishing a violation than merely an objective standard alone). Nor did the District Court offer any logical treatment of the question beyond conclusory statements that the statute cannot be understood. To the contrary, courts have recognized that vagueness is only a concern when it is unclear as to *whether* a statute has an objective *or* a subjective component. *Cf. Karlin v. Foust*, 188 F.3d 446, 463 (7th Cir. 1999) (rejecting argument that "a properly worded mixed standard [with both subjective and objective elements] is *per se* void for vagueness in the abortion context"). Here, N.D.C.C. ch. 12.1-19.1 clearly has both, and each is understandable on its own terms.

[¶60] The District Court also concluded the sexual assault exceptions described in N.D.C.C. § 12.1-19.1-03(2) are unconstitutionally vague because "[p]hysicians have no way of reliably determining" whether a pregnancy was caused by assault or abuse. (R603:10-11:¶¶31-33). However, the District Court's decision entirely fails to grapple with the fact that healthcare providers, teachers, and many other professionals in our society are already required by law to report suspected abuse or assault, especially with regard to minors. *E.g.*, N.D.C.C. §50-25.1-03(1) (reporting obligations imposed under law where certain professions have "reasonable cause to suspect" abuse).

[¶61] The District Court's suggestion that no one other than "law enforcement officers, investigators, judges, or jurors" would be capable of forming a reasonable judgment as to whether a pregnancy was the result of a criminal act (R603:11:¶33), would, if taken at face value, suggest that every law imposing abuse reporting requirements on people who are not judges or legal professionals risks being declared void for vagueness. That would be a significant holding indeed. *See* Ann M. Haralambie, 2 Handling Child Custody, Abuse and Adoption Cases § 12:23 (Dec. 2023 update) (noting "all states require certain persons to report suspected child abuse" and "[g]enerally, failure to report when required is a criminal offense"); *see also Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782 § 2[a] ("Statutory provisions permitting a conviction for a failure to report when there was 'reason to believe' or 'reasonable cause to suspect' child abuse … have survived claims that they were unconstitutionally vague"); *State v. Brown*, 140 S.W.3d 51, 54 (Mo. 2004) (Missouri's mandatory child-abuse reporting statute is "not unconstitutionally vague.… [T]he phrase 'reasonable cause to suspect' … is readily understandable by ordinary persons.… Indeed,

every other state appellate court interpreting the same or similar language in reporting statutes has reached the same conclusion.") (compiling cases).

[¶62] And more fundamentally, a statute is not vague simply because it "requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all"—that is, that the "provision simply has no core." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (cleaned up). "The mere fact that a penal statute is so framed as to require a jury … to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). The abuse exceptions in N.D.C.C. § 12.1-19.1-03(2) do not require healthcare providers to prove to a legal certainty that a crime was committed before performing an abortion under that section; they only require a "reasonable" judgment that one occurred. That is effectively the same "reasonableness" standard by which healthcare providers already incur reporting obligations under law. *See* N.D.C.C. §50-25.1-03(1). Consequently, "[w]hile doubts as to the applicability of the language in marginal fact situations may be conceived," the statute gives regulated parties "clear notice that a reasonably ascertainable standard of conduct is mandated." *United States v. Powell*, 423 U.S. 87, 93, 92 (1975); *see also, e.g., Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1209 (Idaho 2023); (R:458:173:23-177:13) (State's medical expert testifying that the "sacred relationship of physician-patient" allows the physician to render a reasonable medical judgment that the abuse circumstances described in N.D.C.C § 12.1-19.1-03(2) have occurred, and for which an abortion is permitted).

[¶63] Thus, for the vagueness findings as well, the State has at least a "fair prospect" or a "reasonable probability" of success on appeal.

5. <u>The State has a likelihood of success on appeal because the District Court's conclusion regarding the mental health exclusion ignored undisputed evidence that an abortion is not the standard of care to treat mental health disorders.</u>

[¶64] Another issue with the District Court's decision is its determination that the exclusion of psychological or emotional conditions from the definition of "serious health risk" in N.D.C.C. § 12.1-19.1-01(5) violates the fundamental right to an abortion. (R603:21-23:¶¶63-66). The District Court offers little in the way of explaining its determination, other than declaring that the State has no compelling interest in "prohibiting physicians from considering a women's mental health as part of her overall health and well-being in the context of abortion." (R603:22:¶¶65).

[¶65] However, entirely absent from the District Court's order is any mention of the undisputed record evidence—evidence that came from both the Plaintiffs' and the State's mental health experts—that an abortion is not the standard of care to treat mental health disorders. (R556:19:8-10, 52:22-53:2, 57:3-16, 58:3-14, 60:3-17, 64:23-72:4, 123:24-125:24) (Plaintiffs' mental health expert testified she has never recommended abortion as a mental health disorder treatment option, and abortion is not part of the evidenced-based standard of care to treat mental health disorders); (R462:77:3-79:11, 78:24-80:23, 118:21-119:7, 125:8-126:22, 129:26:130:6, 133:24-134:8, 135:10-138:17, 218:9-20) (State's expert testified an abortion is not the standard of care to treat mental health disorders).

[¶66] Even the federal government has "emphatically disavowed the notion that an abortion is ever required as stabilizing treatment for mental health conditions." *Moyle v. United States*, 603 U.S. ___, 144 S. Ct. 2015, 2021 (2024). Consequently, it is entirely

rational to not include mental health concerns within the ambit of what constitutes serious health risks for which an abortion may be performed, given that the procedure (the abortion) does not treat the patient's mental health disorder.

[¶67] Again, this further shows the State has a "fair prospect" or a "reasonable probability" of success on appeal by the State to warrant a stay.

* * * *

[¶68] In summary, the Legislative Assembly responded to this Court's decision in *Wrigley v. Romanick* by enacting a statute that balances the State's compelling interest for protecting unborn human life with the right of a woman to receive an abortion when necessary for protecting her life or health. Nonetheless, the District Court, largely relying on now-overruled federal cases interpreting the Federal Constitution, concluded that North Dakota's Constitution contains an unlimited right to abortion prior to viability (and perhaps even later). The District Court reached that conclusion even though it expressly acknowledged that is not how our State Constitution would have been understood when it was ratified. For that and many other reasons, Appellant has at least a "fair prospect" or a "reasonable probability" of success on appeal.

D. Irreparable Injury to the State Weighs in Favor of a Stay Pending Appeal

[¶69] As this Court recognized the last time this issue came before it, the State has a compelling interest in protecting the lives of unborn children. *Wrigley*, 2023 ND 50, ¶29. The District Court's finding that there is a right to abortion on demand prior to viability (in the SJ Order) or seemingly without any limit on gestational age (in the Judgment), severely undermines the State's ability to protect unborn lives, and will foreseeably result in irreparable harm (*i.e.*, death) to those lives. The State's success on appeal will not be able

to undo the irreparable injury that will arise from the unnecessary destruction of even one unborn child's life. And in a more general sense, the State experiences irreparable harm whenever it is erroneously prevented from enforcing its duly enacted laws. *Cf., e.g., New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury"); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (same); *Conner v. Alltin, LLC*, 571 F.Supp.3d 544, 571, n.12 (N.D. Miss. 2021) (irreparable injury if the trial court's decision to declare statute unconstitutional is incorrect).

[¶70] Additionally, the apparent discrepancies between the District Court's SJ Order and Judgment will risk confusion and further irreparable harm without a stay. As noted *supra*, while the SJ Order only appears to have found a right to abortion on demand up to the point of fetal viability, the District Court's Judgment does not appear to place any gestational age limit on the right to an abortion, potentially putting the lives of innumerable unborn children at significant risk.

[¶71] Moreover, the SJ Order and Judgment may have adverse implications for other provisions of North Dakota law—including the North Dakota Abortion Control Act (N.D.C.C. ch. 14-02.1), which was never challenged by Plaintiffs. *See* (R151:2:¶2, n.1) (asserting Plaintiffs are only challenging Section 1 of Senate Bill 2150, which was codified at N.D.C.C. ch. 12.1-19.1). A number of the provisions contained in N.D.C.C. ch. 12.1-19.1, declared unconstitutional in its entirety by the District Court, are also contained within the North Dakota Abortion Control Act (N.D.C.C. ch. 14-02.1). *See* (R152:3-13) (Sections 2-9 of Senate Bill 2150 amended various parts of the North Dakota Abortion

Control Act). The District Court has declared one to be totally invalid, while the other remains the law in North Dakota. The incongruence from this situation causes irreparable injury to the State because the State's ability to enforce the North Dakota Abortion Control Act (N.D.C.C. ch. 14-02.1) has now been cast into doubt, even though those statutory provisions were never challenged in this action.

[¶72] In sum, this factor also weighs in favor of a stay because of the irreparable injury that will occur to the State during the pendency of this appeal.

E. The Substantial Harm Factor Weighs in Favor of a Stay

[¶73] Neither Plaintiffs nor any other party will suffer substantial harm by staying the District Court's SJ Order and Judgment pending appeal.

[¶74] First, Plaintiff Access Independent Health Services, Inc., d/b/a Red River Women's Clinic ("Access") has admitted that it has suffered no harm as a result of N.D.C.C. ch. 12.1-19.1 because it no longer operates in this State (R453:150:14-16). Indeed, neither Access or Plaintiff Eggleston even practice medicine in North Dakota and they apply Minnesota law, not N.D.C.C. ch. 12.1-19.1, to their practice. (R453:71:24-73:8, 100:8-101:6, 178:18-24); (R454:64:11-68:15, 207:3-13). A stay of the SJ Order and Judgment pending appeal will therefore cause no harm to either of those Plaintiffs.

[¶75] As to the other Plaintiffs and pregnant women that may need an abortion to preserve their life or health, N.D.C.C. ch. 12.1-19.1 permits and authorizes abortions that are necessary to protect a woman's life or health. Plaintiffs acknowledge as much, and their own experts testified regarding the numerous circumstances when an abortion would be permitted under N.D.C.C. ch. 12.1-19.1 to protect the life or health of the female. *See*

(R481:87:12-18, 88:13-89:22, 130:3-132:4, 184:5-23); (R476:208:13-20, 219:17-221:7); (R467:223:11-224:24, 230:11-231:8).

[¶76] Moreover, State's medical expert repeatedly testified that under a series of hypotheticals an abortion is allowed under N.D.C.C. ch. 12.-19.1 when the treating physician, in his or her reasonable medical judgment, concludes that there is serious health risk to the mother. *See* (R458:38:16-20, 69:6-12, 72:24-73:3, 80:1-81:15, 86:19-22, 89:4-9, 90:18-99:5, 101:1-7, 110:3-8, 121:12-18, 127:11-16, 132:24-134:7, 137:17-138:7, 140:9-141:20, 146:20-147:2, 151:3-14, 154:19-155:12, 156:24-157:5, 159:19-25, 160:3-166:25, 168:4-169:23). And N.D.C.C. ch. 12.1-19.1 affords physicians latitude to determine when an abortion is necessary to preserve the life or health of the mother. (R460:56:2-57:6, 59:8-16, 60:17-61:10, 85:15-87:10).

[¶77] In short, N.D.C.C. ch. 12.1-19.1 reflects the tradition, recognized by this Court in *Wrigley v. Romanick*, of permitting abortions where they are necessary to protect the life or health of the mother. That right will remain in place with a stay of the District Court's SJ Order and Judgment pending appeal.

[¶78] Consequently, this factor likewise weighs in favor of granting of a stay pending appeal, as no substantial harm will come to any party.

F. Granting a Stay Pending Appeal Will Not Harm the Public Interest.

[¶79] The final factor is whether the stay will harm to the public interest. Here, not only will the public interest not be harmed, but it will be advanced by issuing a stay.

[¶80] First, upholding the will of the people—as expressed by their elected representatives through duly enacted statutes—is in the public interest, especially where, as here, the basis for declaring the statute unconstitutional is questionable at best. *See*

Pavek v. Donald J. Trump for President, Inc., 967 F.3d 905, 909 (8th Cir. 2020); *see also Sinner v. Jaeger*, 467 F.Supp.3d 774, 786 (D.N.D. 2020) ("enforcement of duly enacted laws advances the public interest") (quoting *Ass'n of Equip. Mfrs. v. Burgum*, 2017 WL 8791104, at *11 (D.N.D. Dec. 14, 2017)).

[¶81] Second, the public interest would be served by granting a stay pending appeal to temper the exercise of "raw judicial power" evidenced by the SJ Order and Judgment in creating an unlimited right to an abortion before viability (under the SJ Order) or without any gestational age limit (as suggested by the Judgment). *Cf. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 277-78 (2022). Despite this Court's explicit and repeated direction that North Dakota's Constitution must be understood and interpreted based upon its meaning at the time of ratification or amendment, the District Court's SJ Order specifically disavows the need to consider how our State Constitution would have been understood when the relevant provisions were enacted. *Compare* (R603:13:¶40) *with, e.g.*, *SCS Carbon Transport LLC*, 2024 ND 109, ¶19; *see also, e.g., Sorum*, 2020 ND 175, ¶¶ 19-20; *MKB Management Corp.*, 2014 ND 19, ¶ 25; *Hagerty*, 1998 ND 122, ¶ 22; *Ex parte Corliss*, 16 N.D. at 481. The public interest is not served by allowing a District Court to disregard express direction from this Court on the proper methodology and approach for resolving important constitutional questions.

[¶82] Finally, a stay is in the public interest because it maintains the status quo, as N.D.C.C. ch. 12.1-19.1 has now been in effect since April 23, 2023. *See* (R203:5-10:¶¶10-19); (R205-224). Given the numerous legal infirmities of the District Court's SJ Order and Judgment discussed above, a stay pending will avoid the deleterious effects of N.D.C.C.

ch. 12.1-19.1 being effective, then not being effective, and subsequently becoming effective again once this Court has rendered a decision on the merits of the appeal.

[¶83] In short, given the posture in which this case comes before the Court, the public interest will be advanced by issuing a stay pending appeal and allowing this Court to decide the important issues that are involved in this case with the benefit of full merits briefing and argument.

IV. CONCLUSION

[¶84] The State respectfully requests the Court stay the District Court's Judgment declaring N.D.C.C. ch. 12.1-19.1 unconstitutional pending this Court's consideration of the issues on appeal, and the issuance of this Court's opinion and mandate.

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State of North Dakota
Drew H. Wrigley
Attorney General

/s/ Philip Axt
Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Email: pjaxt@nd.gov
Email: ctitus@nd.gov

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521
Email: dan@grandforkslaw.com
Email: jquinn@grandforkslaw.com
Email: marcus@grandforkslaw.com

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota