STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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; ERICA HOFLAND, M.D., on behalf of herself and her patients; COLLETTE LESSARD, M.D., on behalf of herself and her patients; and BRENDAN BOE, M.D., Pharma.D., on behalf of himself and his patients,

Plaintiffs,

vs.

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

Case No. 08-2022-CV-01608

AMENDED COMPLAINT

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1. Plaintiffs Access Independent Health Services, Inc., doing business as Red River Women's Clinic (the "Clinic"), Kathryn Eggleston, M.D., Ana Tobiasz, M.D., Erica Hofland, M.D., Collette Lessard, M.D., and Brendan Boe, M.D., Pharma.D., by and through their

undersigned attorneys, bring this complaint against the above-named defendants, their employees, agents, and successors in office, and in support thereof allege the following:

PRELIMINARY STATEMENT

2. Less than six weeks after the North Dakota Supreme Court recognized that the state Constitution protects "a fundamental right to obtain an abortion to preserve [a patient's] life or her health," *Wrigley v. Romanick*, 2023 ND 50, ¶ 27, 988 N.W.2d 231, 242, the Legislative Assembly enacted yet another extreme, total abortion ban that flagrantly violates this constitutional guarantee. Senate Bill 2150 ("S.B. 2150" or the "Amended Abortion Ban")[1] prevents pregnant people from accessing necessary, time-sensitive healthcare and threatens their lives, health, and fertility. Openly flouting the Supreme Court's recent decision in this case, the Legislative Assembly drafted language for medical exceptions that is incomprehensible to physicians and incompatible with the Supreme Court's holding.

3. Pregnant North Dakotans have a fundamental right to access life- and health-preserving care in their home state. *Wrigley v. Romanick*, 2023 ND 50, ¶ 27, 988 N.W.2d at 242. The Amended Abortion Ban, like the laws that it replaced, prevents them from doing so. While the Amended Abortion Ban has an exception for "health," the exception is too narrow to allow pregnant people to access care in situations where their health is at risk. For example, the exception prohibits abortions to treat the most common underlying cause of pregnancy-related deaths in the United States—mental health conditions—despite the long history and tradition of recognizing that abortion care may be necessary to preserve a person's mental health. *See id.* at ¶ 23. Moreover, the Amended Abortion Ban has no exception to allow abortions for patients with pregnancies

[1] A copy of Senate Bill 2150 is attached as Exhibit A. This action challenges only section 1 of S.B. 2150, which creates a new section within title 12.1 of the North Dakota Century Code.

where the fetus is unlikely to survive the pregnancy and sustain life after birth, even though continuing the pregnancy carries additional risks for the pregnant person or for another fetus in a multifetal pregnancy.[2] As a result, pregnant North Dakotans carrying such pregnancies must leave the state and bear additional financial and logistical costs if they choose to access abortion care. For people who are unable to travel out of state, the Amended Abortion Ban forces them to continue the pregnancy and assume unnecessary risks to their lives, health, and future fertility.

4. The Amended Abortion Ban fails to provide a discernible standard for when physicians may legally provide abortion care. In particular, the health exception does not allow physicians to rely on their own good faith medical determinations about the proper treatment for their patients. Instead, it holds them to a vague standard with both objective and subjective elements that is impossible to apply to real-world medical scenarios. Because the standards for when it is legal to provide abortion care are so unclear, physicians who provide abortions are at risk of arbitrary or discriminatory prosecution if law enforcement questions their medical decisions after the fact. Due process demands greater clarity in a criminal statute than the Amended Abortion Ban provides.

5. Furthermore, because of the legal uncertainty that it creates for physicians, the Amended Abortion Ban threatens to reduce the healthcare available to all people in the state, regardless of their pregnancy desires or outcomes. Pregnancy carries health risks in any situation, and these risks are higher when healthcare is unavailable. Indeed, most pregnancy-related deaths

[2] Plaintiffs here challenge the prohibition of abortion as applied to pregnancies where, due to a fetal condition or diagnosis, there is little to no chance of the fetus surviving the pregnancy and sustaining life after birth, or where a fetal condition poses risks to a pregnant person's health. Plaintiffs do not seek an exception for other fetal genetic conditions.

may be preventable if patients receive necessary care and treatment.[3] But in states with restrictive abortion laws, physicians are fleeing to avoid the legal risk of practicing in a hostile state, forcing hospitals to stop providing obstetrical care.[4]

6. Patients have a right to access health-preserving abortion care, and physicians must be able to provide that care without risking their liberty and a prison sentence. Plaintiffs respectfully ask this Court to find the criminal prohibition of abortion in the Amended Abortion Ban void for vagueness and to issue any and all declaratory or injunctive relief necessary to protect the health and lives of pregnant North Dakotans.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to N.D. Const. art. VI, § 8 and N.D. Cent. Code § 27-05-06.

8. Plaintiffs' claims for declaratory and injunctive relief are authorized by N.D. Cent. Code §§ 32-06-02, 32-23-01 and by the general equitable powers of this Court.

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[3] *See generally* Susanna Trost et al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 US States, 2017-2019*, Centers for Disease Control and Prevention (2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/docs/pdf/Pregnancy-Related-Deaths-Data-MMRCs-2017-2019-H.pdf (noting that maternal mortality review committees in 36 states found that 84% of pregnancy-related deaths were preventable).

[4] *See, e.g.,* Bonner General Health, *Press Release 3/17/2023: Discontinuation of Labor & Delivery Services at Bonner General Hospital*, https://bonnergeneral.org/wp-content/uploads/2023/03/Bonner-General-Health-Press-Release-Closure-of-LD-3.17.2023.pdf (announcing the end of labor and delivery services and noting that "[h]ighly respected, talented physicians are leaving. Recruiting replacements will be extraordinarily difficult."); Randi Kaye & Stephen Samaniego, *Idaho's murky abortion law is driving doctors out of the state* (May 13, 2023), https://www.cnn.com/2023/05/13/us/idaho-abortion-doctors-drain/index.html; Daniel Grossman et al., *Care Post-Roe: Documents cases of poor-quality care since the* Dobbs *decision* (May 2023), https://www.ansirh.org/sites/default/files/2023-05/Care%20Post-Roe%20Preliminary%20Findings.pdf (discussing submissions from healthcare providers in states with abortion bans about potentially relocating).

9. Venue is appropriate under N.D. Cent. Code § 28-04-05 because Plaintiff Ana Tobiasz practices in Burleigh County, and Defendants Drew H. Wrigley and Julie Lawyer are located in Burleigh County.

PARTIES

I. Plaintiffs

10. Plaintiff Red River Women's Clinic has been in operation since 1998. Until August 2022, the Clinic operated in Fargo, North Dakota. The Clinic now provides abortions and other reproductive healthcare in Moorhead, Minnesota. The Clinic brings claims on behalf of itself and its patients.

11. The Clinic's mission is to provide high-quality affordable abortion care and family planning services to its patients. The Clinic's physicians and staff are deeply committed to providing abortion care and to ensuring that pregnant people have access to comprehensive reproductive healthcare. The Clinic provides a range of services, including abortions, contraception, pregnancy testing, and sexually transmitted infection testing. The majority of the Clinic's patients are from North Dakota; for example, in 2021, when Red River Women's Clinic was the sole abortion clinic in North Dakota, approximately 73% of people who received abortions in the state were North Dakota residents.[5]

12. Patients seek abortion care at Red River Women's Clinic for a variety of reasons, including to preserve their lives and health. For example, "[s]ome patients have pregnancy-related health conditions, such as severe preeclampsia or anemia, which they believe would make it unsafe for them to continue the pregnancy." Decl. of Tammi Kromenaker (Dkt. #7), ¶ 11. "Other patients

[5] *See ND Induced Termination of Pregnancy Data 2021*, North Dakota Health & Human Services, 4 (2021), https://www.hhs.nd.gov/sites/www/files/documents/DOH%20Legacy/Vital/ITOP%202021.pdf.

who [have] sought care at the Clinic have had health conditions unrelated to their pregnancies, such as back pain requiring surgery, but could not receive treatment for those conditions while they were pregnant." *Id.*

13. Plaintiff Kathryn Eggleston, M.D., is a physician licensed to practice medicine in North Dakota and is the Medical Director of Red River Women's Clinic. Dr. Eggleston has provided abortion care at the Clinic since 2004 and has served as the Clinic's Medical Director since 2008. As Medical Director, Dr. Eggleston oversees the provision of all medical care at the Clinic and provides both medication and surgical abortions to the Clinic's patients. Dr. Eggleston brings claims on behalf of herself and her patients.

14. Plaintiff Ana Tobiasz, M.D., is a maternal-fetal medicine physician licensed to practice medicine in North Dakota. Dr. Tobiasz practices in Bismarck. She is a Clinical Assistant Professor in the University of North Dakota School of Medicine and Health Sciences' Department of Obstetrics & Gynecology, and vice-chair of the American College of Obstetricians and Gynecologists ("ACOG") North Dakota section. As one of only five maternal-fetal medicine specialists in the state, Dr. Tobiasz regularly provides care for patients with complicated pregnancies, including patients with health conditions that are a contraindication to pregnancy and patients who receive a diagnosis of a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth.[6] Dr. Tobiasz also treats patients experiencing medical complications for whom inducing labor or terminating the pregnancy is the standard of care. When appropriate based on a patient's health circumstances and personal beliefs, her practice includes

[6] Because North Dakota law has prohibited physicians from providing abortions based on a fetal genetic condition since 2013, none of the Plaintiffs provide this care to patients in North Dakota who receive a fetal diagnosis. *See* N.D. Cent. Code § 14-02.1-04.1 (repealed by S.B. 2150).

counseling patients about termination of pregnancy and providing referrals for abortion. Dr. Tobiasz brings claims on behalf of herself and her patients.

15. Plaintiff Erica Hofland, M.D., is a physician licensed to practice medicine in North Dakota. She practices obstetrics and gynecology and has been providing obstetric care, including delivery care, for the past ten years in Dickinson. Dr. Hofland serves as the vice-chair of the ACOG North Dakota section. Dr. Hofland treats patients for whom an abortion is health-preserving care, including patients who receive a diagnosis of a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth. She also treats patients experiencing medical emergencies and complications for whom inducing labor or terminating the pregnancy is the standard of care. Dr. Hofland brings claims on behalf of herself and her patients.

16. Plaintiff Collette Lessard, M.D., is a physician licensed to practice medicine in North Dakota. She practices obstetrics and gynecology in Grand Forks and has been providing obstetric care, including miscarriage care and delivery care, for nearly ten years. She is a Clinical Assistant Professor at the University of North Dakota School of Medicine, and serves on the board of the North and South Dakota Perinatal Quality Collaborative and the North Dakota Society of Obstetrics and Gynecology. Dr. Lessard treats patients for whom an abortion is health-preserving care, including patients who receive a diagnosis of a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth. She also treats patients experiencing medical emergencies and complications for whom inducing labor or terminating the pregnancy is the standard of care. Dr. Lessard brings claims on behalf of herself and her patients.

17. Plaintiff Brendan Boe, M.D., Pharm.D., is a physician licensed to practice medicine in North Dakota. He practices obstetrics and gynecology in Grand Forks. Dr. Boe treats patients for whom an abortion is health-preserving care, including patients who receive a diagnosis of a

fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth. He also treats patients experiencing medical emergencies and complications for whom inducing labor or terminating the pregnancy is the standard of care. Dr. Boe brings claims on behalf of himself and his patients.

II. Defendants

18. Defendant Drew. H. Wrigley is the State's Attorney General. The Attorney General must "[a]ppear and defend all actions against any state officer," and "advise the several state's attorneys in matters relating to the duties of their office." N.D. Cent. Code § 54-12-01. The Attorney General is also "authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state so to do." N.D. Cent. Code § 54-12-02. He is sued in his official capacity.

19. Defendant Kimberlee Jo Hegvik is the State's Attorney for Cass County. The State's Attorney's office is charged with prosecuting all public offenses on behalf of the State of North Dakota. N.D. Cent. Code § 11-16-01(1). She is sued in her official capacity.

20. Defendant Julie Lawyer is the State's Attorney for Burleigh County. The State's Attorney's office is charged with prosecuting all public offenses on behalf of the State of North Dakota. N.D. Cent. Code § 11-16-01(1). She is sued in her official capacity.

21. Defendant Amanda Engelstad is the State's Attorney for Stark County. The State's Attorney's office is charged with prosecuting all public offenses on behalf of the State of North Dakota. N.D. Cent. Code § 11-16-01(1). She is sued in her official capacity.

22. Defendant Haley Wamstad is the State's Attorney for Grand Forks County. The State's Attorney's office is charged with prosecuting all public offenses on behalf of the State of North Dakota. N.D. Cent. Code § 11-16-01(1). She is sued in her official capacity.

FACTUAL ALLEGATIONS

A. The Amended Abortion Ban Prohibits Providing Abortions With Three Extremely Narrow Exceptions.

23. North Dakota's "Trigger Ban," N.D. Cent. Code § 12.1-31-12, banned abortion for any reason, with no exceptions. *See* Complaint (Dkt. #2), ¶¶ 29-30. The Trigger Ban was preliminarily enjoined in an order of this Court. Order on Pl.'s Mot. for Prelim. Inj. (Dkt. #95).

24. On March 16, 2023, the North Dakota Supreme Court unanimously denied the Attorney General's request to vacate the preliminary injunction of the Trigger Ban. *See* Judgment (Dkt. #118). The Supreme Court explained that, "[a]fter review of North Dakota's history and traditions, and the plain language of article I, section 1 of the North Dakota Constitution, it is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes [that] a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health." *Wrigley v. Romanick*, 2023 ND 50, ¶ 27.

25. S.B. 2150 is a new, total abortion ban which repeals the Trigger Ban and several other duplicative, overlapping bans. Like the Trigger Ban, the Amended Abortion Ban makes it a class C felony to perform an abortion. *See* S.B. 2150, § 1. A class C felony carries a maximum of five years of imprisonment, a fine of $10,000, or both. *See* N.D. Cent. Code § 12.1-32-01.4.

26. As originally introduced in January 2023, S.B. 2150 would have amended the Trigger Ban without permitting abortions for health reasons unless the patient was experiencing a medical emergency.[7] But after the North Dakota Supreme Court issued its decision in this case, the legislature, operating on a deadline, made certain changes to S.B. 2150. The legislature did not hold a public hearing on these amendments or give healthcare providers an opportunity to publicly

[7] *See* S.B. 5150, 68th Leg. Assemb., Reg. Sess. (N.D. Jan. 6, 2023), https://ndlegis.gov/assembly/68-2023/regular/documents/23-0137-05000.pdf.

testify to the practicalities of the standards in the bill. In modifying the law, the legislature moved the Amended Abortion Ban to a new section of the Century Code, added the definition of "serious health risk" to the statute, and modified the first exception in the ban to allow physicians to provide abortions when a "serious health risk" is present. S.B. 2150, § 1.

27. The Amended Abortion Ban threatens to reduce healthcare access for all pregnant North Dakotans. Already, 19% of pregnant North Dakotans lack reliable access to prenatal care, and, as of 2020, North Dakota had the sixth highest proportion of people living in a maternity care desert—counties without obstetric providers and facilities—of any state in the country.[8] In other states with restrictive abortion laws, physicians are leaving in record numbers, saying that they do not want to prosecuted "simply for saving someone's life"[9] and "cannot continue to practice in a place where I do not feel safe."[10]

28. During the floor debates on S.B. 2150, legislators correctly asserted that the law "does not comply with the North Dakota Supreme Court ruling"[11] and urged their colleagues to

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[8] *North Dakota is the #6 State with the Most People Living in Maternal Health Care Deserts*, STACKER (Oct. 29, 2021), https://stacker.com/north-dakota/north-dakota-6-state-most-people-living-maternal-health-care-deserts (using 2020 Census population data to calculate what percentage of a state's population lives in "maternity care desert" based on March of Dimes' definition). A "maternity care desert" is defined as "any county without a hospital or birth center offering obstetric care and without any obstetric providers." *See* March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* 6 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf.

[9] Kaye & Samaniego, *supra* note 4.

[10] Kylie Cooper, *I'm a maternal-health doctor, and I'm leaving Idaho because of restrictive abortion ban,* Idaho Statesman (Feb 16, 2023), https://www.idahostatesman.com/opinion/readers-opinion/article272519522.html.

[11] *Second Reading and Roll Call on S.B. 2150 Before the S.*, 68th Leg. Assemb., Reg. Sess., at 1:27:19 (N.D. Apr. 19, 2023) (statement of Sen. Kathy Hogan), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230526/-1/30365?startposition=20230419131455#people_ .

"learn from [the North Dakota Supreme Court's] decision and let it guide our lawmaking process."[12] Ignoring their advice, the Legislative Assembly passed S.B. 2150 to, in the words of one legislator, "send another message to the North Dakota Supreme Court—this is what this legislature wants."[13]

29. Governor Doug Burgum signed the Amended Abortion Ban on April 24, 2023. It went into effect that same day.[14]

30. "Abortion" as used in the Amended Abortion Ban is defined as:

> the act of using, selling, or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one or more unborn children in a multifetal pregnancy, with knowledge the termination by those means will with reasonable likelihood cause the death of the unborn child. The use, sale, prescription, or means is not an abortion if done with the intent to:
> a. Remove a dead unborn child caused by spontaneous abortion;
> b. Treat a woman for an ectopic pregnancy; or
> c. Treat a woman for a molar pregnancy.

S.B. 2150, § 1.[15]

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[12] *Second Reading and Roll Call on S.B. 2150 Before the H.*, 68th Leg. Assemb., Reg. Sess., at 2:26:06 (N.D. Apr. 17, 2023) (statement of Rep. Zachary Ista), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230526/-1/30247?startposition=20230417142328#info ("We've had the benefit of the state Supreme Court issuing a guiding, precedential decision while we are here in session. We can and we should learn from that decision and let it guide our lawmaking process.").

[13] *Second Reading and Roll Call on S.B. 2150 Before the H.*, 68th Leg. Assemb., Reg. Sess., at 2:40:05 (N.D. Apr. 17, 2023) (statement of Rep. Mike Lefor), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230526/-1/30247?startposition=20230417143825#people.

[14] *SB 2150 – Actions*, North Dakota Legislative Branch, https://www.ndlegis.gov/assembly/68-2023/regular/bill-actions/ba2150.html (last modified Apr. 26, 2023).

[15] The Abortion Control Act, title 14-02.1 of the Century Code, uses a different definition of "abortion" and does not include "selling" or "[t]he . . . sale" of an instrument or medication within its definition of "abortion." *See* N.D. Cent. Code § 14-02.1-02 (amended and reenacted by S.B. 2150, § 3).

31. The Amended Abortion Ban provides three exceptions: (1) in cases of death or serious health risks (the "Serious Health Risk Exception"); (2) in sexual violence cases up to six weeks of pregnancy (the "Sex Offenses Exception"); and (3) for third parties acting under physician supervision (the "Third Party Exception"). *Id.*

32. First, the Amended Abortion Ban has a Serious Health Risk Exception under which the ban does not apply to "[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female." *Id.* "Serious health risk" is defined as:

> a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function, not including any psychological or emotional condition. The term may not be based on a claim or diagnosis that the woman will engage in conduct that will result in her death or in substantial physical impairment of a major bodily function.

Id. § 1(5). "Reasonable medical judgment" is defined as "a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved." *Id.* § 1(4). The bill does not define "major bodily function" aside from noting that it does not include any psychological or emotional conditions.

33. Second, the Amended Abortion Ban has an extremely narrow Sex Offenses Exception under which the ban does not apply to "[a]n abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20, if the probable gestational age of the unborn child is six weeks or less." *Id.* § 1.

34. Third, the Amended Abortion Ban has a Third-Party Exception under which the ban does not apply to "[a]n individual assisting in performing an abortion if the individual was

acting within the scope of that individual's regulated profession, was under the direction of or at the direction of a physician, and did not know the physician was performing an abortion in violation of this chapter." *Id.*

B. The Amended Abortion Ban Is Unconstitutionally Vague.

35. Due process requires that a statute provide fair notice of what conduct is prohibited so that "persons of common intelligence" do not have to "guess at its meaning and differ as to its application." *Peters-Riemers v. Riemers*, 2001 ND 62, ¶ 20, 624 N.W.2d 83, 89 (internal citations omitted). In the context of abortion specifically, exceptions to abortion bans are unconstitutionally vague if "physicians cannot know the standard under which their conduct will ultimately be judged." *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997).

36. The Amended Abortion Ban fails to provide adequate notice of when abortion is permitted or when it is prohibited. The use of vague, confusing, non-medical terminology in the exceptions invites conflicting interpretations of the law and leaves physicians who provide abortion care vulnerable to arbitrary prosecution.

37. The Serious Health Risk Exception states that it applies to "[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent death or a serious health risk." S.B. 2150, § 1. But nowhere does the statute explain who must "deem" that the abortion is necessary, or how a physician would know what the "reasonable medical judgment" of a "reasonably prudent physician" in a particular circumstance would dictate.

38. Further compounding the confusion, the exception combines both an *objective* standard—"reasonable medical judgment" as determined by a "reasonably prudent physician"—and a *subjective* standard—"intended to prevent the death or a serious health risk" to the patient. In other cases involving exceptions to abortion bans, courts have concluded that the combination

of an objective "reasonable medical judgment" and subjective "good faith" standard in this way "contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable." *Voinovich*, 130 F.3d at 204.

39. The concern that other physicians may second-guess one's judgment is particularly heightened in the context of abortion care, because "[t]he determination of whether a medical emergency or necessity exists . . . is fraught with uncertainty and susceptible to being subsequently disputed by others. . . . In an area as controversial as abortion, . . . where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably." *Id.* at 205. For that reason, abortion bans which lack a clear scienter requirement are "little more than 'a trap for those who act in good faith.'" *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)). "[I]mpos[ing] criminal liability without a mental culpability requirement" in this way renders an abortion ban unconstitutionally vague. *Voinovich*, 130 F.3d at 203-04.

40. The narrow Sex Offenses Exception is similarly confusing.[16] Physicians are not judges or prosecutors, yet the Sex Offenses Exception requires them to determine, "based on reasonable medical judgment," whether specific crimes have occurred and whether those crimes

[16] Because the Sex Offenses Exception limits care to the first six weeks of pregnancy, very few survivors of sexual violence would be able to access such care. Many people do not know that they are pregnant within the first six weeks of pregnancy, which may be only two weeks after a person's first missed period. Lauren J. Ralph et al., *Home pregnancy test use and timing of pregnancy confirmation among people seeking health care*, 107 Contraception 10 (Mar. 2022), https://www.contraceptionjournal.org/article/S0010-7824(21)00438-8/fulltext. For survivors of rape, studies estimate that about a third of rape victims do not discover they are pregnant until the second trimester (around fourteen weeks of pregnancy)—several weeks after the six-week deadline imposed by the Amended Abortion Ban. Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 Am. J. Obstetrics & Gynecology 320 (1996).

resulted in a pregnancy before they can provide abortion care to survivors of sexual violence. But it is not clear how a "reasonably prudent physician" would discern whether a patient's pregnancy resulted from "gross sexual imposition," "sexual imposition," "sexual abuse of a ward," or "incest." Indeed, the elements of these crimes, as defined in chapter 12.1-20, include evidence that a physician would have no way of knowing, such as whether a perpetrator acted with knowledge or "reasonable cause to believe that the victim is unaware that a sexual act is being committed upon him or her," or whether the perpetrator compelled the victim "to submit to force or by threat of imminent death" or "by any threat or coercion that would render a person reasonably incapable of resisting." N.D. Cent. Code §§ 12.1-20-03 to -04. Physicians do not have resources to investigate crimes, and even the most well-resourced police departments and prosecutors' offices, working in conjunction, may require more than a few weeks to determine whether they have sufficient evidence to support one of the enumerated crimes. The Sex Offenses Exception thus makes no sense; it "ask[s] our healthcare providers to exercise their reasonable medical judgment on what is inherently a question of law," even though "they are no more qualified to make a reasonable medical judgment about a legal question than a lawyer is to apply their reasonable legal judgment to a medical question."[17]

41. When "criminal penalties are at stake," due process requires that a statute provide clear guidance of what it prohibits to allow people to conform their behavior and to protect those it covers from arbitrary prosecution. *Vill. Of Hoffman Ests. v. Flipside, Hoffman Ests. Inc.*, 455 U.S. 489, 499 (1982). By failing to clearly articulate the standard under which their conduct will

[17] *Second Reading and Roll Call on S.B. 2150 Before the H.*, 68th Leg. Assemb., Reg. Sess., at 2:24:20 (N.D. Apr. 17, 2023) (statement of Rep. Zachary Ista), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230526/-1/30247?startposition=20230417142328#info_.

be judged, the exceptions to the Amended Abortion Ban do not provide physicians with constitutionally adequate notice of what care they may provide and facilitates arbitrary enforcement by police officers and prosecutors who question a physician's "reasonable medical judgment" after the fact.

C. The Amended Abortion Ban Violates the Rights of Pregnant Patients by Denying Them Health-Preserving Care.

i. The Serious Health Risk Exception Chills the Provision of Care in Many Situations Where A Patient's Physical Health is At Risk.

42. "North Dakota has a long history of permitting women to obtain abortions to preserve their life or health." *Wrigley v. Romanick*, 2023 ND 50, ¶ 23. As the Supreme Court recently noted, "[m]edical journals published shortly after statehood indicate it was common knowledge that an abortion could be performed to preserve the life or health of the woman." *Id.* at ¶ 25. As one medical journal from that time explained,

> [t]here are not infrequently cases in which *an abortion is imperative*: the mentally unfit who might become deranged; the woman with a narrow brim or outlet because of which her life might be in danger and a Cesarean section is the only relief; the woman who may bleed to death; the eclamptic; and those suffering from dangerous diseases.

Id. (quoting *Criminal Abortions*, 34 Journal-Lancet 81, 82 (1914) (emphasis added)). Then, as now, medical professionals recognized that abortion is necessary healthcare.

43. The Serious Health Risk Exception infringes on the inalienable rights of patients by chilling providers from offering health-preserving abortion care and thus making that care unavailable to patients. Vague exceptions to abortion bans which permit care only when an unknown person deems that care "necessary" discourage physicians from providing abortion care in situations where a patient's life or health is at risk but where the risk cannot be easily quantified. *See United States v. Idaho*, 623 F.Supp.3d 1096, 1104 (D. Idaho 2022) (finding, in discussing an Idaho abortion ban, that "[d]espite the risks [various] conditions present, it is not always possible

for a physician to know whether treatment for any particular condition, at any particular moment in time, is 'necessary to prevent the death' of the pregnant patient..."), *reconsideration denied*, No. 1:22-CV-00329-BLW, 2023 WL 3284977 (D. Idaho May 4, 2023).[18] Similarly, under the Amended Abortion Ban, even if a physician and patient agree that an abortion is necessary to preserve the patient's health, due to the ambiguity in the Serious Health Risk Exception, physicians will be reluctant to provide that care, and patients may not be able to obtain an abortion.

44. Many medical conditions pose a significant, but uncertain, risk to a person's health during pregnancy for which obtaining an abortion would be health-preserving care. Being pregnant can cause or exacerbate a chronic condition. For example, preexisting heart disease can put a pregnant patient at significant risks for health complications.[19] Cardiovascular conditions are among the leading causes of pregnancy-related deaths in the U.S. and are the leading cause of pregnancy-related death for Black women.[20] For many patients, heart conditions which may have caused little or no symptoms prior to pregnancy can become a threat to their health due to the significant physiological changes that happen during pregnancy, such as increase in blood volume,

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[18] *See also* Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade, 386 New Eng. J. Med. 2061, 2061 (June 2, 2022), https://www.nejm.org/doi/pdf/10.1056/NEJMp2206246?articleTools=true (describing a Michigan hospital's efforts to interpret a state law permitting abortions to "preserve the life" of the pregnant person).

[19] Syed Iftikhar & Mimi Biswas, *Cardiac Disease In Pregnancy*, StatPearls [Internet] (last modified Jul. 11, 2022), https://www.ncbi.nlm.nih.gov/books/NBK537261/.

[20] Trost, *supra* note 3, at 3.

increase in heart rate, and increase in cardiac output.[21] These symptoms may be mild in the beginning of pregnancy but can become more serious as pregnancy progresses.[22]

45. Similarly, certain cancers requiring radiation, chemotherapy, or major surgery; diabetes; renal diseases; certain cardiac, autoimmune, respiratory, or endocrine diseases; certain cases of hyperemesis gravidarum; and certain psychiatric conditions like bipolar disorder, major depressive disorder, anxiety disorders, and psychotic disorders can all be exacerbated by pregnancy, depending on the circumstances.

46. Pregnancy may also prevent patients from accessing treatment for chronic or serious conditions if that treatment is unsafe while pregnant. As an example, some breast cancer patients may not be able to begin or continue treatment while pregnant—and about 40% of pregnant cancer patients have breast cancer.[23] "[M]any targeted systemic therapies for breast cancer are explicitly contraindicated in pregnancy, which leaves traditional chemotherapy as the only option for many pregnant patients."[24] In the first trimester, chemotherapy may not be appropriate or safe for the embryo or fetus, potentially creating major malformations or fetal loss.[25]

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[21] *See* Iftikhar & Biswas, *supra* note 19.

[22] *Id.*

[23] Nicole T. Christian & Virginia Borges, *What* Dobbs *Means for Patients with Breast Cancer*, 387 New Eng. J. Med. 765-67 (Sept. 1, 2022), https://www.nejm.org/doi/pdf/10.1056/NEJMp2209249?articleTools=true; Gina Kolata, *After* Roe*, Pregnant Women With Cancer Diagnoses May Face Wrenching Choices*, N.Y. Times (Jul. 23, 2023), https://www.nytimes.com/2022/07/23/health/pregnant-woman-cancer-abortion.html.

[24] Christian & Borges, *supra* note 23, at 766.

[25] Sophie E. McGrath & Alistair Ring, *Chemotherapy for breast cancer in pregnancy: evidence and guidance for oncologists*, 3 Therapeutic Advanced Med. Oncology, 73 (Mar. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126038/.

Even when continuing the pregnancy is possible, patients may be unable to balance their own health treatment with the demands of pregnancy and then caring for an infant.[26]

47. Many medications used to treat other chronic conditions, such as high cholesterol or panic disorders, may not be safe to take during pregnancy because they may pose a risk to a developing embryo or fetus.[27] For patients who take those drugs who become pregnant, they must decide either to continue taking a necessary medication and risk harm to the embryo or fetus, stop taking the drug and risk harm to themselves, or terminate the pregnancy.

48. For patients with heart disease, cancer, high cholesterol, or any number of chronic or serious conditions, a patient and her physician may believe that an abortion is necessary to preserve the patient's health. But because of the Amended Abortion Ban's chilling effect, even patients with serious and potentially life-threatening medical conditions may be unable to obtain an abortion in North Dakota.

49. Moreover, the Serious Health Risk Exception denies patients autonomy over their healthcare decisions. Patients, not physicians, decide whether and to what extent to tolerate medical risks. Physicians inform patients of the risks of obtaining, deferring, or declining medical care. The patient can choose to seek a second (or third or fourth) opinion if they like. The Serious Health Risk Exception forces patients to tolerate as much risk to their life and well-being as a

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[26] Christian and Borges, *supra* note 23, at 765.

[27] *See, e.g.*, Änne Bartels & Keelin O'Donoghue, *Cholesterol in pregnancy: a review of knowns and unknowns*, 4 Obstetric Med. 147, 148 (Dec. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4989641/ ("HMG CoA-reductase inhibitors (statins), which are the most commonly used drugs to treat high cholesterol outside of pregnancy, are contraindicated."); Aff. of Samantha Meltzer-Brody, M.D. ¶¶ 40-41, *SisterSong Women of Color Reprod. Just. Collective v. Georgia*, No. 2022CV367796, 2022 WL 3335938 (Ga. Super. Ct. July 23, 2022) (discussing patient who was concerned about having to stop medication for bipolar disorder during pregnancy).

hypothetical physician might tolerate, despite the fact that it is not typically a physician's role to make these types of highly personal decisions on their patients' behalf.

50. North Dakotans have a fundamental right to health-preserving abortion care, and laws which chill the provision of that care infringe on that right and harm pregnant people. Tellingly, every major mainstream medical organization, including ACOG, the American Medical Association ("AMA"), the American College of Emergency Physicians ("ACEP"), and the Society for Maternal-Fetal Medicine ("SMFM") opposes bans on healthcare which interfere with the physician-patient relationship. Such interference is contrary to the appropriate exercise of professional judgment that medical professionals need to exercise to protect patients' well-being. The AMA recently updated its Principles of Medical Ethics to clarify that in the context of abortion, "physicians must have latitude to act in accord with their *best* professional judgment" and be "expressly permitt[ed]…to perform abortions in keeping with good medical practice."[28] The AMA also states that, "[l]ike all health care decisions, a decision to terminate a pregnancy should be made privately within the relationship of trust between patient and physician in keeping with the patient's unique values and needs and the physician's best professional judgment."[29]

ii. The Amended Abortion Ban Denies Patients Health-Preserving Care When Their Mental Health is At Risk.

51. The Amended Abortion Ban explicitly excludes "any psychological or emotional condition" from the definition of "[s]erious health risk"—despite the fact that mental health

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[28] *AMA Announces New Adopted Policies Related to Reproductive Health Care*, Am. Med. Ass'n (Nov. 16, 2022), https://www.ama-assn.org/press-center/press-releases/ama-announces-new-adopted-policies-related-reproductive-health-care (emphasis added).

[29] *Amendment to Opinion 4.2.7, Abortion H-140.823*, Am. Med. Ass'n (2022) https://policysearch.ama-assn.org/policyfinder/detail/%224.2.7%20Abortion%22?uri=%2FAMADoc%2FHOD.xml-H-140.823.xml.

conditions can be exacerbated by pregnancy, that pregnancy may prevent people from taking necessary medications for mental health treatment, and that mental health is among the most common causes of pregnancy-related deaths. For patients with mental health conditions that put them at risk of lasting harm or death, obtaining an abortion may be necessary to preserve their life or health.

52. Pregnancy can have significant effects on a person's mental health and may both exacerbate existing conditions and lead to new ones. Approximately 20% of pregnant people experience mental health complications.[30] And "mental health conditions are the most common complications of pregnancy and childbirth."[31] People with a history of mental health disorders or a history of child abuse or neglect are particularly vulnerable to experiencing pregnancy-related psychological distress.[32] Obtaining medical treatment for mental health conditions is plagued with obstacles because screening and diagnosis are unevenly implemented, referrals to therapists and

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[30] Michael W. O'Hara & Kat Wisner, *Perinatal mental illness: Definition, Description and Aetiology*, 28 Best Prac. & Rsch. Clinical Obstetrics & Gynaecology 3 (Jan. 2014).

[31] Adrienne Griffen et al., *Perinatal Mental Health Care In The United States: An Overview Of Policies And Programs*, 40 Health Aff. (Millwood), 1543, 1543 (Oct. 2021), https://pubmed.ncbi.nlm.nih.gov/34606347/.

[32] Lucy Ogbu-Nwobodo et al., *Mental Health Implications of Abortion Restrictions for Historically Marginalized Populations*, 387 New Eng. J. Med. 1613 (Oct. 27, 2022), https://www.nejm.org/doi/pdf/10.1056/NEJMms2211124?articleTools=true; *FAQs Postpartum Depression*, Am. Coll. of Obstetricians and Gynecologists, https://www.acog.org/womens-health/faqs/postpartum-depression (last visited June 2, 2023) (noting that people with a history of depression are more likely to develop postpartum depression).

psychiatrists are infrequent, and there is a shortage of available mental health providers.[33] As a result, the overwhelming majority of people who struggle with mental health conditions associated with pregnancy do not receive treatment.[34]

53. Pregnancy-related mental health complications can have a devastating effect on a person's well-being. The symptoms of postpartum depression can be severe and include depressed mood, excessive crying, withdrawing from family and friends, inability to sleep or sleeping too much, irritability and anger, hopelessness, severe anxiety, and recurring thoughts of death or suicide.[35] Without proper treatment, the symptoms can last for months or longer.[36] Likewise, postpartum psychosis is an emergent medical condition.[37] Patients with postpartum psychosis may experience hallucinations, delusions, mania, insomnia, or thoughts of harming themselves or others.[38]

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[33] Stacy Weiner, *A growing psychiatrist shortage and an enormous demand for mental health services*, Ass'n of Am. Med. Colls. (Aug. 9, 2022), https://www.aamc.org/news/growing-psychiatrist-shortage-enormous-demand-mental-health-services; Griffen et al., *supra* note 31, at 1543; Taylor Ghahremani et al., *Women's Mental Health Services and Pregnancy: A Review*, 77 Obstetrical & Gynecological Surv., 122, 123, 127-28 (Feb. 2022), https://pubmed.ncbi.nlm.nih.gov/35201363/.

[34] *Addressing Maternal Mortality in Medicaid by Focusing on Mental Health*, Am. J. of Managed Care (Feb. 14, 2023), https://www.ajmc.com/view/addressing-maternal-mortality-in-medicaid-by-focusing-on-mental-health.

[35] *Postpartum depression*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/postpartum-depression/symptoms-causes/syc-20376617 (last visited June 1, 2023).

[36] *Id.*

[37] *Postpartum Psychosis*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/24152-postpartum-psychosis (last visited June 1, 2023).

[38] *Id.*

54. Mental health is the most frequent underlying cause of pregnancy-related deaths in the United States.[39] Indeed, approximately 23% of pregnancy-related deaths are associated with mental health conditions, including deaths caused by suicide and substance use disorder.[40]

55. Patients who have previously experienced perinatal mental health conditions are at higher risk of experiencing those same conditions in a subsequent pregnancy.[41] For example, patients with a history of postpartum depression have a 20-25% risk of having another depressive episode with a future pregnancy.[42] Likewise, patients who have experienced postpartum psychosis—a serious condition that can be life-threatening—have a greater than 50% risk of experiencing a recurrence in a future pregnancy.[43] Given the high risk of recurrence of these disorders, people with a history of serious perinatal mental health conditions may determine that it is necessary to terminate a pregnancy to preserve their mental health.

56. Additionally, some medications used to treat common psychiatric conditions may cause serious congenital malformations in the fetus, yet are necessary for maintaining the pregnant person's mental health.[44] For example, lithium, which is used to treat bipolar disorder, is associated

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[39] Trost, *supra* note 3.

[40] *See id.*

[41] "Perinatal" refers to the period immediately before and after birth. *Perinatal Depression*, Nat'l Inst. of Mental Health, https://www.nimh.nih.gov/health/publications/perinatal-depression (last visited June 1, 2023).

[42] Katherine L. Wisner & Paul S. Appelbaum, *Abortion Restriction and Mental Health*, 80 JAMA Psychiatry, 285, 285 (Apr. 2023).

[43] *Id.*

[44] *Id.*

with several adverse fetal health outcomes, including cardiac malformations and arrythmias.[45] Similarly, valproic acid, a type of antiepileptic drug used to treat bipolar disorder, has been associated "with an increased risk of neural tube defects, craniofacial and cardiovascular anomalies, fetal growth restriction, and cognitive impairment."[46] For some patients, valproic acid may be the only medication that effectively treats their bipolar disorder; discontinuing the medication could lead to the recurrence of the underlying disorder, and trying another drug during pregnancy may not be a viable option.[47] Like patients who rely on medications to stabilize their physical health, patients who take psychotropic drugs to treat mental illness face the decision of whether to stop a necessary medication and allow their own health to decline, continue the medication and risk harm to the fetus, or terminate the pregnancy.[48]

57. Physicians have described the harm that abortion bans cause to patients with underlying mental health conditions for whom providing an abortion would preserve their mental health. For example, one physician described treating a patient who had to travel out of state for abortion care, a preventable hardship that undermined her psychological and economic safety:

> [The patient] traveled on an airplane for the first time ever, . . . using her whole paycheck to buy tickets, rent a hotel. . . . She was raped two months ago. Each episode of morning sickness causes [post-traumatic stress disorder symptoms] so intense she tried to take her life yesterday. If abortion was legal in her home state, several things would be different 1) she could have accessed an abortion more promptly 2) perhaps therefore she wouldn't have had an escalation of PTSD such that she tried to kill herself, [and] 3) she'd have more money in her bank account,

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[45] Carrie Armstrong, *ACOG Guidelines on Psychiatric Medicine Use During Pregnancy and Lactation*, 78 Am. Fam. Physician 772 (2008), https://www.aafp.org/pubs/afp/issues/2008/0915/p772.html.

[46] *Id.*

[47] Wisner & Appelbaum, *supra* note 42, at 285.

[48] *Id.*

> super important given she's a single parent and her family who doesn't support abortion even in cases of rape, just kicked them both out.[49]

The patient ultimately did not get an abortion that day because, according to the physician, "she felt she was too emotionally unstable" to make the decision.[50] Her physician fully supported that decision but still "fear[s] for her life, the ongoing pregnancy, her young child. I fear she won't have money to return and get her abortion. I fear she could kill herself first."[51]

58. In recent legal challenges to restrictive abortion bans, physicians have explained the need to allow for abortion care to preserve a patient's mental health and the severe risks for patients when abortion care is not available. For example, in one case, a physician testified that she had a patient who experienced "debilitating postpartum psychosis" after the birth of a child. The physician described the patient's symptoms as "excruciating" and noted the "strong association between postpartum psychosis and maternal suicide." After the patient's condition had improved, she unintentionally became pregnant again. Her physician testified,

> She was gravely concerned about either stopping her medication during pregnancy and experiencing a worsening of her bipolar disorder, or continuing her medication and exposing the fetus to serious teratogenic risks. But even more than that, she was terrified at the thought of experiencing postpartum psychosis again and potentially hurting her child or herself. This patient told me repeatedly that she felt such overwhelming distress at the thought of continuing the pregnancy that she would rather die than go on.[52]

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[49] Grossman et al., *supra* note 4, at 12.

[50] *Id.*

[51] *Id.*

[52] Aff. of Samantha Meltzer-Brody, M.D. ¶¶ 40-41, *SisterSong Women of Color Reprod. Just. Collective v. Georgia*, No. 2022CV367796, 2022 WL 3335938 (Ga. Super. Ct. July 23, 2022).

Other physicians have similarly testified about patients who considered suicide or were placed on suicide watch after being denied abortion care.[53]

59. Pregnant North Dakotans have a fundamental right to obtain an abortion to preserve their mental health. *See Wrigley v. Romanick*, 2023 ND 50, ¶ 25 (listing "the mentally unfit who might become deranged" among conditions where abortion is medically necessary care) (quoting *Criminal Abortions*, 34 Journal-Lancet 81, 82 (1914)). And the state of North Dakota has an interest in preventing patient suicide. *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995). That interest is subordinate to a patient's own right to bodily autonomy. *Id.* With the Amended Abortion Ban, the government is failing to fulfill its duty to the state and people of North Dakota by disregarding the state interest in reducing patient suicide while simultaneously overriding individual patients' bodily autonomy.

iii. The Amended Abortion Ban Prohibits Abortion Even When Ending the Pregnancy Would Preserve the Health of the Pregnant Person and When There is Little to No Possibility of Fetal Survival.

60. The Amended Abortion Ban has no exception to allow patients to end pregnancies where there is little to no possibility of fetal survival, even though certain fetal conditions or diagnoses may place the pregnant person's health at risk. There are many conditions where the fetus either will not survive to birth or likely will not survive more than a few hours or days after birth, including neural tube defects (including anencephaly); certain trisomies (the presence of an extra chromosome) like trisomy 13 and 18; triploidy (the presence of an extra set of chromosomes); certain gastric and cardiac conditions in the fetus; and Potter Syndrome (where the fetus does not

[53] *See, e.g.*, Aff. of Dr. Sharon Liner ¶ 11, *Preterm-Cleveland v. Yost*, No. A2203203 (Ohio Ct. Com. Pl. Sept. 2, 2022) ("We have had at least 3 patients threaten to commit suicide. Another patient stated that she would attempt to terminate her pregnancy by drinking bleach."); Aff. of David Burkons, M.D. ¶ 9, *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL 4279758 (Ohio Ct. Com. Pl. Sept. 2, 2022).

develop functional kidneys). Patients with such pregnancies may choose abortion, which is medically safer and preserves the patients' health, rather than carrying the pregnancy to term and birthing a baby that will not survive.

61. Carrying a pregnancy to term and experiencing childbirth come with higher risks for morbidity and mortality than having an abortion. The mortality rate associated with childbirth in the United States is approximately 14 times higher than that associated with abortion.[54] And studies have demonstrated that banning abortion would increase maternal mortality.[55]

62. Many of the most dangerous pregnancy complications, such as pregnancy-induced hypertension and placental abnormalities, arise later in pregnancy. *See* Decl. of Mark Nichols (Dkt. #8), ¶ 15. And "[a]lmost half of vaginal and caesarean deliveries are associated with at least one medical complication, including hemorrhage, infection, injury to pelvic and abdominal organs and muscles, and creation of scar tissue." *Id.* at ¶16. Early termination of the pregnancy reduces the patient's risk of experiencing these serious complications or conditions.

63. Some fetal conditions pose particularly acute risks to the pregnant person. For example, mirror syndrome is an emergent complication of pregnancy where both the pregnant

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[54] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (2012).

[55] Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 Demography 2019 (2021), https://read.dukeupress.edu/demography/article/58/6/2019/265968/The-Pregnancy-Related-Mortality-Impact-of-a-Total; *see also* Raymond & Grimes, *supra* note 54.

person and the fetus experience severe fluid retention. Terminating the pregnancy resolves the risk to the patient.[56]

64. Likewise, terminating a pregnancy due to a fetal condition or diagnosis may be particularly important in multifetal pregnancies. In multifetal pregnancies, a fetal condition in one or more of the fetuses can lead to an emergent condition where selective abortion (sometimes called selective "fetal reduction" or "fetal termination") is necessary to give the pregnant person and the remaining fetus(es) the best chance of survival.[57] For example, "in some cases (e.g. complications of monochorionic twins) failure to perform [fetal reduction] could result in the loss of both twins."[58]

65. North Dakotans have publicly testified about the importance of allowing pregnant people to make their own determinations about abortion in cases where a fetus is unlikely to survive or sustain life after birth. Rebecca Matthews testified against S.B. 2150 and shared the story of her third pregnancy from over 15 years ago. Rebecca was pregnant with identical twin girls who shared a placenta and had a rare condition called twin-to-twin transfusion syndrome. In 2007, she traveled out of state and was contemplating whether to terminate one twin to save the other. Rebecca described this time as a "living hell," "spent in prayer" accompanied by her two children. She described how she "learned to lean on [her] Maternal Fetal Medicine doctor and

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[56] *See* Caroline Ruth Mathias et al., *The diagnostic conundrum of maternal mirror syndrome progressing to pre-eclampsia*, 23 Case Reps. in Women's Health e00122 (Jul. 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6542765/.

[57] *Practice Bulletin 231: Multifetal Gestations Twins Triplet and Higher-Order Multifetal Pregnancies*, Am. Coll. of Obstetricians and Gynecologists (June 2021), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2021/06/multifetal-gestations-twin-triplet-and-higher-order-multifetal-pregnancies.

[58] Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans – Texas Senate Bill 8*, 387 New Eng. J. Med. 388, 389 (Aug. 4, 2022).

Fetal Surgeon staff to understand all the medical options available for the most optimal outcome." (cleaned up). And while she was grateful that she could "navigate all the options available" to her, she eventually lost both twins and delivered them stillborn.[59]

66. Another North Dakotan, Mandy Dendy, discovered halfway through her first pregnancy that the fetus had no kidneys—a condition called Potter Syndrome, for which there are no treatments. Mandy and her husband had to decide whether to "carry a child that was given no chance of survival . . . or terminate the pregnancy." Hoping her son would survive, she decided to carry her pregnancy to term. Just in case, she arranged for a priest to baptize her son in the delivery room, and for a funeral and burial. Around week thirty-seven of pregnancy, she delivered her son. Within hours of birth, he died. Mandy has experienced this twice; during her fifth pregnancy, she again learned that her fetus had Potter Syndrome and again chose to carry the pregnancy to term. Highlighting the importance of having a choice, she said, "we don't regret the choices we made in carrying our sons to term despite both of them dying within hours of their births. Having a choice in a situation where you have such little control is important."[60]

67. Without exceptions in North Dakota law to allow for such terminations, patients who choose to end a pregnancy due to a fetal condition or diagnosis must do so out of state, in a short window of time, at considerable added travel expense and often without insurance

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[59] *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. (N.D. Jan. 16, 2023) (statement of Rebeca Matthews), https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13872-A-MATTHEWS_REBECCA.pdf.

[60] *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. (N.D. Jan. 16, 2023) (statement of Mandy Dendy), https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13562-N-DENDY_MANDY.pdf.

coverage.[61] Nearly every physician who offered testimony on S.B. 2150—including Dr. Tobiasz, Dr. Lessard, and Dr. Boe—urged the legislature to allow for exceptions in such situations so that patients could access care in their home state.[62] As one physician explained, allowing abortions in cases where the fetus is unlikely to survive the pregnancy and sustain life after birth in North Dakota is "necessary so that all women can continue [to] trust that they can seek and receive safe care in this state when these unfortunate situations arise."[63]

68. In these circumstances, patients have a right to decide whether to obtain an abortion to preserve their physical and mental health. Forcing a pregnant person to assume additional health

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[61] See *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. 2 (N.D. Jan. 16, 2023) (statement of Ciara Johnson), https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13567-F-JOHNSON_CIARA.pdf. ("Eliminating [abortion access in cases of fetal conditions where the fetus is unlikely to survive the pregnancy and sustain life after birth] is a true disservice to our own people and places social and financial burdens on women who are already in very difficult situations.").

[62] *See Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. 3 (N.D. Jan. 16, 2023) (statement of Ana Tobiasz), https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13415-F-TOBIASZ_ANA.pdf ("Forcing these women to carry these pregnancies to term poses a risk to their health . . . I would respectfully ask that consideration be given for an amendment that would allow for these families to stay in state and have an in-hospital labor induction at the time these conditions are diagnosed rather than having to travel out of state."); *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. 3 (N.D. Jan. 16, 2023) (statement of Collette Lessard), https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13433-F-LESSARD_COLLETTE_R.pdf ("Pregnancy comes with risks, even in the healthiest women. We should allow these families to make these decisions for their child while in the uterus, just like they are allowed to make decisions about withdrawing care or providing supportive care for their child after birth. This also allows the patient and her family to consider the risks to her with delivering the baby in the second trimester for example, compared to carrying to full-term."); *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Leg. Assemb., Reg. Sess. 2 (N.D. Jan. 16, 2023) (statement of Brendan Boe, https://www.ndlegis.gov/assembly/68-2023/testimony/SJUD-2150-20230116-13338-F-BOE_BRENDAN_M.pdf ("These are impossible and heart-wrenching decisions that families sometimes have to make, and I ask that you consider allowing them to make those decisions prior to advanced gestation or delivery.").

[63] *Bill Hearing on S.B. 2150 Before the S. Judiciary Comm.*, (statement of Ciara Johnson), *supra* note 61.

risks when there is little to no possibility that the fetus will survive does not further a legitimate state interest. *See Johnson v. Wyoming*, Civ. Action No. 18732 at 18 (Dist. Ct., 9th Jud. Dist., Teton County, Wyo., Aug. 10, 2022) (Order Granting Prelim. Inj.) (finding, in a case involving a similar law, that "[w]hen the potential life is found to have a diagnosable genetic defect that is incompatible with life, the Court could find that the [law] is beyond a reasonable doubt, not related to a legitimate government interest").

CLAIMS FOR RELIEF

First Claim for Relief

(Due Process/Void for Vagueness)

69. The allegations of paragraphs 1 through 68 are incorporated as though fully set forth herein.

70. The Amended Abortion Ban's vague language violates the North Dakota Constitution's guarantee that a person will not be deprived of their fundamental rights without due process of law, as guaranteed by N.D. Const., art. I, § 12. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates . . . due process of law." *In Int. of D.D.*, 2018 ND 201, ¶ 7, 916 N.W.2d 765, 768 (N.D. 2018) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926)).

71. The Amended Abortion Ban does not provide notice of whether, when, or how its exceptions apply in a variety of situations common in pregnancy, because it: (1) fails to use clear and unambiguous language to describe each of the exceptions; (2) describes the exceptions in contradictory and impossible to apply ways by forcing physicians to guess at what a "reasonably prudent physician" would do (in the case of the Serious Health Risk Exception) or to determine whether a crime has been committed (in the case of the Sex Offenses Exception); and (3) in the

case of the Serious Health Exception, improperly combines an objective and subjective standard. As a result of these defects, providers may be prosecuted under the Amended Abortion Ban even if they act in good faith based on their best medical judgment and the standard of care.

Second Claim for Relief

(Right to Life and Safety – Right to Health-Preserving Care)

72. The allegations of paragraphs 1 through 71 are incorporated as though fully set forth herein.

73. The North Dakota Constitution guarantees all people the inalienable right of "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness." N.D. Const. art. I, § 1. "These rights implicitly include the right to obtain an abortion to preserve the woman's life or health." *Wrigley v. Romanick*, 2023 ND 50, ¶ 22. The due process language in art. I, § 12 of the Constitution "protects and insures the use and enjoyment of the rights declared" by art. I, § 1. *State v. Cromwell*, 72 N.D. 565, 575, 9 N.W.2d 914, 919 (1943).

74. While "the legislature can regulate abortion, it must do so in a manner that is narrowly tailored to achieve the compelling interest." *Wrigley v. Romanick*, 2023 ND 50, ¶ 30.

75. The Amended Abortion Ban unconstitutionally deprives Plaintiffs' patients of their right to life and safety under art. I, § 1 and art. I, § 12 of the Constitution of the State of North Dakota by chilling the provision of abortion care and by making abortions unavailable to pregnant North Dakotans who experience risks to their mental rather than physical health, even when the North Dakota Supreme Court has cited to the long history of recognizing that abortion may be necessary to preserve a pregnant person's mental health. Furthermore, the Amended Abortion Ban must fail because there is no legitimate government interest in forcing pregnant people to assume

additional health risks where the fetus is unlikely to survive the pregnancy and sustain life after birth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

76. Issue a judgment that the Amended Abortion Ban violates the Constitution of the State of North Dakota and is void for vagueness and of no effect;

77. Issue a judgment against Defendants granting appropriate declaratory relief to clarify the scope of the exceptions to the Amended Abortion Ban consistent with the North Dakota Constitution;

78. Issue a judgment that the Amended Abortion Ban, as applied to pregnant people with mental health conditions and people carrying pregnancies where the fetus is unlikely to survive the pregnancy and sustain life after birth, violates the North Dakota Constitution;

79. Issue permanent injunctive relief that restrains Defendants, their agents, servants, employees, attorneys, and any persons in active concert or participation with Defendants, from enforcing the Amended Abortion Ban or instituting disciplinary actions related to alleged violations of the Amended Abortion Ban in a manner violating the Court's judgment; and

80. Grant such other and further relief as the Court may deem just and proper.

Dated this 12th day of June, 2023

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