IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MKB Management Corp, dba Red River Women's Clinic, Kathryn L. Eggleston, M.D.,	)	
Plaintiffs,	)	**Supreme Ct. No. 20130259**
vs.	)	**District Ct. No. 09-2011-CV-02205**
Birch Burdick, in his official capacity as State Attorney for Cass County, Terry Dwelle, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health,	)	
Defendants.	)	

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

HONORABLE WICKHAM CORWIN

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

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STATEMENT OF THE ISSUES

I. In interpreting a constitutional provision, a court's duty is to ascertain the intent of the people who adopted the provision. To do so, the court considers the contemporary legal practices and laws in effect when the provision was adopted. Before, when, and for decades after the North Dakota Constitution was adopted, North Dakota law prohibited abortion. Did the district court err by holding the North Dakota Constitution creates a fundamental right for a woman to have an abortion?

II. Plaintiffs did not bring a claim under the Federal Constitution, and courts refrain from deciding constitutional issues not necessary to resolve the case before them. The district court held the challenged bill violates the Fourteenth Amendment to the Federal Constitution. Did the district court err in addressing the challenged bill's constitutionality under the Federal Constitution?

III. If a statute is capable of two constructions and one will render the statute constitutional, a court must select the constitutional interpretation. The district court rejected reasonable, constitutional interpretations of the challenged bill. Did the district court err by not selecting the constitutional interpretations?

STATEMENT OF THE CASE

During the 2011 Legislative session, the North Dakota Legislative Assembly enacted 2011 House Bill No. 1297. App. 231.[1] HB 1297 made changes to the North Dakota Abortion Control Act, codified in N.D.C.C. ch. 14-02.1. In August of 2011, MKB Management Corporation served the North Dakota Department of

[1] "App." refers to the Appendix; "Doc." refers to the district court docket.

Health (the State) with a Summons and Complaint. The Complaint alleges Sections 1 and 6 and part of Section 8 of HB 1297 violate the North Dakota Constitution. Id. at 10, 18, 27-30. The challenged sections regulate medication abortions. Medication abortion is an alternative to surgical abortion.

In February 2012, the district court enjoined enforcement of the challenged sections during the pendency of the proceedings. Id. at 133. In its order, the district court held that the North Dakota Constitution protects a woman's right to choose to have an abortion and that a woman's right to choose to have an abortion under the North Dakota Constitution is fundamental. Id. at 86.

After trial, the district court issued its Memorandum Opinion and Order for Permanent Injunction (Final Order). Id. at 151. In the Final Order, the district court held a law impacting a woman's right to choose to have an abortion is subject to review under the "strict scrutiny" standard. Id. at 154, 161. The district court found the challenged sections of HB 1297 violate "the fundamental rights protected by the first and twelfth sections of article one of the Constitution of North Dakota." Id. at 207. It permanently enjoined enforcement of sections 1(2), 1(4), 6(2), 6(4), and 6(5) of HB 1297 and directed the clerk "to enter a final judgment pursuant to N.D.R.Civ.P. 54(b)." Id. at 208.

Rule 54(B) Judgment was entered on July 15, 2013 (Judgment). Id. at 209. The State timely appealed the Judgment on August 26, 2013. Id. at 229.

Prior to the district court entering its Judgment, MKB supplemented its complaint to challenge the constitutionality of 2013 Senate Bill 2305. App. 134. The district court preliminarily enjoined enforcement of SB 2305 on July 31, 2013

(Preliminary Injunction). Id. at 228. The State timely appealed the Preliminary Injunction. Id. at 230.

STATEMENT OF THE FACTS

Because the State challenges the Judgment and Preliminary Injunction on legal, not factual, grounds, the only facts relevant to the issues before the Court are the language in sections 1 and 6 of HB 1297. The language of SB 2305 is not relevant because the district court has not issued a final judgment interpreting SB 2305.[2] Sections 1 and 6 of HB 1297 are at pages 231, 236, and 237 of the Appendix, and codified at N.D.C.C. §§ 14-02.1-02(3), (5) and 14-02.1-03.5.

STANDARD OF REVIEW

Interpretation of a statute or constitutional provision is a question of law. Albright v. N.D. Workforce Safety & Ins., 2013 ND 97, ¶ 13, 833 N.W.2d 1. Whether a statute violates the North Dakota Constitution is also a question of law. Simons v. Dep't of Human Servs., 2011 ND 190, ¶ 23, 803 N.W.2d 587. This Court reviews questions of law de novo. Id.

LAW AND ARGUMENT

I. HB 1297 does not violate the North Dakota Constitution.

A. To be struck down, a state statute must be found unconstitutional beyond a reasonable doubt.

MKB has a substantial burden when attempting to prove the unconstitutionality of a state statute. "All regularly enacted statutes carry a

[2] Because the Preliminary Injunction only makes a preliminary assessment of the facts, see App. 224 n.12, the State's appeal of the order is limited to the district court's legal error of finding a right to abortion under the North Dakota Constitution and applying the "strict scrutiny" standard to determine whether MKB was likely to prevail on the merits. Id. at 218, 224.

strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." Simons v. Dep't of Human Servs., 2011 ND 190, ¶ 23, 803 N.W.2d 587. "Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity." Id. In fact, "[t]he presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt." Id.

The stringent burden for establishing unconstitutionality is mandated by the various roles the North Dakota Constitution assigns to the three branches of our government. See Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967). The power to declare legislative acts unconstitutional is "one of the highest functions of" and "one of the greatest responsibilities of the courts," and "should be exercised with great restraint, caution, and even with reluctance." Montana Dakota Utils. Co. v. Johanneson, 153 N.W.2d 414, 420 (N.D. 1967); see also Simons, 2011 ND 190, ¶ 23, 803 N.W.2d 587. The power of this Court to declare legislative acts unconstitutional is so significant that the North Dakota Constitution provides that four justices on the Supreme Court (rather than the usual majority) must find that a statute violates the North Dakota Constitution before it may be declared unconstitutional. N.D. Const. art. VI, § 4.

MKB failed to meet its heavy burden of proving HB 1297 violates the North Dakota Constitution. It also failed to demonstrate it has a substantial likelihood of success of proving SB 2305 is unconstitutional. For these reasons, the district court's Judgment and Preliminary Injunction should be reversed.

B. No right to abortion exists in the North Dakota Constitution.

Significantly, MKB only challenges HB 1297 under the North Dakota Constitution, not the Federal Constitution. App. 10, 27-30. Thus, the initial and primary issue before this Court is whether a right to abortion exists in the North Dakota Constitution. This is an issue of first impression. Because Article I, Section 1 (Section 1) and Article I, Section 12 (Section 12) do not create a fundamental right to have an abortion, the district court's Judgment and Preliminary Injunction should be reversed.

1. Sections 1 and 12 must be interpreted to ascertain the intent of the people who adopted them.

This Court has explained that "[t]he object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it." State v. Robinson, 160 N.W. 514, 516 (N.D. 1916). Accordingly, in construing a constitutional provision, courts "undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted." Kadrmas v. Dickinson Pub. Sch., 402 N.W.2d 897, 899 (N.D. 1987).

To ascertain the intent of the people adopting a constitutional provision, "it is appropriate to consider contemporaneous and long-standing practical interpretations of the provision by the Legislature where there has been acquiescence by the people in such interpretations." Kadrmas, 402 N.W.2d at 899. Thus, to determine the meaning and scope of constitutional provisions, courts consider the contemporary legal practices and laws in effect when the provision was adopted. See State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985)

(interpreting Section 12 based on statutes in effect when Constitution was adopted); City of Bismarck v. Altevogt, 353 N.W.2d 760, 764-65 (N.D. 1984) (reviewing territorial statutes to interpret constitutional right to jury trial); Martian v. Martian, 328 N.W.2d 844 (N.D. 1983) (finding no right to jury trial in divorce proceeding because jury trials were not available in divorce cases under common law or by statute at the time the Constitution was adopted). In other words, "the North Dakota Constitution must be read in the light of history." State v. Allesi, 216 N.W.2d 805, 817 (N.D. 1974).

2. The North Dakota Constitution is not required to be interpreted to extend the same rights as the Federal Constitution.

This Court independently interprets the North Dakota Constitution in light of its text and history. In doing so, the Court determines whether the North Dakota Constitution provides a specific right and, if it does, the scope of that right. If it determines the North Dakota Constitution provides a specific right, it can interpret the North Dakota Constitution to provide less, more, or greater protection of that right than the Federal Constitution.

Whether the North Dakota Constitution provides a right to abortion is not dependent on whether a right to abortion has been found in the Federal Constitution; the North Dakota Constitution should be interpreted to give effect to the intent of the people who adopted it. The intent of the people who adopted the North Dakota Constitution is not evidenced by federal courts' interpretations of the Federal Constitution decades after the North Dakota Constitution was adopted.

A fundamental and critical flaw in the district court's analysis was the belief a state constitution has to be interpreted to protect the same rights deemed protected by the Federal Constitution. See App. 157, 161, 175. Although it is true under the Supremacy Clause of the Federal Constitution that a state cannot apply its laws, constitutional or statutory, to deny a person of a federal constitutional right, it is not true that a state court must interpret its state constitution to protect the same rights protected by the Federal Constitution.

The Michigan Supreme Court correctly noted federal constitutional rights are not necessarily incorporated into state constitutions. It wrote:

> Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution.

Sitz v. Dep't of State Police, 506 N.W.2d 209, 216-17 (Mich. 1993). The Michigan Supreme Court further explained: "As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." Id. at 217. Other courts have reached the same conclusion. See, e.g., Sanders v. State, 585 A.2d 117, 146 n.25 (Del. 1990) ("Since the Delaware Constitution is an organic body of law, there is no reason why it cannot be interpreted to provide fewer protections than the Federal Constitution."); Taylor v. State, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994) ("Indiana courts have the responsibility of independent constitutional analysis. . . . In carrying out this responsibility, our courts should decide such issues independently of federal law. . . . Decisions of the United States Supreme

Court and other federal courts construing similar federal constitutional provisions may be persuasive, but Indiana courts should grant neither deference, nor precedential status, to such cases when interpreting provisions of our own constitution."); West v. Thompson Newspapers, 872 P.2d 999, 1004 n.4 (Utah 1994) ("The scope of state constitutional protection for expression may be broader or narrower than the federal, depending on the state constitution's language, history, and interpretation.").

When interpreting the state constitution, a state court's first step is to determine whether a right itself is incorporated into the state constitution. It is only after a court determines a right is incorporated into the state constitution that the court determines the scope of the state constitution's protection of that right. See Earl M. Maltz, False Prophet–Justice Brennan and the Theory of State Constitutional Law, 15 HASTINGS CONST. L. Q. 429, 444 (1988). The simple, but critical, point misapplied by the district court is that the Federal Constitution does not prevent state courts from interpreting their state constitutions not to protect rights protected by the Federal Constitution.

This Court's language in Southeast Cass Water Resource District v. Burlington Northern Railroad Co., 527 N.W.2d 884, 890 (N.D. 1995), should not be read to require courts to ignore the intent of the people adopting the North Dakota Constitution and to blindly incorporate federal constitutional interpretations into the North Dakota Constitution. In that case, the Court wrote it "cannot interpret our state constitution to grant narrower rights than [those] guaranteed by the federal constitution." Id. at 890. That statement should be

understood from the perspective of practical application, not interpretation, i.e., the state constitution may not be applied in a manner as to deprive someone of a federal constitutional right. In fact, the case the Court cited in support of the quoted statement, State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974), simply states the unremarkable proposition that "[i]t is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution." That proposition does not prohibit courts from interpreting the North Dakota Constitution not to protect a right protected by the Federal Constitution (or, if the North Dakota Constitution is found to protect a right protected by the Federal Constitution, to provide the right less protection than provided by the Federal Constitution). Although "[i]t is now axiomatic that the state may grant greater but not lesser protections than the United States Constitution," State v. Herrick, 1997 ND 155, ¶ 19, 567 N.W.2d 336, that does not mean the North Dakota Constitution must be interpreted to protect the same rights held protected by the Federal Constitution. It simply means the State cannot deny a person the protection of the Federal Constitution simply because the same protection does not exist in the North Dakota Constitution.

This principle of state constitutional interpretation is supported by cases from other jurisdictions addressing challenges to abortion laws. For example, in Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997), the court conducted independent analysis and determined the Michigan Constitution does not confer a state right to abortion. Id. at 109-11. In doing so, it distinguished between rights protected by the state constitution and the Federal Constitution.

Id. at 111.

In Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993), the court found the challenged statute "to be facially constitutional under both the United States and Ohio Constitutions." Id. at 584. In doing so, the court separately addressed "whether Section 1, Article I, Ohio Constitution includes within the liberties afforded the right of a woman to choose to have an abortion" and "the nature and extent of such right." Id. at 575. If a protectable right is found, the court explained "the state may use either a lesser or greater standard" to protect that right than used under the Federal Constitution. Id. at 575 n.5.

Both of these cases acknowledge a state constitution may not protect rights found protected in the Federal Constitution, or a state constitution may provide a particular right less protection than the Federal Constitution. Of course, when a statute is challenged under both the Federal Constitution and state constitution, it must be found invalid if it violates either. In the present case, however, HB 1297 and SB 2305 are only challenged under the North Dakota Constitution. Since the North Dakota Constitution does not protect the right to an abortion, the district court should have found HB 1297 constitutional under the North Dakota Constitution and dismissed the Complaint. For the same reason, the district court also should have denied MKB's motion to enjoin enforcement of SB 2305.

3. The people who adopted Sections 1 and 12 did not intend them to create a fundamental right to have an abortion.

The history of Sections 1 and 12 demonstrates the people who adopted them did not intend the sections to create a fundamental right to have an

abortion. In fact, the history and tradition of North Dakota unambiguously demonstrate Sections 1 and 12 were not intended to provide any protection for abortions.

The laws in place prior to, at the time of, and after adoption of the North Dakota Constitution demonstrate a right to abortion was not intended under the North Dakota Constitution. The Dakota Territory enacted its first abortion statutes in 1877, twelve years before the 1889 Constitution was adopted and North Dakota was admitted as a State. See Penal Code, Dakota Territory, 1877, §§ 337, 338. Despite the statutory prohibition against abortion, which the drafters of the North Dakota Constitution are presumed to have known about, neither the North Dakota Constitution nor the debates of the Constitutional Convention mention abortion. See Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota (1889); History of the State Constitutional Convention of 1889. The complete silence on the question of abortion demonstrates there was no intent to alter existing law.

The laws in existence after the North Dakota Constitution was adopted further demonstrate its provisions were not intended to provide any protection for abortions. Statutes prohibiting abortions remained on the books until after Roe v. Wade was decided. See Compiled Laws of the Territory of Dakota §§ 6538, 6539 (1887), recodified at N.D.R.C. §§ 7177, 7178 (1895), recodified at N.D.R.C. §§ 8912, 8913 (1905), recodified at N.D. Compiled Laws §§ 9604, 9605 (1913), recodified at N.D.R.C. §§ 12-2501, 12-2504 (1943), recodified at N.D.C.C. §§ 12-25-01, 12-25-04 (1960), repealed by 1973 N.D. Sess. Laws ch. 116, § 41.

This Court's decisions also demonstrate a right to abortion was not intended under the North Dakota Constitution. In multiple cases this Court affirmed convictions for performing or procuring abortions. See State v. Dimmick, 296 N.W. 146 (N.D. 1941); State v. Shortridge, 211 N.W. 336 (N.D. 1926); State v. Longstreth, 121 N.W. 1114 (N.D. 1909).

A right to abortion cannot be found in the text or history of the North Dakota Constitution. There is no evidence the drafters or ratifiers of the North Dakota Constitution intended to create a constitutionally protected right to have an abortion. Accordingly, the district court erred in finding Sections 1 and 12 establish a fundamental right to have an abortion.

4. Cases interpreting Sections 1 and 12 support the determination Sections 1 and 12 do not create a fundamental right to have an abortion.

This Court has interpreted Sections 1 and 12 on multiple occasions. The Court's analysis in those cases demand a finding Sections 1 and 12 do not create a fundamental right to have an abortion.

This Court has held parents have a constitutional right to parent their children. See Hoff v. Berg, 1999 ND 115, ¶ 10, 595 N.W.2d 285. That right, unlike a right to have an abortion, has longstanding traditional roots in American culture. Hoff cites Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972) for the proposition that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nature and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 1999 ND 115, ¶ 8.

The right to refuse unwanted medical treatment was found in State ex rel. Schuetzle v. Vogel, 537 N.W.2d 358, 360 (N.D. 1995). Like the right to parent one's child, the right to refuse unwanted medical treatment has "well-established legal and philosophical underpinnings." Id.

Unlike the right to parent children or to refuse unwanted medical treatment, a decision to have an abortion does not have a similar long-standing traditional, as demonstrated in Section I(B)(3).

In Kadrmas, the plaintiffs asserted Article VIII, § 2 required the state or public school districts to provide free transportation for students to and from school. Rejecting the argument, the Court examined the statutes in effect when Section 148, the predecessor to Article VIII, § 2, was adopted. 402 N.W.2d at 899. The Court explained that at that time "there was no statutory provision requiring or authorizing school districts to provide student transportation or to compensate parents for transporting their children to and from school." Id. Rather, the "statutory law remained silent with regard to school districts providing transportation or reimbursement for transporting students until 1903, when a law was enacted authorizing school boards to arrange and pay for student transportation under specified circumstances or when petitioned by a majority of the district voters.'" Id.

The Court explained that "our laws on this subject demonstrate a long-standing practice of state and school district involvement in student transportation." Id. at 900. However, the Court continued, "our laws also clearly demonstrate that the Legislature has never required that the state or school

districts assume the entire responsibility or cost of transporting students." Id. Based on its historical review of statutes relating to student transportation, the Court explained that "the people of this state have acquiesced in sharing that responsibility [transporting their students] from the first days of statehood to the present time." Id.

Reading the provision in the light of history, the Court wrote "the long-standing legislative practice of making student transportation a shared responsibility between school districts and parents provides some indication that the constitutional requirement of a 'uniform system of free public schools' does not mandate free student transportation." Id. The Court then held Article VIII, § 2 "does not require the state or school districts to provide free transportation for students to and from school." Id. at 902.

In Kadrmas, the fact the law never required the state or school districts to assume the cost of transporting students to and from school indicated Article VIII, § 2 does not mandate free student transportation. History and tradition in the present case is even stronger. Statutes prior to and after adoption of Sections 1 and 12 were not simply silent on whether a right to abortion existed. For over a decade before the 1889 Constitution was adopted and for over eight decades after it was adopted, North Dakota law made abortion illegal. The "long-standing legislative practice" of making abortion illegal demonstrates the protections provided in Sections 1 and 12 do not include the right to an abortion.

Unlike this Court did in Kadrmas, the district court refused to interpret Sections 1 and 12 in historical context to determine the intent of the people

adopting the provisions. Rather, the district court closed its eyes to the overwhelming contemporaneous and long-standing practical interpretations of Sections 1 and 12 by the Legislature and courts, and blindly accepted subsequent interpretations of the Federal Constitution. The district court erred by focusing on subsequent federal decisions rather than the intent of the people who adopted the North Dakota Constitution.

The consistent prohibition of abortion, from territorial days until Roe v. Wade was decided in 1973, unequivocally demonstrates the drafters and ratifiers of the North Dakota Constitution did not intend the North Dakota Constitution to confer a right to abortion.

5. Mahaffey supports the determination Sections 1 and 12 do not create a fundamental right to have an abortion.

In Mahaffey, the Michigan Court of Appeals held the Michigan Constitution does not confer a state right to abortion. In doing so, it correctly identified the standard to make that independent analysis. It wrote:

> In interpreting a constitutional provision, the primary duty of the judiciary is to ascertain the purpose and intent of the provision at issue. The intent to be determined is that of the people who adopted the constitutional provision at issue. Intent should be determined by reference to the state of the law or custom previously existing, and by contemporaneous construction, rather than by reference to the changed views of the present day. Thus, a court should place itself in the position of the framers and ascertain what was meant at the time the provision was adopted.

564 N.W.2d at 109 (citations omitted).

The court then considered the law when the constitution was adopted, noting "abortion was a criminal offense." Id. at 109. The court explained:

> The drafters of a constitutional provision are presumed to have known the existing laws and to have drafted the provision accordingly. Thus, we must presume that the drafters of the 1963 constitution were aware of the statutory prohibition against abortion. The fact that the 1963 constitution itself and the debates of the Constitutional Convention preceding the adoption of the constitution are silent regarding the question of abortion indicates that there was no intention of altering the existing law. We believe that the addition of a fundamental right to abortion to the constitution "would have been such a marked change in the law as to elicit major debate among the delegates to the Constitutional Convention as well as the public at large." Furthermore, less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute. Under these facts, we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion.

Id. at 110.

The court next considered judicial precedent, which led it to "the conclusion that there is no right to abortion under the Michigan Constitution." Id. at 110. The case law demonstrated that "in Michigan a woman's right to abortion is derived solely from the federal constitution." Id. at 111.

Like the Michigan Constitution, the North Dakota Constitution "must be interpreted in light of the rights and liberties it was created to uphold, and not the philosophical viewpoints of the judiciary who hold the responsibility of interpretation." State v. Herrick, 1999 ND 1, ¶ 22, 588 N.W.2d 847. As demonstrated above, the North Dakota Constitution was not created to uphold the right or liberty to have an abortion. This Court should interpret it in that manner.

C. The district court erred in applying the "strict scrutiny" test.

Because there is no right to have an abortion under the North Dakota

Constitution, the district court erred in applying the "strict scrutiny" test. Rather, HB 1297 should have been reviewed under the rational basis standard of review and found constitutional. Similarly, the district court should have applied the rational basis standard of review when evaluating MKB's likelihood of success of proving SB 2305 unconstitutional, and denied MKB's motion for preliminary injunction. Because it did not do so, this Court should reverse the district court's Judgment and Preliminary Injunction and remand the case for proper determination under the rational basis standard of review.

II. The district court erred in addressing HB 1297's constitutionality under the Federal Constitution.

MKB's challenge to the constitutionality of HB 1297 was based solely on the North Dakota Constitution. App. 10, 27-30. MKB did not challenge the constitutionality of HB 1297 under the Federal Constitution. The district court acknowledged this. Id. at 155.

Despite the fact MKB did not bring a claim under the Federal Constitution, the district court sua sponte addressed the constitutionality of HB 1297 under the Fourteenth Amendment to the Federal Constitution.[3] App. 202. The district court exceeded its jurisdiction by deciding an issue not raised in the Complaint or tried by consent of the parties. See N.D.R.Civ.P. 15(b)(2).

[3] The State disputes that HB 1297 violates the Fourteenth Amendment. Because that issue was not raised below, it should not be decided by this Court. See City of Bismarck v. Nassif, 449 N.W.2d 789, 792 (N.D. 1989) ("Before this Court will address an issue on appeal, even a constitutional issue, that issue must have been sufficiently raised in the court below."). For that reason, the State's brief does not address HB 1297's constitutionality under the Fourteenth Amendment.

Moreover, "[i]t is a well-settled rule of decision making that a court will refrain from deciding constitutional issues where there are appropriate alternative grounds to resolve the case before it." Bismarck Public Schools v. Walker, 370 N.W.2d 565, 566 (N.D. 1985). Despite this well-settled rule, the district court addressed a constitutional issue that was not required to resolve the case.

The district court erred by sua sponte opining on the constitutionality of HB 1297 under the Fourteenth Amendment when the issue was not raised in the Complaint or essential to resolution of the case. For this reason, the district court's holding regarding the constitutionality of HB 1297 under the Federal Constitution must be reversed.[4]

III. The district court misinterpreted HB 1297.

"[I]f a statute is capable of two constructions, one that would render it of doubtful constitutionality and one that would not, the constitutional interpretation must be selected." McCabe v. N.D. Workers Comp. Bureau, 1997 ND 145, ¶ 10, 567 N.W.2d 201. Moreover, statutes must be liberally construed in the light of their purpose. Fireman's Fund Mortgage Corp. v. Smith, 436 N.W.2d 246, 247 (N.D. 1989); N.D.C.C. § 1-02-01.

Rather than construe HB 1297 in favor of its constitutionality, the district court adopted interpretations that led it to find HB 1297 unconstitutional. The district court's unconstitutional interpretations of HB 1297 must be rejected over the alternative reasonable, constitutional interpretations.

[4] On multiple occasions the district court misstated federal precedent. Since Plaintiffs' challenge is under the North Dakota Constitution, not the Federal Constitution, the State's brief does not address the district court's erroneous interpretations of federal case law.

A. HB 1297 does not create a de facto ban on medication abortions.

1. Misoprostol is not an abortion-inducing drug when used subsequent to Mifeprex to help expel the contents of the uterus.

HB 1297 requires physicians prescribing or administering an abortion-inducing drug "for the purpose of inducing an abortion" to comply with the FDA-approved protocol. App. 236 (emphasis added). HB 1297 defines an "Abortion-inducing drug" to mean a drug "prescribed or dispensed with the intent of causing an abortion." Id. at 231. HB 1297 defines "Abortion" to mean the act of using any instrument or drug "with the intent to terminate the clinically diagnosable intrauterine pregnancy of a woman . . . ." Id. In simple terms, abortion means to intentionally cause "the death of the unborn child." Id.

Significantly, HB 1297 addresses abortion-inducing drugs, not all drugs used in a medication abortion. A drug used to "induce" an abortion is the drug that causes or brings about the death of the unborn child. See The American Heritage Dictionary 657 (2d col. ed. 1991).

"Mifeprex is the only medication in the United States that has received FDA approval for marketing for the purpose of inducing abortions in the first trimester." See Doc. 9 ¶ 5 (emphasis added). The FDA's review of the new drug application for Mifeprex included the approval of the drug's Final Printed Label (FPL). See App. 177. The Mifeprex FPL consists of three parts: Prescribing Information, Medication Guide, and Patient Agreement. See id. at 245, 257, 260. The FPL's Prescribing Information provides "Mifeprex is indicated for the medical termination of intrauterine pregnancy through 49 days' pregnancy." Id. at 249

(emphasis added). It further states: "Patients taking Mifeprex must take 400 µg of misoprostol two days after taking mifepristone unless a complete abortion has already been confirmed before that time (see DOSAGE AND ADMINISTRATION)." Id.

The Mifeprex Dosage and Administration provides that the patient take three 200 mg tablets (600 mg) of Mifeprex in a single oral dose. Id. at 255. It further provides for the patient to return "to the health care provider two days after ingesting Mifeprex." Id. If, at that time, a clinical examination or ultrasonographic scan does not confirm the contents of the uterus have been expelled, "the patient takes two 200 µg tablets (400 µg) of misoprostol orally." Id.

Under the FDA-approved protocol for Mifeprex, the "anti-progestational activity" of Mifeprex "inhibits the activity of endogenous or exogenous progesterone" and "[t]he termination of pregnancy results." Id. at 246 (emphasis added). The sole function of Misoprostol in the FDA-approved protocol, on the other hand, is to cause the cervix to open and the uterus to contract and expel its contents. Id. at 173.

Misoprostol, when used in conjunction with Mifeprex, is not used to induce or cause the death of the unborn child. Rather, the death is induced or caused solely by the Mifeprex. In fact, under the FDA-approved protocol, Misoprostol is not required in all instances as shown by the fact that in up to 6.3% of medication abortions in United States trials "expulsion" occurred before the second visit "unaided by misoprostol." App. 247, 248; see also App. 173 n.10.

Although Misoprostol is often used with Mifeprex in the medication abortion process, it is not used to induce the abortion. Mifeprex is used to induce the abortion; Misoprostol is used to expel the contents of the uterus, or complete the abortion, when the use of Mifeprex alone does not expel the contents of the uterus. Id. at 249. Thus, Mifeprex is the "Abortion-inducing drug" and Misoprostol is simply a drug subsequently used as part of the medication abortion.

The district court rejected this reasonable interpretation of HB 1297 and held Misoprostol is an abortion-inducing drug. Id. at 173-74. Because Misoprostol is not FDA-approved for use in medication abortions, the district court held HB 1297 prohibits all medication abortions in North Dakota, constituting a de facto ban of medication abortions. Id. at 173, 174.

But when Misoprostol is used in accordance with the Mifeprex FPL, Misoprostol is not an abortion-inducing drug. Mifeprex is used to induce the abortion, i.e., to cause "the death of the unborn child." Once Mifeprex has been administered, termination of the pregnancy has commenced and cannot be reversed. When used, Misoprostol is used to complete the abortion by helping to expel the contents of the uterus.

Interpreting HB 1297 to permit the use of Misoprostol to help expel the contents of the uterus, in accordance with the Mifeprex FPL, follows the plain language of the bill, is consistent with the bill's purpose of regulating, rather than banning, medication abortions, and complies with the rules of statutory construction.

2. The administration of Misoprostol in accordance with the Mifeprex FPL satisfies the requirements of HB 1297.

HB 1297 prohibits the administration of any abortion-inducing drug unless, among other things, "the provision or prescription of the abortion-inducing drug satisfies the protocol tested and authorized by the federal food and drug administration and as outlined in the label for the abortion-inducing drug." App. 236 (emphasis added). The "drug label" is the FPL. Id. at 231.

The Mifeprex FPL provides for the administration of Misoprostol in conjunction with Mifeprex. HB 1297 incorporates by reference the Mifeprex FPL and thereby permits the administration of Misoprostol in conjunction with Mifeprex whether or not Misoprostol is an abortion-inducing drug. Accordingly, HB 1297 does not constitute a de facto ban on medication abortions.

3. The district court's interpretation of HB 1297 renders portions of HB 1297 superfluous.

The district court's interpretation of HB 1297 is contrary to the rules of statutory construction because it renders parts of HB 1297 meaningless. In construing statutory provisions, courts give effect and meaning to every word, phrase, and sentence. Steen and Berg Co. v. Berg, 2006 ND 86, ¶ 26, 713 N.W.2d 87. It is presumed the "entire statute is intended to be effective." N.D.C.C. § 1-02-38(2).

Interpreting HB 1297 to completely ban medication abortions renders numerous provisions of HB 1297 meaningless. For example, the requirement a physician dispensing or prescribing an abortion-inducing drug provide the patient "with a copy of the drug's label" is superfluous if HB 1297 is read to completely

ban medication abortions. App. 236. Similarly, the requirement a physician dispensing or prescribing an abortion-inducing drug enter into a signed contract with "another physician who agrees to handle emergencies associated with the use or ingestion of the abortion-inducing drug," as well as the requirement the physician provide to the patient emergency contact information, is meaningless if HB 1297 bans a physician from dispensing or prescribing abortion-inducing drugs. Id.

HB 1297 makes it clear abortion-inducing drugs can be used for the purpose of inducing an abortion. It provides: "When an abortion-inducing drug or chemical is used for the purpose of inducing an abortion, the drug or chemical must be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed, or otherwise provided the drug or chemical to the patient." Id. Again, this requirement is meaningless if HB 1297 completely bans medication abortions.

HB 1297 also requires a physician that provides an abortion-inducing drug to a patient "for the purpose of inducing an abortion" to provide a written report to the Health Department if the physician knows the patient "experiences during or after the use an adverse event . . . ." Id. at 238. This reporting requirement cannot be given effect if HB 1297 is interpreted to ban medication abortions.

The identified provisions demonstrate the Legislature understood HB 1297 to permit medication abortions to be performed. The district court's interpretation of HB 1297 does not give effect and meaning to every word, phrase, and sentence of HB 1297 and must be rejected.

4. The State's interpretations comply with legislative intent.

Importantly, the district court acknowledged its interpretation of HB 1297 may not comply with the Legislature's intent. Id. at 172. It also impliedly acknowledged its interpretation leads to an absurd result, authorizing the use of FDA approved abortion-inducing drugs, while at the same time banning the use of the only FDA approved abortion-inducing drug. Id. at 173-43. The State's interpretations, however, comply with the bill's language, legislative intent, and common sense.

One purpose of HB 1297 is to protect the health of women seeking abortions by regulating medication abortions. See Minutes of House Standing Comm. on H.B. 1297 at 1 (Jan. 31, 2011); Hearing before House Human Servs. Comm. on H.B. 1297 (written testimony of Christopher T. Dodson, Executive Dir.) (Jan. 31, 2011); Handout - Dangers of Abortion-Inducing Drugs and Need for Regulation; Hearing before Senate Health & Human Servs. Comm. on H.B. 1297 (written testimony of Janne Myrdahl (Mar. 14, 2011). The Legislature chose to do this is by using "the FDA guidelines for definitions and safe practices and for informational purposes." Minutes of House Standing Comm. on H.B. 1297 at 1 (Jan. 31, 2011). By deciding to use the FDA approved FPL for an abortion-inducing drug, the Legislature agreed to use the FDA approved Mifeprex FPL. Despite Misoprostol not being FDA-approved for use in medication abortions, the FDA approved Mifeprex FPL permits Misoprostol to be used to expel the contents of the uterus. It is illogical to hold the Legislature decided to defer to the FDA approved FPLs for abortion-inducing drugs, while at the same time banning

the use of the very drugs permitted to be used in the FDA approved Mifeprex FPL.

While Misoprostol is not FDA-approved for use in medication abortions, it is FDA-approved to be used in conjunction with Mifeprex in medication abortions. Similarly, while HB 1297 prohibits use of Misoprostol as an abortion-inducing drug, it does not prohibit the use of Misoprostol in accordance with the FPL of the FDA approved abortion-inducing drug Mifeprex.

The district court erred by rejecting two reasonable interpretations of HB 1297.

B. HB 1297 does not require physicians to direct patients to go to a specific physician and hospital if they have complications.

HB 1297 requires a physician administering an abortion inducing drug to "enter a signed contract with another physician who agrees to handle emergencies associated with the use or ingestion of the abortion-inducing drug." App. 236. It further provides that pregnant woman to whom a physician gives or prescribes an abortion-inducing drug "must be provided the name and telephone number of the physician who will be handling emergencies and the hospital at which any emergencies will be handled." Id. at 236-37. These requirements implement portions of the Mifeprex FPL. See App. 255 ("Physicians must also be able to provide surgical intervention in cases of incomplete abortion or severe bleeding, or have made plans to provide such care through others, and be able to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary."; "The patient should be given instructions on what to do if significant discomfort, excessive vaginal bleeding or

other adverse reactions occur and should be given a phone number to call if she has questions following the administration of the misoprostol. In addition, the name and phone number of the physician who will be handling emergencies should be provided to the patient.").

Statutes are to be read as a whole and construed in a practical manner giving consideration to the context of the statute and the purpose for which it was enacted. Dakota Res. Council v. N.D. Pub. Serv. Comm'n, 2012 ND 72, ¶ 8, 815 N.W.2d 286. Rather than read the statute as a whole and in a practical manner, the district court placed undue emphasis on the words "who will be handling" and "will be handled," interpreting the provision to require the physician "to instruct patients to go to one specific physician and one specific hospital, regardless of either the distance involved or the level of the emergency." App. 191. It erred in doing so.

The purpose of the contract requirement is so a physician is available to handle emergencies if they arise. The purpose of requiring the physician administering the abortion inducing drug to provide the patient the other physician's name and telephone number is so the patient knows a physician she can contact if an emergency arises. When read in context and as a whole, the use of the language "who will be handling" and "will be handled" cannot reasonably be read to mandate the physician to instruct the patient to only go to the contract physician or a specific hospital. In fact, the required contract does not mandate the other physician actually handle any or all emergencies; it only requires the other physician agree to handle emergencies associated with the

medication abortion. Moreover, nothing in HB 1297 prohibits the physician administering the abortion inducing drug from providing additional information or instructions to the patient, such as instructing the patient to go to the nearest medical facility in the case of an emergency or providing the patient the name and number of other physicians or hospitals that are available in case of an emergency.

Requiring the physician administering the abortion inducing drug to contract with another physician to be available in case of an emergency cannot reasonably be read as limiting patients' options in cases of emergencies. Moreover, to the extent the language is ambiguous and there are two possible constructions, the district court was required to adopt the constitutional interpretation. The district court erred by not doing so.

C. HB 1297 does not require public disclosure of the contract.

HB 1297 provides: "The physician shall produce the signed contract on demand by the patient, the department of health, or a criminal justice agency." App. 236. The requirement for a physician to disclose the signed contract is quite limited; the physician is only required to disclose the contract when demanded by the patient, the Health Department, or a criminal justice agency. The reasons for requiring contract disclosure to the patient, the Health Department, or a criminal justice agency are also obvious.

The Health Department administers N.D.C.C. ch. 14-02.1 and reports violations of N.D.C.C. ch. 14-02.1 to the Attorney General. See N.D.C.C. §§ 14-02.1-02.2, 14-02.1-07. Law enforcement agencies investigate criminal

violations of N.D.C.C. ch. 14-02.1. See N.D.C.C. § 14-02.1-11. And the patient has an interest in the contract identifying the physician who may be handling emergencies. Thus, the reason for requiring limited disclosure of the contract when requested by the patient or the identified governmental agencies is so the patient has access to the information she needs and so the governmental agencies can enforce the law.

The district court, however, ignored the limitations of the disclosure requirement and the obvious reasons for the required limited disclosure. The district court wrote "the emergency services contract would be available to many upon demand, thereby assuring the identity of the contracting physician would soon become known to the most committed opponents of abortion." App. 192 (emphasis added). It also asserted the disclosure requirement manifests "an impermissible purpose," asserting there is no justification for the provision. Id. at 192 n.26.

The district court's interpretation of the disclosure provision ignores its specific language and purposes. The district court erred in holding HB 1297 requires the signed contract to be provided to "many upon demand" and manifests "an impermissible purpose."

D. HB 1297 does not impose criminal liability on physicians if a patient does not attend an appointment.

HB 1297 requires that "[w]hen an abortion-inducing drug or chemical is used for the purpose of inducing an abortion, the drug or chemical must be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed, or otherwise provided the drug or chemical

to the patient." App. 237. This requirement only addresses how the abortion-inducing drug is administered, not what happens if a patient misses an appointment and the abortion-inducing drug is not administered. In other words, a physician would only violate the requirement if the physician prescribed an abortion-inducing drug to a patient so the drug could be taken outside of the physician's presence, not if a patient missed an appointment and, thus, never took the abortion-inducing drug.

The district court asserted HB 1297 imposed criminal liability on physicians when a patient did not show up for an appointment. It wrote: "A law that would impose criminal liability on a physician for eventualities they could not control makes no sense." App. 194. In doing so, the district court improperly rejected an alternative reasonable, constitutional interpretation of HB 1297.

The district court's conclusion HB 1297 is unconstitutional is premised on multiple incorrect interpretations of HB 1297. For that reason, the district court's Judgment should be reversed.

IV. Rule 54(b) certification was properly granted.

After the trial on the merits of the constitutionality of HB 1297, and on the same day the district court entered its Judgment, MKB supplemented its Complaint to challenge the constitutionality of SB 2305. Doc. 237. Upon issuance of the Judgment, the case regarding HB 1297 would have been concluded and appealable if MKB had not been permitted -- two years into the case and after trial -- to supplement its Complaint to add a new cause of action challenging SB 2305. By adding a new claim on the day the district court issued

its Final Order, MKB prevented resolution of the entire case until the parties could conduct discovery and a trial could be held on the new claim. Absent Rule 54(b) certification, MKB's belated supplementation of the Complaint would have prevented the State from appealing the district court's Judgment for months or years.

The district court recognized MKB's Supplemental Complaint prevented the State from appealing the Judgment absent Rule 54(b) certification. This was despite a trial on the merits, the issuance of a permanent injunction, and the claim being "finally resolved." App. 208. In light of that fact, the district court "determined there is no just reason for delaying the entry of a final judgment" as to MKB's challenge to the constitutionality of HB 1297. Id. Moreover, the underlying basis of the district court's decision and permanent injunction was its interpretation of the North Dakota Constitution. That legal issue, which is "a matter of great public interest," could "only be settled by the North Dakota Supreme Court." Id.

In summary, the district court's grant of Rule 54(b) certification was proper for the following reasons:

- It would have been unjust to prevent the State from appealing the district court's Final Order, subjecting the State to the permanent injunction for months or years without the ability to appeal, because of MKB's strategic decision to supplement its Complaint.

- The Final Order resolved all legal and factual aspects of MKB's challenge to the constitutionality of HB 1297. Any future discovery or factual findings regarding SB 2305 would not impact the district court's Final Order.

- Interpretation of the North Dakota Constitution is a legal issue and the North Dakota Supreme Court must ultimately resolve the legal

issue of whether the North Dakota Constitution can be interpreted to protect the right to have an abortion.

- Whether the North Dakota Constitution protects the right to have an abortion is a matter of great public interest.

V. The Preliminary Injunction is reviewable absent Rule 54(b) certification.

The Court usually requires Rule 54(b) certification to review a preliminary injunction when the injunctive features of the order are incidental and serve no active purpose. Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401, 405 (N.D. 1992). "The absence of a Rule 54(b) certification has not, however, kept [the Court] from reviewing 'interim relief [which] affects fundamental interests of the litigants.'" Id. at 406. That includes relief that has "significant constitutional underpinnings" for the parties. Eberts v. Billings County Board of Commissioners, 2005 ND 85, ¶ 6, 695 N.W.2d 691.

The Preliminary Injunction, which has significant constitutional underpinnings, affects the "fundamental interests" of the State and its citizens. The order's injunctive feature serves an active rather than incidental purpose. It bars the State from enforcing SB 2305, which was enacted by the people, through their elected representatives, for the purpose of protecting the health of women seeking abortions. And the Preliminary Injunction is premised on the district court's "determination that the fundamental rights protected by the state constitution include a woman's right to electively terminate a pregnancy before the fetus is viable." App. 218.

In accordance with this Court's precedent, the Preliminary Injunction is reviewable by interlocutory appeal because:

- The Preliminary Injunction serves the active purpose of prohibiting the State from enforcing SB 2305.

- The Preliminary Injunction affects the fundamental interests of the litigants, as well as North Dakota citizens.

- The Preliminary Injunction has "significant constitutional underpinnings" to the parties and the public.

CONCLUSION

Defendant Terry Dwelle, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, respectfully requests the Court: (1) hold the North Dakota Constitution does not protect the right to have an abortion; (2) reverse the district court's July 15, 2013 Rule 54(B) Judgment and July 31, 2013 Memorandum Opinion and Order Granting Preliminary Injunction; and (3) remand the matter with instructions that the district court determine the constitutionality of HB 1297, and MKB's motion to preliminary enjoin SB 2305, under the rational basis standard of review.

Dated this _____ day of October, 2013.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MKB Management Corp, dba Red River Women's Clinic, Kathryn L. Eggleston, M.D., Plaintiffs, vs. Birch Burdick, in his official capacity as State Attorney for Cass County, Terry Dwelle, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health, Defendants.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20130259** **District Ct. No. 09-2011-CV-02205**

The undersigned certifies pursuant to N.D.C.C. §§ 32(a)(7)(A),(C) and that the text of Defendant/Appellant's Brief (excluding the table of contents, table of authorities, and statement of issues contains 8,315 words, 417 of which address the appropriateness of N.D.R.Civ.P.54(b) certification.

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

Dated this _____ day of October, 2013.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MKB Management Corp, dba Red River Women's Clinic, Kathryn L. Eggleston, M.D.,	)	
Plaintiffs,	)	**AFFIDAVIT OF SERVICE BY MAIL**
	)	**Supreme Ct. No. 20130259**
vs.	)	
Birch Burdick, in his official capacity as State Attorney for Cass County, Terry Dwelle, M.D., in his official capacity as the chief administrator of the North Dakota Department of Health,	)	**District Ct. No. 09-2011-CV-02205**
Defendants.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

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

2. I am of legal age and on the 7th day of October, 2013, I served the attached, **BRIEF OF DEFENDANT/APPELLANT TERRY DWELLE, M.D., IN HIS OFFICIAL CAPACITY**, by placing a true and correct copy thereof in an envelope addressed as follows:

Joseph Turman
Turman & Lang, Ltd.
505 North Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0100

Autumn Katz
Center for Reproductive Rights
120 Wall St., 14th Floor
New York, NY 10005

Birch P. Burdick
Cass County State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, ND 58108

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

_____
Donna J. Connor

Subscribed and sworn to before me
this _____ day of October, 2013.

_____
Notary Public
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October 7, 2013

HAND DELIVERED

Penny L. Miller, Clerk
North Dakota Supreme Court
Judicial Wing, 1st Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: MKB Management Corp, et al. v. Birch Burdick, et al.;
Supreme Ct. No. 20130259
District Ct. No. 09-2011-CV-02205

Dear Ms. Miller:

Per your e-mail dated October 4 requesting a reduction in word count, enclosed are the original and seven copies of Brief of Defendant/Appellant Terry Dwelle, M.D., In His Official Capacity, and an Affidavit of Service by Mail. These documents are also being provided to you by e-mail today in the same order as the paper brief. Please re-file these documents with the court.

Thank you.

Sincerely,

Douglas A. Bahr
Solicitor General

jjt
Enclosures
cc: Joseph Turman (w/encs.)
Autumn Katz (w/encs.)
Birch P. Burdick (w/encs.)
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