THE CHANGING TIDES OF NORTH DAKOTA ABORTION LEGISLATION *

ABSTRACT

In *Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The Court held that the Due Process Clause of the Fourteenth Amendment and the U.S. Constitution do not include a right to an abortion. The Court returned to states the discretion to allow, regulate, or prohibit abortions. In response, North Dakota's Sixty-Eighth Legislative Assembly passed three bills pertaining to abortion: Senate Bill 2150, redefining abortion, its exceptions, and grounds for disciplinary actions against physicians performing non-exempt abortions; Senate Bill 2129, amending the alternatives-to-abortion program; and House Bill 1171, prohibiting of forced or coerced abortion. Additionally, in *FDA v. Alliance for Hippocratic Medicine*, the U.S. Supreme Court stayed several of the FDA's decisions regarding mifepristone, a chemical abortion pill. The Court will potentially hear this case in its upcoming term. North Dakota's newly enacted abortion legislation impacts both the medical and legal professions and will be further impacted if the U.S. Supreme Court grants certiorari in *Alliance for Hippocratic Medicine v. FDA*.

* This article is meant to be an unbiased analysis of the changes to abortion law in North Dakota. It does not reflect the views of the author or the NORTH DAKOTA LAW REVIEW.

I. INTRODUCTION

This article is a continuation of the North Dakota Law Review article *Dobbs v. Jackson Women's Health and the Ripple Effect Felt Throughout North Dakota Legislation and Law*.[1] The author seeks to objectively analyze the North Dakota abortion-related bills introduced and passed in response to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[2] This article will first provide a historical overview of the U.S. Supreme Court's abortion cases, including the *Dobbs* Court's reasonings and rationale. Second, this article will survey North Dakota's newly enacted abortion-related bills. Lastly, this article will address how a possible U.S. Supreme Court ruling on chemical abortion pills could affect North Dakota law.

1. Colin Kearney & Gabrielle Wolf, *Dobbs v. Jackson Women's Health and the Ripple Effect Felt Throughout North Dakota Legislation and Law*, 98 N.D. L. REV. 245 (2023).
2. 142 S. Ct. 2228 (2022).

II. A BRIEF HISTORY OF U.S. SUPREME COURT ABORTION CASELAW

In addition to *Dobbs*, the U.S. Supreme Court's caselaw relevant to North Dakota includes its 1973 opinion, *Roe v. Wade*,[3] and its 1992 opinion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] *Roe* and *Casey* established the framework and applicable standards for abortion law challenges.[5] This article will provide an overview of these two opinions and their current relevance in light of *Dobbs*.

A. ROE V. WADE

Roe v. Wade was a landmark decision perceived by many as the origin of federal caselaw on abortion.[6] At issue in *Roe*, articles of the Texas Penal Code made it a crime for any person to perform or to assist in performing an abortion.[7] The Texas statute defined abortion as the destruction of "the life of the fetus or embryo . . . in the woman's womb" or causing premature birth.[8] The only exception was if the abortion was performed to save the mother's life.[9] Texas' abortion statutes reflected a majority of states' statutes at that time.[10]

Jane Roe, a pseudonym,[11] brought a federal action against Henry Wade, the Dallas County District Attorney, on the grounds that the Texas code was facially unconstitutional, unconstitutionally vague, and violated her right to personal privacy.[12] Roe alleged she could not get an abortion in Texas "because her life did not appear to be threatened by the continuation of her pregnancy" and that she did not have the means of traveling to another state to obtain an abortion.[13]

The U.S. Supreme Court held that the abortion laws implemented in a majority of the states were not ancient in origin.[14] Rather, the laws derived from statutory changes in the late nineteenth century.[15]

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3. 410 U.S. 113 (1973), *overruled in part by Dobbs*, 142 S. Ct. at 2242.
4. 505 U.S. 833 (1992), *overruled in part by Dobbs*, 142 S. Ct. at 2242.
5. *Roe*, 410 U.S. at 164-65; *Casey,* 505 U.S. at 877.
6. *Dobbs,* 142 S. Ct. at 2240.
7. *Roe*, 410 U.S. at 117 n.1.
8. *Id.* (quoting TEX. PENAL CODE ANN. art. 1191 (West 1911)).
9. *Id.* (quoting TEX. PENAL CODE ANN. art. 1196 (West 1911)) ("Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.").
10. *Id.* at 118 n.2.
11. *Id.* at 120 n.4.
12. *Id.* at 120.
13. *Id.*
14. *Id.* at 129.
15. *Id*.

The states' criminal abortion laws could be attributed to three considerations:[16] first, "Victorian social concern to discourage illicit sexual conduct,"[17] second, concerns associated with the risks of abortion as a medical procedure, particularly with abortions performed before the development of antisepsis,[18] and, third, protecting prenatal life.[19]

Although the Constitution does not explicitly guarantee citizens the right to privacy, the Court recognized that citizens have a right to personal privacy with roots in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[20] The Court held that a state can regulate in this protected area when a state has an interest "in safeguarding health, in maintaining medical standards, and in protecting potential life."[21] The Court concluded that a woman's decision to have an abortion in the early stages of her pregnancy was within the right to personal privacy; however, that right must be weighed against a state's important and legitimate interest in enacting the regulation.[22] However, a state's interest was only compelling after "viability," which the Court defined as the end of the first trimester of pregnancy.[23] Up until the end of the first trimester, a physician could determine whether to terminate a pregnancy.[24]

B. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY

Nearly twenty years later, the right to abortion established in *Roe* was challenged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[25] In *Casey*, the petitioners[26] challenged "five provisions of the Pennsylvania Abortion Control Act of 1982," claiming that the provisions were facially unconstitutional.[27] In order to obtain an abortion, the Act required a woman's informed consent,[28] a parent's informed consent for a minor to receive an abortion,[29] and, if a woman was married, a signed statement that she notified

16. *Id*. at 147.
17. *Id*. at 148.
18. *Id*. at 148-49.
19. *Id*. at 150.
20. *Id*. at 152.
21. *Id*. at 154.
22. *Id*. at 153-54.
23. *Id*. at 163. The Court determined that, up until the first trimester, "mortality in abortion may be less than mortality in normal childbirth." *Id*. Additionally, a fetus "presumably has the capability of meaningful life outside the mother's womb" after the point of viability. *Id*.
24. *Id*.
25. *See* 505 U.S. 833 (1992).
26. *Id*. at 845 (The petitioners included "five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services.").
27. *Id*. at 844-45; *see also* 18 PA. CONS. STAT. §§ 3203-20 (1990).
28. *See* 18 PA. CONS. STAT. § 3205 (1990).
29. *See id.* § 3206.

her husband that she intended to get an abortion.[30] The Act provided exemptions for medical emergencies.[31]

The Court reaffirmed *Roe* on the "principles of institutional integrity, and the rule of *stare decisis*."[32] Although the Court reaffirmed *Roe*'s essential holding, *Casey* distinguished itself from *Roe* by considering abortion a "liberty" under the Due Process Clause of the Fourteenth Amendment.[33] A literal reading of the Due Process Clause suggests that it is limited to prohibiting states from *procedurally* depriving individuals of liberty.[34] However, the Court determined that the Clause also contained a *substantive* right of liberty.[35]

The Court also affirmed the concept that the full scope of liberties is not limited to the express provisions in the Constitution or Bill of Rights, as first recognized by Justice Harlan in his dissenting opinion in *Griswold v. Connecticut*.[36] The Court held that the Constitution protects individual liberties by prohibiting states from interfering with a person's decision relating to family and parenthood.[37]

Casey also overruled portions of the *Roe* opinion.[38] Unlike *Roe,* where a physician had the authority to determine whether to terminate a pregnancy until the point of viability at the bequest of a pregnant client,[39] *Casey* instead granted the authority directly to the pregnant woman.[40] *Casey* also rejected *Roe*'s trimester framework and adopted an undue burden standard for state abortion regulations.[41]

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30. *See id.* § 3209.

31. *See id.* §§ 3203, 3205(a), 3206(a), 3209(c).

32. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845-46 (1992), *overruled in part by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

33. *Id*. at 846.

34. *Id*.

35. *Id*. (citing Mugler v. Kansas, 123 U.S. 623, 660-61 (1887)); Daniels v. Williams, 474 U.S. 327, 331 (1986)).

36. *Id*. at 848-49 ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.") (quoting Poe v. Ullman, 367 U.S. 497, 543, (1961) (Harlan, J., dissenting)).

37. *Id*. The Constitution affords protections "relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

38. *See id.* at 881.

39. Roe v. Wade, 410 U.S. 113, 163 (1973), *overruled in part by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

40. *Casey*, 505 U.S. at 870 (1992).

41. *Id*. at 873-74 (The framework was a "rigid prohibition on all previability regulation" and undervalued state interests.).

C. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Thirty years after *Casey*, the Court addressed abortion again in *Dobbs v. Jackson Women's Health Organization*.[42] At issue was Mississippi's Gestational Age Act, which prohibited a person from intentionally or knowingly performing or inducing an abortion if the gestational age of the unborn child was over fifteen weeks, except for medical emergencies or severe fetal abnormality.[43] The petitioners[44] claimed the Act violated a woman's right to have an abortion established in the Constitution.[45] In support of the act, Mississippi's legislature listed factual findings on abortion in the United States compared to other nations,[46] key stages of human prenatal development,[47] abortion procedures after fifteen weeks of gestation,[48] and the physical and psychological risks of abortion to the mother.[49]

Although *Roe* referenced five constitutional amendments begetting a woman's right to have an abortion, the Fourteenth Amendment was the primary source in both *Roe* and *Casey*.[50] The Fourteenth Amendment has historically been the root of controversy, particularly when the Court is "asked to recognize a new component of . . . liberty."[51] As such, the Court is reluctant to recognize new liberties, acknowledging the principles of federalism embedded in the Constitution by leaving that authority to the states and their elected officials.[52]

Until the late 1900s, American law did not recognize the right to an abortion.[53] Common law considered abortion a crime at some stages of pregnancy, and statutory law followed suit.[54] Petitioners argued that abortion

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42. *See* 142 S. Ct. 2228 (2022).

43. *Id*.; *see also* MISS. CODE ANN. § 41-41-191(4)(b) (2018). The "gestational age" begins on "the first day of the last menstrual period of the pregnant woman." MISS. CODE ANN. § 41-41-191(3)(f).

44. *Dobbs*, 142 S. Ct. at 2244 (The petitioners include Jackson Women's Health Organization, an abortion clinic, and one of its doctors.).

45. *Id.*

46. MISS. CODE ANN. § 41-41-191(2)(a) ("The United States is one (1) of only seven (7) nations in the world that permits nontherapeutic or elective abortion-on-demand after the twentieth week of gestation.").

47. *Id*. § 2(b)(i)(1)-(6) (The Act lists six stages in early prenatal development when new functions begin and vital organs form.).

48. *Id*. § 2(b)(i)(8)-(9).

49. *Id*. § 2(b)(ii)-(iv).

50. *See* Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled in part by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992), *overruled in part by Dobbs*, 142 S. Ct. at 2242.

51. *Dobbs*, 142 S. Ct. at 2246-47.

52. *Id*. at 2247 (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

53. *Id*. at 2248.

54. *Id*.; *see id*. at 2248-57.

is "an integral part of a broader entrenched right,"[55] such as the right to personal privacy in *Roe*[56] and the liberty to make "intimate and personal choices" in *Casey*.[57] However, the *Dobbs* Court emphasized that these broad rights are not absolute.[58] While *Roe* and *Casey* balanced the interests of women seeking an abortion with the state's interest in protecting potential life,[59] the Court held that those interests can be evaluated differently.[60] Additionally, the Court differentiated the right to have an abortion from other rights because abortion "presents a profound moral question" that impacts "potential life."[61] The Court ultimately held that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority."[62] The Court "overrule[d] those decisions and return[ed] that authority to the people and their elected representatives."[63]

In overruling its precedent, the Court found that the five factors of the *stare decisis* assessment weighed strongly in favor of overruling *Roe* and *Casey*.[64] First, the nature of the error in *Roe* was "egregiously wrong," and the Court's interpretation of the constitutional provisions was unreasonable.[65] Second, the quality of the reasoning in *Roe* stood on weak grounds by relying on historical narrative rather than text, history, or precedent,[66] which the *Casey* plurality did not even endorse.[67] Third, the Court looked to workability and whether the undue burden standard established in *Casey* is understandable and can be applied consistently and predictably.[68] Although the *Casey* plurality tried to establish the meaning of "undue burden," the standard has often led to confusion and disagreement due to its ambiguity.[69] Fourth, the opinions of *Roe* and *Casey* distorted other unrelated legal doctrines by diminishing the standard for constitutional challenges.[70] Finally, overruling *Roe* and *Casey* would not affect substantial reliance interests

55. *Id*. at 2257.
56. Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled in part by Dobbs*, 142 S. Ct. at 2242.
57. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992), *overruled in part by Dobbs*, 142 S. Ct. at 2242.
58. *Dobbs*, 142 S. Ct. at 2257.
59. *Roe*, 410 U.S. at 150; *Casey*, 505 U.S. at 852.
60. *Dobbs*, 142 S. Ct. at 2257.
61. *Id*. at 2284 (citing *Roe*, 410 U.S. at 150; *Casey*, 505 U.S. at 852).
62. *Id.*
63. *Id*.
64. *Id*. at 2265, 2278.
65. *See id*. at 2265.
66. *See id*. at 2265-72.
67. *See id.* at 2272.
68. *Id*.
69. *See id*. at 2272-76.
70. *See id*. at 2275-76.

because *Casey's* plurality conceded that abortion is an "unplanned activity" and relies on availability.[71] As such, the Court overruled *Roe* and *Casey* holding that the Constitution does not recognize the right to an abortion and, therefore, returned the authority to the states to regulate.[72]

III. A BRIEF HISTORY OF NORTH DAKOTA'S ABORTION CASELAW

In 2007, the Sixtieth North Dakota Legislative Assembly passed House Bill 1466, which created a new section under North Dakota Century Code Chapter 12.1-31, establishing an abortion trigger law.[73] The bill prohibited abortion but provided three affirmative defenses: (1) the abortion is necessary to save a pregnant woman's life, (2) the pregnancy is the result of a criminal offense, and (3) an individual is acting within his or her regulated profession under the supervision of a physician.[74] Initially, the Act would become effective upon approval by the legislative council[75] but was later amended in 2019 by House Bill 1546,[76] changing the effective date to the thirtieth day after the following:

> 1. The adoption of an amendment to the United States Constitution which, in whole or in part, restores to the states the authority to prohibit abortion; or
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> 2. The attorney general certifies to the legislative council the issuance of the judgment in any decision of the United States Supreme Court which, in whole or in part, restores to the states authority to prohibit abortion.[77]

After *Dobbs* restored states' authority to regulate abortion, the second trigger provision of House Bill 1546 was met.[78] On June 28, 2022, North Dakota Attorney General Drew Wrigley wrote to the Director of the North Dakota Legislative Council, stating that the requirements to enforce the new section were met and that Section 12.1-31-12 would become effective on July 28, 2022.[79]

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71. *See id*. at 2276-78.
72. *Id*. at 2279.
73. H.B. 1466, 60th Legis. Assemb., Reg. Sess. (N.D. 2007).
74. *Id*.
75. *Id.*
76. H.B. 1546, 66th Legis. Assemb., Reg. Sess. (N.D. 2019).
77. *Id.*
78. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); Letter from Drew Wrigley, Att'y Gen., N.D., to John Bjornson, Dir., N.D. Legis. Council (June 28, 2022), https://bloximages.chicago2.vip.townnews.com/bismarcktribune.com/content/tncms/assets/v3/editorial/a/03/a03a34de-f6eb-11ec-b45f-bfc1296c0c7b/62bb0cbe990b7.pdf.pdf [https://perma.cc/62LC-BZFY].
79. Letter from Drew Wrigley to John Bjornson, *supra* note 78.

Shortly before the effective date, Access Independent Health Services, Inc. ("Access") filed a motion seeking a temporary injunction.[80] Access challenged whether Wrigley properly initiated and implemented the second trigger law provision.[81] The district court was unable to make a final decision on whether to issue a preliminary injunction before the new section would take effect and instead considered the appropriateness of a temporary restraining order.[82] The district court granted the motion for a temporary restraining order, finding that Wrigley acted prematurely by attempting to execute the triggering language before the U.S. Supreme Court issued a certified judgment on the matter, which was set to take place on July 26, 2022.[83]

Wrigley petitioned the North Dakota Supreme Court for a supervisory writ to vacate the preliminary injunction.[84] The North Dakota Supreme Court reviewed whether the district court abused its discretion by granting the temporary restraining order.[85] Analyzing the required elements of a preliminary injunction,[86] the North Dakota Supreme Court determined that the North Dakota Constitution provides a fundamental right to an abortion when the abortion is necessary to preserve the woman's life or health.[87] As such, Section 12.1-31-12 warranted a strict scrutiny standard.[88] A statute subject to a strict scrutiny standard review is justified "if it furthers a compelling government interest and is narrowly tailored to serve that interest."[89] The North Dakota Supreme Court found that, although North Dakota has an interest in protecting a woman's health and unborn human life, the statute was not narrowly tailored to meet that interest.[90] In particular, the statute unnecessarily restricted access to abortions and failed to include ectopic pregnancies as an exception, thus criminalizing a potentially life-preserving abortion.[91] Therefore, the North Dakota Supreme Court held that

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80. Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-1608, ¶ 1, 2022 WL 3009722, at *1 (N.D. Dist. Ct. July 27, 2022).

81. *Id*. ¶ 3.

82. *Id*. ¶ 4.

83. *Id*. ¶¶ 9-10.

84. Wrigley v. Romanick, 2023 ND 50, ¶ 1, 988 N.W.2d 231, 234.

85. *Id*. ¶ 11.

86. *Id*. ¶ 12 ("A trial court's discretion to grant or deny a preliminary injunction is based on the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest.") (quoting Eberts v. Billings Cnty. Bd. of Comm'rs, 2005 ND 85, ¶ 8, 695 N.W.2d 691, 693).

87. *Id*. ¶ 27; *see* N.D. CONST. art. I, § 1.

88. *Wrigley*, 2023 ND 50, ¶ 28, 988 N.W.2d 231, 242.

89. *Id*. (citing Hoff v. Berg, 1999 ND 115, ¶ 14, 595 N.W.2d 285, 290).

90. *Id*. ¶¶ 30-33.

91. *Id*. ¶¶ 30, 32.

the district court did not abuse its discretion and denied Wrigley's requested relief, upholding the injunction.[92]

IV. RECENT NORTH DAKOTA ABORTION LEGISLATION

After the North Dakota Supreme Court held in *Wrigley v. Romanick* that the North Dakota Constitution provides a "fundamental right for a woman to obtain an abortion in instances where it is necessary to preserve her life or health,"[93] the Sixty-Eighth North Dakota Legislative Assembly passed three abortion-related bills: Senate Bill 2150, redefining abortion and its exceptions;[94] Senate Bill 2129, amending the alternatives-to-abortion program;[95] and House Bill 1171, prohibiting of forced or coerced abortion.[96] This section explains the three enacted bills, including the bills' amendments and legislative history.

A. SENATE BILL 2150

Senate Bill 2150 was passed during the Sixty-Eighth Legislative Assembly.[97] The bill proposed changes to several sections of the North Dakota Century Code relating to abortions, exceptions to abortion, and grounds for disciplinary action against physicians performing non-exempt abortions.[98] These changes included creating and enacting a new chapter to Title 12.1 and amending and reenacting several sections of Chapter 14-02.1 (the "Abortion Control Act") and Section 43-17-31(1).[99] However, the bill underwent several substantial changes as it progressed through the legislative process.

When legislators first introduced Senate Bill 2150 on January 6, 2023, the bill's language proposed "to amend and reenact sections"[100] as opposed to its final enrollment on April 19, 2023, which proposed "to create and enact."[101] The amendments included modifications to the definition of

92. *Id*. ¶¶ 39-40.
93. *Id*. ¶ 20.
94. *See* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
95. *See* S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
96. *See* H.B. 1171, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
97. *See* S.B. 2150 (as introduced by Senate, Jan. 6, 2023), https://www.ndlegis.gov/assembly/68-2023/regular/documents/23-0137-05000.pdf [https://perma.cc/4DPS-ABGR].
98. *See id.*
99. *See id.*
100. *Id.* at 1.
101. S.B. 2150, at 1 (final enrollment) https://www.ndlegis.gov/assembly/68-2023/regular/documents/23-0137-08000.pdf [https://perma.cc/2G9E-QN7G].

abortion and revisions to the affirmative defenses.[102] "Abortion" under the introductory version of Senate Bill 2150 was defined as:

> [T]he act of using 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. Such use, prescription, or means is not an abortion if done with the intent to:
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> (1) Save the life or preserve the health of the unborn child;
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> (2) Remove a dead unborn child caused by spontaneous abortion; or
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> (3) Treat a woman for an ectopic pregnancy.[103]

Additionally, the bill proposed reclassifying "affirmative defenses" under Section 12.1-31-12 as "exceptions," meaning the criminal penalties of a Class C felony would no longer apply to an individual who performed an abortion.[104] These exceptions applied under the following circumstances:

> a. An abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death of the pregnant female.
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> b. An abortion to terminate a pregnancy that 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 postfertilization age of the unborn child is six weeks or less.
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> c. An 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 section.
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> d. An abortion necessary due to a medical emergency.[105]

Aside from the proposed amendments and subsection (d), the above criteria were considered affirmative defenses under the original Section 12.1-31-12.[106] The early version of Senate Bill 2150 proposed to amend subsection

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102. *Id.* at 1-3.
103. *Compare id.* at 3, *with* N.D. CENT. CODE § 12.1-31-12(1)(a) (2007).
104. S.B. 2150, at 1-2.
105. *Id.* at 2-3.
106. N.D. CENT. CODE § 12.1-31-12(3) (2007).

(a) of 12.1-31-12(3) by changing the language from "professional judgment" to "reasonable medical judgment," though the definition remained the same.[107] The bill also amended subsections (b) and (c) by prohibiting abortions after six weeks postfertilization age and adding a knowledge requirement for individuals assisting in an abortion procedure.[108] In addition to reclassifying affirmative defenses as "exceptions," Senate Bill 2150 amended the statute to also include subsection (d) which permitted abortions for medical emergencies.[109] Under the additional subsection, legislation defined a medical emergency as a medical condition resulting in the pregnant woman's "death or in substantial and irreversible physical impairment of a major bodily function."[110]

Following the amendments to Section 12.1-31-12, the bill proposed to amend and reenact seven sections of the Abortion Control Act,[111] as well as Section 43-17-31(1) of the North Dakota Century Code.[112] Beginning with Section 14-02.1-02, which defines nineteen terms within the Abortion Control Act, the bill proposed to remove three of the Act's definitions: Down Syndrome, genetic abnormality, and "probable gestational age of the unborn child."[113]

Section 14-02.1-02.1 pertains to printed information for abortion referral services.[114] Senate Bill 2150 requires the Department of Health and Human Services to provide a notice to women seeking an abortion that certain abortions are prohibited in addition to providing other required materials: a list of agencies that can assist women through pregnancy, childbirth, and adoption; the anatomy and physiology of the unborn child during prenatal development; the father's legal obligations to the child; the various methods of abortion and their associated medical risks; and reversal of abortion-inducing drugs.[115] The Department of Health and Human Services must provide the materials for free, in print, on the Department's website.[116]

Senate Bill 2150 also amended both Section 14-02.1-02.2, the abortion report form, and Section 14-02.1-07, reporting practice of abortion, by requiring physicians and the Department of Health and Human Services to state whether a completed abortion fell within one of the exceptions laid out

107. S.B. 2150, at 2.
108. *Id.*
109. *Compare id.* at 3, *with* N.D. CENT. CODE § 12.1-31-12(3) (2007).
110. S.B. 2150, at 2.
111. N.D. CENT. CODE ch. 14-02.1.
112. S.B. 2150.
113. *Id.* at 3-6.
114. *Id.* at 8.
115. *Id.* at 6-8.
116. *Id.* at 8.

in Section 12.1-31-12.[117] Under Section 14-02.1-07, every facility and hospital that performs abortions must keep detailed records, including notes and test results, from admission to discharge as well as a copy of the forms and reports used by the facilitator.[118] All records kept by the abortion facilities are considered confidential and must be kept in the permanent files for at least seven years.[119]

North Dakota Century Code Section 14-02.1-03 lists the notification requirements before a woman may consent to an abortion.[120] Senate Bill 2150 removed the provision requiring a woman to obtain her husband's written consent to procure an abortion.[121] However, a woman must still give her informed consent, as defined under Section 14.02.1-02, and certify her marital status and age.[122] The bill left the provision requiring a pregnant minor to obtain written consent from her parent, custodian, or legal guardian.[123] An unemancipated minor's parents or legal guardian must receive the required information under 14-02.1-02 at least twenty-four hours before the abortion procedure.[124] Also remaining, women are protected from coerced abortions.[125]

Section 14-02.1-03.1, pertaining to parental consent for an unmarried minor seeking an abortion, requires courts to "issue an order to notify the minor's parents or guardians of the pendency of the proceeding and calling for their attendance at a reconvening of the hearing in order to advise and counsel the minor and assist the court in making its determination" if it is in the child's best interest.[126] The bill limited this required notification to pregnancies resulting from "gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest."[127]

Section 14-02.1-04 only allows abortion after viability to preserve the woman's life, but the amendments removed the "substantial risk of grave impairment" exception.[128] Finally, Senate Bill 2150 removed the disciplinary action provision against a physician when the physician performed an

117. *Id.* at 16-17.
118. *Id.*
119. *Id.* at 16-17. The remainder of Section 14-02.1-07 lists the report requirements, including time limitations for the physicians, copies of the reports, and the department's responsibility to collect the reports and maintain the confidentiality of the client.
120. N.D. CENT. CODE § 14-02.1-03 (2023).
121. S.B. 2150, at 10.
122. *Id.* at 9-10.
123. *Id.* at 10.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 13.
128. *Id*. at 15.

abortion before determining whether the unborn child had a detectable heartbeat under Section 43-17-31.[129]

Inevitably, Senate Bill 2150 underwent changes once it reached the Senate Judiciary Committee. Counter to the bill's introduction, which redefined abortion and provided three state-of-mind exceptions, the Committee considered removing subsection (a) of Section 12.1-31-12 on performing an abortion with the intent to "[s]ave the life or preserve the health of the unborn child."[130] Christopher Dodson, who assisted in drafting the amendments before the Committee, explained that the purpose of removing the subsection was due to the ambiguous language and to avoid an individual's ability to evade criminal penalties because of the broad language.[131] The Senate Judiciary Committee also proposed changing "postfertilization age" to "gestational age" as the term "gestational age" is more familiar to the medical community.[132] The final amendment proposed added additional language to subsection (b) of the abortion exceptions.[133] Dodson explained that the exception in its original state implied that physicians would have to make a legal determination as to whether the client's pregnancy resulted from a criminal offense.[134] Instead, the subsection would clearly state that a physician can make a "reasonable medical judgment."[135]

The Senate Judiciary Committee also considered a proposal to amend and reenact Section 14-02.1-01 of the North Dakota Century Code in Senate Bill 2150.[136] The amendment included a statement that the purpose of Chapter 14-02.1 "is to protect and promote human life and maternal health when the performance of an abortion is not otherwise prohibited by law."[137] The Senate Judiciary Committee supported these amendments and approved the bill as amended.[138] The Senate adopted the Judiciary Committee's

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129. *Id.* at 21.

130. *See* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by the S. Judiciary Comm., Jan. 25, 2023) [hereinafter S. Comm. S.B. 2150] https://www.ndlegis.gov/assembly/68-2023/regular/documents/23-0137-05003m.pdf [https://perma.cc/W9PT-4U24]; *see also* S. JUDICIARY COMM., PROPOSED AMENDMENTS TO SENATE BILL NO. 2150 (Jan. 25, 2023) https://www.ndlegis.gov/assembly/68-2023/regular/documents/23-0137-05003a.pdf [https://perma.cc/Y5NP-9JQB].

131. *See* S. Comm. S.B. 2150 at 2; *Hearing on S.B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb., Reg. Sess. (Jan. 25, 2023) (statement of Christopher Dodson, Exec. Dir., N.D. Catholic Conf.).

132. *Hearing on S.B. 2150*, *supra* note 131.

133. S. Comm. S.B. 2150 at 2.

134. *Hearing on S.B. 2150*, *supra* note 131.

135. S. Comm. S.B. 2150 at 2.

136. *See id.* at 3.

137. *Id.*; *compare id.*, *with* N.D. CENT. CODE § 14-02.1-01 (2013) ("The purpose of this chapter is to protect unborn human life and maternal health within present constitutional limits.").

138. *Hearing on S.B. 2150*, *supra* note 131.

suggestions, and the amendments became the First Engrossment of Senate Bill 2150.[139]

The House Committee on Human Services discussed additional amendments.[140] These amendments included adding molar pregnancy to the definition of abortion and changing the term "medical emergency" to "serious health risk."[141] The House Committee on Human Services also considered removing subsection (d) of the exceptions from the introductory bill and instead including "serious health risk" under subsection (a).[142] One major change the Committee proposed was to "create and enact a new chapter to title 12.1" instead of amending and reenacting 12.1-31-12.[143] Chairman Robin Weisz of the House Committee on Human Services stated that the purpose of the new chapter was for organization, in part because the Code had undergone several changes since its inception, and to add clarity to the chapter as a whole.[144] The above amendments passed with ten in favor, two opposed, and two abstaining, becoming the First Engrossment with House Amendments.[145]

Moreover, Human Services Committee also considered including an amendment to move the timeframe to procure an abortion for a pregnancy resulting from "gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest" from six weeks to ten weeks.[146] Additionally, the House considered including mental health under the definition of serious health risk.[147]

Much discussion ensued about the engrossed Senate Bill 2150 once it reached the House floor.[148] Representative Rohr began the discussion by explaining the legislative history of Senate Bill 2150 and stated that the bill "does not enact new restrictions on abortion. It only better restates the existing laws taking into consideration requests from the medical community and the recent state Supreme Court decision."[149] During the discussion, Representative Ista indicated that although the bill was amended to include a

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139. *See id*. (The bill passed with forty-three in favor and four opposed.); *see also* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by the Senate, Jan. 31, 2023).

140. S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by the H. Comm. on Hum. Servs., Apr. 13, 2023).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Hearing on S.B. 2150 Before the H. Hum. Servs. Comm.*, 68th Legis. Assemb., Reg. Sess. (Apr. 13, 2023) (statement of Chairman Weis, H. Comm. on Hum. Servs.).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See Hearing on S.B. 2150 Before the House*, 68th Legis. Assemb., Reg. Sess. (Apr. 17, 2023).

149. *Id.* (statement of Rep. Rohr, N.D. H. of Reps.).

physician's "reasonable medical judgment" to terminate a pregnancy resulting from a criminal sexual offense, the language raises implications that a physician must make a question of law using their "medical judgment."[150] Following Representative Ista, Representative Murphy asked what the bill does if a physician, unaware of his or her patient's pregnancy, prescribes the patient medication that induced an abortion, to which Representative Rohr responded that Senate Bill 2150 requires physicians to notify women of medication that could potentially cause an abortion.[151] Additionally, Representative Roers Jones raised concerns about the term "gestational age," which is measured from the first day of the woman's last menstrual cycle to the time of examination.[152] Given that the bill's timeframe for an abortion resulting from a criminal sexual offense is six weeks gestational age or less, Representative Roers Jones suggested that a woman would only have one to two weeks to decide whether to seek an abortion after realizing she missed her menstrual cycle.[153] After the discussion, Senate Bill 2150 passed the House[154] and became the First Engrossment with House Amendments.[155] Finally, the Senate approved Senate Bill 2150 for enrollment.[156] The bill was signed by Governor Doug Burgum on April 24, 2023.[157]

B. SENATE BILL 2129

In addition to Senate Bill 2150, the Sixty-Eighth Legislative Assembly passed Senate Bill 2129, which proposed "to amend and reenact Section 50-06-26 of the North Dakota Century Code, relating to the alternatives-to-abortion program."[158] Senate Bill 2129 appropriated funds from the Department of Health and Human Services to oversee the alternatives-to-abortion program.[159] The program gives funding to companies that encourage childbirth as an alternative to abortion.[160]

In 2005, when Section 50-06-26 of the North Dakota Century Code was first adopted, the statute established an alternatives-to-abortion services

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150. *Id.* (statement of Rep. Ista, N.D. H. of Reps.).

151. *Id.* (statements of Reps. Murphy and Rohr, N.D. H. of Reps.).

152. *Id.* (statement of Rep. Roers Jones, N.D. H. of Reps.).

153. *Id*.

154. *Id.* (14th Order of Business) (The House voted seventy-six in favor, fourteen opposed, and four abstentions.).

155. *See* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by H., Apr. 17, 2023).

156. *See Hearing on S.B. 2150 Before the Senate*, 68th Legis. Assemb., Reg. Sess. (Apr. 19, 2023) (Senate Bill 2150 passed with forty-two in favor and five opposed.).

157. N.D.S.J., 68th Legis. Assemb., Reg. Sess. 1914 (2023).

158. S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as introduced by S., Jan. 3, 2023).

159. *Id.*

160. *See id*.

program where the Department of Health and Human Services disbursed funds from Title IV-A of the Social Security Act.[161] Additionally, the program did not have a statutory fixed amount of funding.[162] When Senate Bill 2129 was first introduced at the Senate Human Services Committee, it amended the language of Section 50-06-26 by changing the name from "alternatives-to-abortion services program" to the "alternatives-to-abortion program."[163] The bill also proposed that the funds derive from the North Dakota state treasury in the sum of 1,600,000 dollars instead of using funds from the Federal Social Security Act.[164]

Senator Myrdal explained that the Committee recommended changing the source of funding because of concerns about whether the federal funding would continue.[165] Additionally, Senator Myrdal's proposal increased the funding to 1,600,000 dollars based on the number of abortions received in North Dakota within the last fifty years, the amount of funding the program used in the past, and the growth in the number of centers being built.[166]

In addition to Senate Bill 2129, the Committee discussed Senate Bill 2195, which appropriated 4,000,000 dollars in funds to the Department of Commerce for grant money to organizations that provide pregnancy resource services.[167] Most of the funding in Bill 2195 supported only post-abortion services, whereas Bill 2129 funded both pre- and post-abortion services.[168] Instead of having two bills to accomplish nearly the same issue, the Committee decided to increase the funding in Senate Bill 2129 from 1,600,000 to 4,000,000 dollars and voted to deny passage to Senate Bill 2195.[169] Additionally, the Committee amended Senate Bill 2129, allowing the funds to derive "from the American Rescue Plan Act or other federal funds and other income" and to require post-abortion services.[170] The Senate

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161. *See* N.D. CENT. CODE ANN. § 50-06-26 (West 2005); *see also* Social Security Act, 42 U.S.C.A. § 601 (West 1997) ("The purpose of this part is to increase the flexibility of States in operating a program designed to . . . prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies . . . .").

162. *See* N.D. CENT. CODE § 50-06-26 (West 2005); *Hearing on S.B. 2129 Before the S. Hum. Serv. Comm.*, 68th Legis. Assemb., Reg. Sess. (Jan. 23, 2023) [hereinafter *Jan. 23 Hearing*] (statement of Sen. Myrdal, N.D.S.) (stating the amount was $400,000).

163. S.B. 2129.

164. *Id*.

165. Jan. 23 *Hearing*, *supra* note 162 (statement of Sen. Myrdal, N.D.S.).

166. *Id*.

167. *Id*.; *see* S.B. 2195, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).

168. *Compare* S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by the S. Hum. Serv. Comm., Feb. 6, 2023), *with* S.B. 2195.

169. Jan. 23 *Hearing*, *supra* note 162; *see Hearing on S.B. 2195 Before S. Hum. Serv. Comm.*, 68th Legis. Assemb., Reg. Sess. (Feb. 6, 2023) (The committee voted "do not pass" on Senate Bill 2195.).

170. Jan. 23 *Hearing*, *supra* note 162; *see* S.B. 2129.

passed the Senate Human Services Committee's amendments,[171] and the bill moved to the Senate Appropriations Committee.

At the Senate Appropriations Committee, Senate Myrdal asked the Committee to lower the amount of funding from the 4,000,000 dollars proposed by the Senate Human Services Committee.[172] She was concerned that such a substantial amount of funding would become an "overwhelmingly state issue" and the federal government could try to control the funds the facilities qualify for.[173] Additionally, she stated that the amended language to draw funding from the American Rescue Plan Act was too broad.[174] As such, the Senate Appropriations Committee lowered the funding from 4,000,000 to 400,000 dollars as reflected in the original statute and removed the language added by the Senate Human Services Committee.[175] The Senate approved these amendments unanimously.[176]

After reaching the House Judiciary Committee, Senate Bill 2129 was amended once more, raising the funds from 400,000 back to 1,600,000 dollars.[177] The funding was then reconsidered at the House Appropriations Committee along with its Human Resources Division, which lowered the funding to 1,000,000 dollars.[178] The House approved the funding,[179] which the Senate subsequently approved,[180] and Senate Bill 2129 was finally enrolled.[181] The bill was signed by Governor Doug Burgum on April 28, 2023.[182]

C. HOUSE BILL 1171

Finally, the Sixty-Eighth Legislative Assembly passed House Bill 1171. The bill proposed "to create and enact a new section to Chapter 12.1-17 of the North Dakota Century Code, relating to prohibiting a forced or coerced abortion; and to provide a penalty."[183]

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171. *Hearing on S.B. 2129 Before the Senate*, 68th Legis. Assemb., Reg. Sess. (Feb. 7, 2023).

172. *Hearing on S.B. 2129 Before the S. Appropriations Comm.*, 68th Legis. Assemb., Reg. Sess. (Feb. 16, 2023) (statement of S. Myrdal, N.D.S.).

173. *Id*.

174. *Id*.

175. *Id.* (Roll call vote passed unanimously.); *see* S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as adopted by the S. Appropriations Comm., Feb. 16, 2023).

176. *Hearing on S.B. 2129 Before the Senate*, 68th Legis. Assemb., Reg. Sess. (Feb. 20, 2023).

177. *Hearing on S.B. 2129 Before the H. Judiciary Comm.*, 68th Legis. Assemb., Reg. Sess. (Mar. 15, 2023).

178. *Hearing on S.B. 2129 Before the H. Appropriations Comm.*, 68th Legis. Assemb., Reg. Sess. (Apr. 13, 2023) (statement by Rep. Stemen, N.D. H. of Reps.).

179. *Hearing on S.B. 2129 Before the House*, 68th Legis. Assemb., Reg. Sess. (Apr. 17, 2023).

180. *Hearing on S.B. 2129 Before the Senate*, 68th Legis. Assemb., Reg. Sess. (Apr. 24, 2023).

181. *See* S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as enrolled, Apr. 24, 2023).

182. N.D.S.J., 68th Legis. Assemb., Reg. Sess. 2212 (2023).

183. H.B. 1171, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).

House Bill 1171 was drafted to mirror and expand Senate Bill 2275, which penalizes forced or coerced abortion for victims of human trafficking.[184] Under House Bill 1171, force or coercion, when read together with the definition of a threat, means a statement or course of conduct that leads a woman to believe that the individual will physically harm her, her unborn child, or another individual as a way to compel her to have an abortion.[185] A person who forces or coerces a woman to have an abortion is subject to a class C felony.[186] When House Bill 1171 was introduced, the language used to define abortion complemented the language under Senate Bill 2150 when it was first introduced.[187] However, due to amendments made to Senate Bill 2150, the definitions were no longer identical.[188]

The initial statements heard by the House Committee on Human Services voiced support for the new section.[189] House Bill 1171 passed the Human Services Committee unanimously[190] and passed the House's final passage measures.[191]

When House Bill 1171 reached the Senate Judiciary Committee, the committee members raised questions about the bill's language and implications.[192] In particular, the Committee questioned whether threats to property and other actions aside from physical violence were included in the bill, which they were not.[193] Despite these concerns, House Bill 1171 passed the Senate Judiciary Committee[194] and the Senate.[195] Governor Burgum signed the bill on April 22, 2023.[196]

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184. *See Hearing on H.B. 1171 Before the H. Hum. Servs. Comm.*, 68th Legis. Assemb., Reg. Sess. (Jan. 17, 2023) (statement of Christopher Dodson, Exec. Dir., N.D. Catholic Conf.); *see also* S.B. 2275, 64th Legis. Assemb., Reg. Sess. (N.D. 2015).

185. H.B. 1171.

186. *Id.*

187. *Compare* H.B. 1171, *with* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (as introduced by S., Jan. 6, 2023).

188. *Compare* H.B. 1171, *with* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).

189. *Hearing on H.B. 1171* (statement of Sen. Myrdal, N.D.S.) ("I think it just goes in with [S.B. 2275] protecting sex trafficking victims, and I think it's important women have that protection.") (statement of Christopher Dodson, Exec. Dir., N.D. Catholic Conf.) ("No woman should be forced to have an abortion no matter who the perpetrator is, no matter who is the victim, and this accomplishes that . . . .").

190. *See id.* (recording fourteen votes in favor, none opposed, and no abstentions).

191. *See Hearing on H.B. 1171 Before the House*, 68th Legis. Assemb., Reg. Sess. (Jan. 18, 2023) (recording eighty-nine votes in favor and one opposed).

192. *See Hearing on H.B. 1171 Before the S. Judiciary Comm.*, 68th Legis. Assemb., Reg. Sess. (Apr. 3, 2023).

193. *Id.* (statement of Sen. Luick, N.D.S.).

194. *Id.* (passing with a vote of six in favor to one opposed).

195. *Hearing on H.B. 1171 Before the Senate*, 68th Legis. Assemb., Reg. Sess. (Apr. 5, 2023) (passing with a vote of forty-six in favor and one opposed).

196. N.D.H.J., 68th Legis. Assemb., Reg. Sess. 1866 (2023).

V. CURRENT FEDERAL CASELAW ON ABORTION PILLS

Though North Dakota's three newly enacted bills prohibit physicians from assisting or performing abortions in North Dakota, with limited exceptions, the FDA permits the use of mail-order chemical abortion pills.[197] These mail-order abortion pills allow individuals to procure an abortion through prescriptions from out-of-state physicians. Similar to the impact the *Dobbs* decision had in North Dakota, the current pending federal caselaw on abortion pills will likely prompt legislators to enact new laws if such question reaches the U.S. Supreme Court. This section explains the current federal caselaw on abortion pills.

The U.S. Supreme Court will likely hear a case in the upcoming term regarding the distribution of the abortion pill mifepristone.[198] *Alliance for Hippocratic Medicine v. FDA* began in the U.S. District Court for the Northern District of Texas[199] and was appealed to the Fifth Circuit Court of Appeals.[200] The case raises concerns about the FDA's approval of mifepristone and permitting its delivery by mail.[201]

On November 18, 2022, the Alliance for Hippocratic Medicine ("Alliance")[202] filed a motion for a preliminary injunction ordering the FDA[203] to withdraw or suspend its 2000 and 2019 approval of mifepristone tablets, its 2016 changes and 2019 approval, and its 2021 letter and response to the 2019 petition regarding its in-person requirements.[204]

Alliance challenged the FDA's 2000 approval of the abortion pill mifepristone,[205] which is a "synthetic steroid that blocks the hormone progesterone, halts nutrition, and ultimately starves the unborn human until death."[206] However, mifepristone alone is not always effective at completing an abortion.[207] Thus, the FDA requires individuals seeking a chemical abortion to take both mifepristone, a drug that terminates the unborn human's life, and then misoprostol, a drug that assists a woman's body in forcing the

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197. *See* All. for Hippocratic Med. v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023).

198. *Id.*

199. *Id*.

200. *See* Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023) (granting stay pending appeal).

201. *Alliance*, 2023 WL 2825871, at *12.

202. *Id.* at *1 ("Plaintiffs are doctors and national medical associations that provide healthcare for pregnant and post-abortive women and girls.").

203. *Id*. at *3 (The court granted a motion by Danco Laboratories, LLC, the company that holds the new drug application for mifepristone, to intervene as a defendant.).

204. *Id*.

205. *Id*. at *1 (citing ECF No. 1 at 2).

206. *Id*. (citing ECF No. 7 at 7-8).

207. *Id*. (citing ECF No. 7 at 8).

unborn human out of her womb.[208] Although the FDA's initial review of mifepristone determined that the drug was not safe or effective for its intended use as a chemical abortion pill, the FDA approved mifepristone shortly thereafter under Subpart H—an "accelerated approval" to expedite reviews.[209] The FDA limited the use of mifepristone and misoprostol to unborn humans with a gestational age of less than eight weeks.[210] The agency also required women and girls seeking a chemical abortion to attend three in-person office visits to administer each drug and to assess any complications.[211] Lastly, the FDA required proper training of physicians and reporting of any negative side effects.[212]

Several associations filed a petition in 2002 challenging the FDA's 2000 approval of mifepristone.[213] Joined by the U.S. House Subcommittee on Criminal Justice, Drug Policy, and Human Resources, the associations raised concerns about the life-threatening and even deadly incidents associated with mifepristone.[214] The FDA rejected the petition fourteen years later, on March 29, 2016.[215] Following its rejection, the FDA removed all post-approval safety restrictions for pregnant women, increased the gestational age for a chemical abortion from seven to ten weeks, altered the dosages for mifepristone and misoprostol, decreased required in-person visits from three to one, allowed non-doctors to administer the drugs, and removed the reporting requirement.[216] In 2019, Alliance filed a petition challenging the FDA once more,[217] and shortly thereafter, the FDA approved a generic version of mifepristone.[218] In 2021, the FDA announced that mifepristone could be dispensed by mail during the COVID pandemic and subsequently denied Alliance's 2019 petition, announcing that it would permanently allow delivery of mifepristone and misoprostol by mail.[219]

For a court to issue a preliminary injunction, the movant must prove four factors.[220] First, the movant must show they have "a substantial likelihood of

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208. *Id*. (citing ECF No. 7 at 8).

209. *Id*. at *1-2. (The program was "originally designed to expedite investigational HIV medications during the AIDS epidemic.").

210. *Id*. at *2 (citing ECF No. 7 at 9).

211. *Id*.

212. *Id*.

213. *Id*. (including Plaintiffs American Association of Pro-Life Obstetricians & Gynecologists and Christian Medical & Dental Associations).

214. *Id*.

215. *Id*. (citing ECF No. 7 at 9).

216. *Id*. (citing ECF No. 7 at 10).

217. *Id*. at *3.

218. *Id*.

219. *Id*. (citing ECF No. 7 at 10-11).

220. *Id*. (citing Louisiana v. Becerra, 20 F.4th 260, 262 (5th Cir. 2021)).

success on the merits."[221] Second, the movant must prove a substantial risk of irreparable harm if the court does not approve the injunction.[222] Third, the potential injury to the movant established in the second factor must outweigh any harm resulting from the court granting the injunction.[223] Finally, the injunction must be of public interest.[224]

The U.S. District Court for the Northern District of Texas began its analysis by determining whether the Alliance had standing to sue in a federal court.[225] To prove standing, Alliance was required to show "(i) that [it] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[226]

Associations such as Alliance can establish an injury-in-fact under "associational standing," meaning it can file a suit if its members independently have standing, the interests of the members align with the purpose of the association, and both the claim and relief allow the association to have standing on behalf of the members.[227] The district court found that the individual members of Alliance had standing because the doctors and physicians had first-hand experience with the resources, time, and equipment necessary to treat the overwhelming amount of adverse reactions resulting from chemical abortion drugs.[228] The members argued that they felt forced to perform these emergency abortions "as the only means to save the life of the woman or girl" due to the failure of the chemical abortion.[229] They also claimed that without information on side effects and adverse outcomes, women could not give informed consent to the provider, harming the doctor-patient relationship and exposing physicians to allegations of malpractice.[230] The district court also found that the members of Alliance had standing "to sue on behalf of their patients" via third-party standing.[231]

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221. *Id*.
222. *Id*.
223. *Id*.
224. *Id*.
225. *Id*.; *see* U.S. CONST. art. III, § 2.
226. *Alliance*, 2023 WL 2825871, at *3 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)).
227. *Id*. (citing Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n, 989 F.3d 368, 377 (5th Cir. 2021)).
228. *Id*. at *4 (citing ECF No. 7 at 14, No. 1-5 at 9).
229. *Id*. (citing ECF No. 1 at 85-86).
230. *Id*. (citing ECF No. 7 at 15); *see* Texas v. Becerra, No. 5:22-CV-185-H, 623 F. Supp. 3d 696, 715-16 (N.D. Tex. Aug. 23, 2022) (holding that requiring physicians to perform elective abortions satisfies the injury requirement).
231. *Alliance*, 2023 WL 2825871, at *4-5.

In addition to associational standing, Alliance had "organizational standing."[232] Organizational standing requires the same criteria as individual standing.[233] For example, a company has organizational standing when it identifies specific projects it has delayed or halted so that the company can address the challenged issue.[234] The district court found that Alliance could not properly educate and inform its members and patients about the chemical abortion drugs since the FDA removed the reporting requirement on the adverse effects of the drugs.[235] As such, Alliance also had standing through "diversionary injury."[236]

The FDA contended that Alliance's standing was grounded in speculation, and Alliance could not identify the FDA's actions as the source of injury.[237] In response, Alliance listed specific events where its members provided emergency care to women suffering from the intense side effects and complications of chemical abortion.[238] The district court distinguished the case from *Clapper v. Amnesty International USA*, which held that a "threatened injury must be certainly impending to constitute injury in fact."[239] Unlike *Clapper,* where the party failed to identify the probability of future threatened injury, the district court held that Alliance's alleged future harms were strengthened by its list of numerous past injuries resulting from the adverse events of chemical abortions.[240] Additionally, Alliance's injury could be fairly traced to the FDA because a favorable decision would relieve Alliance "of at least some of the injuries allegedly caused by FDA."[241]

The district court also found that Alliance was within the zone of interests protected or regulated by the 1938 Food, Drug, and Cosmetic Act ("FDCA") and the 1873 Comstock Act.[242] A party fails to be within the zone of interests when his or her interests are marginally related or inconsistent with a statute's purpose.[243] The provisions within the FDCA "protect the safety of physicians' patients and the integrity of the physician-patient relationship."[244] Because the district court found that Alliance had third-party standing to file suit on behalf of their patients, they were "within the zone of

232. *Id*. at *6 (quoting OCA-Greater Hous. v. Texas, 867 F.3d 604, 610 (5th Cir. 2017)).
233. *Id*. (quoting *OCA-Greater Hous*., 867 F.3d at 610).
234. *Id*. (quoting Texas State LULAC v. Elfant, 52 F.4th 248, 253 (5th Cir. 2022)).
235. *Id*.
236. *Id*.
237. *Id*. at *7.
238. *Id*.
239. *Id*. (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013)).
240. *Id; see also Clapper*, 568 U.S. at 413-14.
241. *Alliance*, 2023 WL 2825871, at *8.
242. *Id*.
243. *Id*. (quoting Texas v. United States, 809 F.3d 134, 162 (5th Cir. 2015)).
244. *Id*. at *9.

interest of the [FDCA]."[245] Additionally, the Comstock Act states that because Congress adopted an amendment prohibiting individuals from mailing information regarding abortion, there is a national policy against abortion.[246] Therefore, Alliance was within the zone of interest under the Comstock Act and had standing to challenge the FDA in federal court.[247]

Next, the district court looked to whether Alliance's claims were reviewable.[248] The FDA argued that the six-year statute of limitations had passed, so Alliance was limited to its claim against the FDA's 2021 response to the 2019 petition.[249] The district court denied this argument on three grounds.[250] First, if the FDA re-opened an issue by restating a policy it previously adopted, the statute of limitations is renewed.[251] When determining whether an agency re-opened an issue, courts look to the context of the agency's rulemaking as well as four non-exhaustive factors: whether the agency (1) proposed changes to a policy, (2) requested comments on the proposed changes, (3) explained the differences between the original and revised policy, and (4) responded to a comment on the original policy.[252] The district court compared the FDA's 2000 approval of mifepristone with its changes in 2016 and 2021 and found that the FDA "reaffirmed its prior actions after undertaking a substantive reconsideration of those actions," thus the statute of limitations period restarted in 2021.[253] Additionally, the FDA unreasonably delayed its response to the petitions asserted against it, which protects Alliance's claims under the equitable tolling doctrine.[254]

Second, the FDA cannot avoid judicial review unless its decision is committed to agency discretion by law.[255] The exception only applies where statutes are so broad that no law can be drawn and applied to a particular case.[256] However, the district court found that 21 U.S.C. Section 355-1 explicitly authorizes the Secretary to determine the disbursement of drugs with serious risks, mitigate safety risks, and minimize the burden of access

245. *Id*.
246. *Id*. (quoting Bours v. United States, 229 F. 960, 964 (7th Cir. 1915)).
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*.
251. *Id*. (quoting Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 892 F.3d 332, 345 (D.C. Cir. 2018)).
252. *Id*. at *10 (citing Tripoli Rocketry Ass'n, Inc. v. U.S. Bureau of Alcohol, Tobacco & Firearms, No. 00CV0273(RBW), 2002 WL 333253171, at *6 (D.D.C. June 24, 2002) (unpublished)).
253. *Id*. at *11.
254. *Id*.
255. *Id*. at *12 (quoting Heckler v. Chaney, 470 U.S. 821, 837-38 (1985)).
256. *Id*.

to the drug.[257] Thus, the FDA's decision was not committed to agency discretion by law.[258]

Finally, judicial review is not precluded because a party failed to exhaust certain claims.[259] Specifically, a court will review an agency's decision if: it is contrary to public policy,[260] will likely result in individual injustice or irreparable injury,[261] the agency has inadequate administrative remedies and unreasonable time limits,[262] where exhaustion would be futile,[263] or where an issue was raised with sufficient clarity.[264] The district court found that all of these conditions were met.[265]

After establishing that it had standing to review the case, the district court determined whether to grant an injunction, beginning its analysis with Alliance's likelihood of success on the merits for the 2021 and pre-2021 actions.[266] The Comstock Act prohibits "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance" from being conveyed through the mail.[267] This prohibition includes items used to cause an abortion, such as instruments, drugs, or medicine.[268] Additionally, the Act prohibits mail carriers from dispersing chemical abortion drugs through interstate or foreign commerce.[269] The FDA argued that the "consensus view" of the Comstock Act allows individuals to mail items resulting in an abortion if the sender did not have unlawful intent.[270] The district court found the FDA's argument unpersuasive, further stating that if the law is plain, then courts will presume a plain interpretation of the operative language.[271] The Act plainly does not require that the sender intend for the recipient to use the drugs unlawfully,[272] which is supported by the Act's legislative history.[273] Since the FDA's decision violated the Comstock Act, it also violated the

257. *Id*. at *12 (citing 21 U.S.C. §§ 355-1(f)(1)-(3)).

258. *Id*. at *13.

259. *Id*.

260. *Id*. at *14 (citing Myron v. Martin, 670 F.2d 49, 52 (5th Cir. 1982)) (pointing to the Comstock Act).

261. *Id*. (citing *Myron*, 670 F.2d at 52).

262. *Id*. at *13 (citing Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 587 (1989)).

263. *Id*. (citing Gulf Restoration Network v. Salazar, 683 F.3d 158, 175 (5th Cir. 2012)).

264. *Id*. (citing Pac. Choice Seafood Co. v. Ross, 976 F.3d 932, 942 (9th Cir. 2020)).

265. *Id*. at *14-15.

266. *Id*. at *16.

267. *Id*. (quoting 18 U.S.C. § 1461).

268. *Id*. (quoting 18 U.S.C. § 1461).

269. *Id*. (quoting 18 U.S.C. § 1462).

270. *Id*. (When the federal courts of appeals come to a "consensus view" on a statute, and Congress does not address these views by modifying or rejecting the statute, courts may interpret the "consensus view" as the statute's meaning.).

271. *Id*. at *16-17 (citing Lawson v. FMR LLC, 571 U.S. 429, 441 (2014)).

272. *Id*. at *17 (quoting 18 U.S.C. § 1461).

273. *Id*.

Administrative Procedure Act, which prohibits agency actions that are "arbitrary and capricious" or "otherwise not in accordance with the law."[274] Thus, Alliance had a substantial likelihood of success on the merits as to the FDA's 2021 action allowing mail-order abortion drugs.[275]

The district court also found that Alliance has a substantial likelihood of success on the merits with the FDA's pre-2021 actions, including the 2000 approval, 2016 changes, and 2019 general approval.[276] Starting with the 2000 approval, the district court found that the FDA violated Subpart H by allowing accelerated approval of new drugs to treat serious or life-threatening illnesses.[277] Under Subpart H, the drugs must have undergone safety and effectiveness studies and provide meaningful therapeutic benefit.[278] The court reasoned that pregnancy is not an illness; rather, it is a natural process that women experience to perpetuate human life.[279] Although the FDA argued in its 2016 changes that unintended pregnancy may result in depression and anxiety, the court held that classifying complications resulting from pregnancy as illnesses is different than classifying pregnancy itself as an illness.[280] To compare, the district court referenced the FDA's use of Subpart H to treat HIV and HIV-related diseases, various cancers, bacterial infections, chronic hypertension, and leprosy.[281] Additionally, mifepristone and other chemical abortion drugs do not provide a "meaningful therapeutic benefit" compared to surgical abortion.[282] The FDA argued that chemical abortion drugs help pregnant women avoid "an invasive surgical procedure and anesthesia."[283] However, the district court found that negative side effects are significantly higher in chemical abortions, including events such as "hemorrhaging, incomplete abortion, and unplanned surgical evacuation."[284]

In addition to the FDA's violation of Subpart H, the district court found that the FDA's pre-2021 actions were arbitrary and capricious.[285] When considering the new drug application for mifepristone, the FDA relied on four

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274. *Id*. at *19 (quoting 5 U.S.C. § 706(2)(A)).

275. *Id*. at *16.

276. *Id*. at *19.

277. *Id*. (citing 21 C.F.R. § 314.500).

278. *Id*. (quoting 21 C.F.R. § 314.500).

279. *Id*.

280. *Id*. at *20.

281. *Id*. (citing Charles Steenberg, *The FDA's Use of Postmarketing (Phase IV) Study Requirements Exception to the Rule?*, 61 FOOD & DRUG L.J. 295, 323 (2006)).

282. *Id*. at *21 (quoting 21 C.F.R. § 314.500).

283. *Id*. at *22 (quoting ECF No. 28 at 37).

284. *Id*.

285. *Id*. at *24 (Courts determine that an agency's action is arbitrary and capricious when it fails to address an important underlying issue of a problem, offers an explanation that contrasts with evidence, or is implausible.).

requirements within the U.S. trials: an ultrasound to determine gestational age, physicians experienced with abortions, that "patients be within one hour of emergency facilities," and that physicians monitor women for four hours.[286] However, the FDA did not include any requirements in its decision to approve mifepristone.[287] In fact, the FDA admitted that the drug was not safe or effective for use but would approve the drug through Subpart H.[288] The district court found that the FDA violated its statutory duty to deny drug applications with legitimate safety concerns.[289] In 2016, when the FDA made numerous changes to chemical abortion requirements, the studies that the FDA relied on were not designed around the safety and effectiveness of mifepristone and misoprostol.[290] Specifically, the FDA did not require that a woman undergoing a chemical abortion have an ultrasound, an in-person exam to check for adverse effects, or an emergency surgical abortion if needed, effectively removing more restrictions on chemical abortions.[291] Finally, in 2019, the FDA approved a generic drug chemically similar to mifepristone.[292]

In analyzing the second required element for a court to issue a preliminary injunction, the court must determine whether irreparable harm would occur if it denied the preliminary injunction.[293] Irreparable harm results when "there is no adequate remedy at law, such as monetary damages."[294] The district court found that Alliance satisfied this requirement.[295] The court referenced two recent instances where women died from chemical abortion drugs, the physical and emotional trauma women endure from chemical abortions, the crucial time necessary for doctors to treat women from failed chemical abortions, and the time, energy, and resources expended by the medical associations.[296]

Finally, the court assessed the third and fourth injunction requirements together—whether the injunction would harm the opposing party and whether it would be of public interest.[297] A strong public interest exists in "preventing unsafe drugs from entering the market"[298] and ensuring agency

286. *Id*.
287. *Id*.
288. *Id*. at *26.
289. *Id*. at *27.
290. *Id*. at *28.
291. *Id*.
292. *Id*. at *29.
293. *Id*.
294. *Id*. (quoting Janvey v. Alguire, 647 F.3d 585, 600 (5th Cir. 2011)).
295. *Id*.
296. *Id*.
297. *Id*. at *30.
298. *Id*. (quoting Hill Dermaceuticals, Inc. v. FDA, 524 F. Supp. 2d 5, 12 (D.D.C. 2007)).

actions comply with the law.[299] The FDA argued that children of women who could not obtain an abortion do worse in school, have behavioral and social issues, make less money, have worse health, and are more likely to be involved in criminal activities.[300] However, the court stated that using these as a reason to promote chemical abortions is synonymous to promoting eugenics.[301] The court found that the factors weighed in favor of protecting women and ensuring compliance with federal law against any harm to the FDA caused by an injunction.[302]

Based on the foregoing reasons, the district court granted Alliance's motion in part, finding that the appropriate relief was a stay on the FDA's approval of mifepristone and all subsequent challenges related to the FDA's approval as opposed to a withdrawal or suspension of mifepristone.[303] The court simultaneously stayed the application of the order for seven days "to allow the federal government to seek emergency relief from the U.S. Court of Appeals for the Fifth Circuit."[304]

On April 14, 2023, Danco Laboratories filed an emergency application for a stay on the order from the U.S. District Court granting the preliminary injunction.[305] Supreme Court Justice Alito ordered a temporary stay on the injunction that lasted until April 19, 2023, and required the parties' responses to the application to be filed before April 18, 2023.[306] Then on April 21, 2023, the Supreme Court Justices granted the stays until the Fifth Circuit finalized its opinion and a party then filed a petition for a writ of certiorari.[307] The stay will terminate immediately if the Court denies certiorari or will terminate after the Court hears the case and sends its judgment to the lower court.[308] Justice Alito dissented to the stays stating that a stay is an equitable remedy and should not be granted "if the moving party has not acted equitably, and that is the situation here."[309] Justice Alito added that Danco Laboratories failed to show that it would suffer irreparable harm resulting from the granted injunction.[310]

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299. *Id*. (quoting Fund for Animals, Inc. v. Epsy, 814 F. Supp. 142, 152 (D.D.C. 1993)).

300. *Id*. at *31 (quoting ECF No. 28-2 at 7).

301. *Id*.

302. *Id*. at *30-31.

303. *Id*. at *32.

304. *Id*.

305. *See* Emergency Application for Stay of Preliminary Injunction Pending Appeal at 41, Danco Lab'ys., LLC v. All. for Hippocratic Med., No. 22A901 (2023), 2023 WL 2996932, at *1.

306. *See* FDA v. All. for Hippocratic Med., No. 22A902 (2023), 2023 WL 2942266, at *1; *see also* Danco Lab'ys., LLC, v. All. for Hippocratic Med., No. 22A901 (2023), 2023 WL 2942264, at *1.

307. *See* Danco Lab'ys., LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023).

308. *Id*.

309. *Id*. at 1075-76 (Alito, J., dissenting).

310. *Id*. at 1076 (Alito, J., dissenting).

VI. CONCLUSION

Within a year, North Dakota abortion law has changed dramatically. Following the U.S. Supreme Court's decision in *Dobbs*, the ability to regulate abortions was returned to the states.[311] Shortly thereafter, the North Dakota Supreme Court held in *Wrigley v. Romanick* that the North Dakota Constitution provides a fundamental right to procure an abortion when the abortion is necessary to preserve the women's life or health.[312] However, almost immediately, the Sixty-Eighth Legislative Assembly passed three bills: Senate Bill 2150, Senate Bill 2129, and House Bill 1171, making such decision moot. Senate Bill 2150 effectively criminalized abortions except when necessary to "prevent the death or a serious health risk to the pregnant female," to terminate a pregnancy resulting from a criminal offense, or when an assisting physician unknowingly performed an abortion.[313] Additionally, a physician removing "a dead unborn child caused by spontaneous abortion" or when treating a woman for ectopic or molar pregnancy is statutorily defined as not an abortion.[314] Those who perform an abortion outside of the exceptions, excluding the pregnant female, are subject to a class C felony.[315] Moreover, Senate Bill 2129 amended North Dakota's alternatives-to-abortion program, a program to encourage childbirth over abortion.[316] The bill reserved 1,000,000 dollars in funds for the program.[317] Finally, House Bill 1171 created a penalty for individuals who force or coerce a pregnant woman to get an abortion.[318] Individuals found to be guilty of forcing or coercing a pregnant woman to have an abortion are subject to a class C felony.[319] Since these bills have only recently been adopted, their impact on North Dakota practitioners has yet to be fully realized. However, new cases will likely arise challenging the bills' language, further developing our understanding of the newly enacted legislation.

Although the U.S. Supreme Court stayed the Texas district court's ruling in *Alliance for Hippocratic Medicine v. FDA*,[320] the parties could appeal the Fifth Circuit's decision to the Supreme Court. If so, the Supreme Court may hear and make a ruling on the availability of mifepristone in the upcoming

311. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242-43 (2022).
312. 2023 ND 50, ¶¶ 27-28, 988 N.W.2d 231, 242.
313. S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
314. *Id*.
315. *Id*.
316. S.B. 2129, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
317. *Id*.
318. H.B. 1171, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).
319. *Id*.
320. Danco Lab'ys., LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023).

term. Since the case is not on the Supreme Court's docket, the impact on North Dakota practitioners and physicians is not yet apparent.

Though the bills passed during the Sixty-Eighth Legislative Assembly prohibit abortion, and thus the use and prescription of mifepristone, the bills do not prohibit a woman's ability to access chemical abortion pills through the mail by service providers in other states that allow abortions.[321] As such, if the U.S. Supreme Court hears *Alliance* and upholds the FDA's approval of mail-order chemical abortion drugs, North Dakota's current legislation would not prevent women from accessing chemical abortion drugs. Citizens would therefore have access to chemical abortion pills through out-of-state prescriptions where abortion is legal. Contrarily, if the U.S. Supreme Court strikes down the FDA's mail-order chemical abortion drugs approval, with Senate Bill 2150 in effect, North Dakota citizens would no longer have access to chemical abortion pills, effectively completely restricting abortions to the statutory exceptions.

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321. *See* S.B.2150, H.B. 1171.

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