

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2022-CV-1608

Access Independent Health Services, )  
Inc., d/b/a Red River Women’s Clinic, )  
on behalf of itself and its patients, and )  
Kathryn L. Eggleston, M.D., on behalf )  
of herself and her patients, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Drew H. Wrigley, in his official capacity )  
as Attorney General for the State of )  
North Dakota, Birch P. Burdick, in his )  
official capacity as the State Attorney )  
for Cass County, )  
 )  
Defendants. )

**ORDER ON PLAINTIFF’S  
MOTION FOR TEPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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[¶1] The Plaintiffs, Access Independent Health Services, Inc., d/b/a Red River Women’s Clinic and Kathryn L. Eggleston, M.D., (“RRWC” or “Plaintiffs”), filed a motion for a temporary injunction in the above matter to stop the enforcement of North Dakota Century Code § 12.1-31-12, currently set to take effect on July 28, 2022. *Docket No. 5*. The Defendants, Drew Wrigley and Birch Burdick, (“Wrigley” or “Defendants”), filed a response opposing RRWC’s motion. *Docket No. 63*. RRWC filed a reply brief countering Wrigley’s arguments on July 22, 2022. *Docket No. 65*.

**BACKGROUND**

[¶2] The issue currently before the Court is whether a temporary restraining order is appropriate to halt N.D.C.C. § 12.1-31-12 from taking effect on July 28, 2022. North Dakota Century Code § 12.1-31-12 defines the crime and affirmative defenses of abortion. This statute was enacted by the

Legislature in 2007, while *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), were still in effect. Because § 12.1-31-12 would have been unconstitutional under these cases at the time it was enacted, the Legislature placed a triggering provision into the statute to allow it to take effect should the conditions outlined be met. The triggering language included with the statute in 2007 was “This Act becomes effective on the date the legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that this Act would be upheld as constitutional.” However, in 2019, the Legislature amended the trigger language to:

[T]his Act become effective on the thirtieth day after:

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
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[.]

[¶]3 All parties agree the current issue is whether the second provision of the trigger language of § 12.1-31-12 was properly initiated and implemented in this case. The following facts are undisputed between the parties. First, in *Dobbs v. Jackson Women’s Health Organization*, the United States Supreme Court overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania*, restoring to the states authority to prohibit abortion. 142 S.Ct. 2228 (2022). Second, the United States Supreme Court issued its opinion in *Dobbs* on June 24, 2022, and on July 26, 2022, issued its Judgment. And, lastly, Wrigley, acting in his role as the attorney general, certified to the North Dakota legislative council that the United States Supreme Court issued a judgment in a decision that restored to the states the authority to prohibit abortion on June 28, 2022.

## ANALYSIS

[¶4] North Dakota Rules of Civil Procedure Rule 65(a) allows the Court the ability to grant a temporary restraining order until it makes a final decision on the appropriateness of issuing a preliminary injunction in the matter. The purpose of the temporary restraining order is to prevent irreparable injury. *Id.* At this time, RRWC has filed a motion for injunctive relief and Wrigley has answered. However, no hearing has been held on the issue and Court has only had all of the briefs before it for less than one week. At this time, the Court is not able to make its final decision on the appropriateness of issuing a preliminary injunction before § 12.1-31-12 is set to take effect on July 28, 2022. Therefore, the Court will consider whether a temporary restraining order is instead *appropriate until it can rule on the motion for preliminary injunction.*

[¶5] RRWC argues a temporary restraining order is appropriate because Wrigley failed to properly follow the procedure outlined in the trigger language of § 12.1-31-12; specifically, RRWC argues Wrigley prematurely issued its certification to the Legislature because the United States Supreme Court had yet to issue its certified judgment of *Dobbs*. Conversely, Wrigley argues a temporary restraining order is *inappropriate because he followed the procedure of the trigger language, and even if he did not, the Court cannot retroactively restrain him from issuing such a certification.*

[¶6] As outlined above, the triggering language of § 12.1-31-12 states: “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.” (emphasis added). The meaning, and therefore, the timing of the “issuance of the judgment” language, is the only dispute between the parties in regard to the triggering language. WWRC argues the judgment of the Supreme Court isn’t issued until 25 days after the Supreme

Court publishes its opinion when the mandate is issued, which includes a certified copy of the Supreme Court's Judgment. *See* Sup. Ct. R. 45. Wrigley argues the judgment is issued on the date the opinion is signed.

[¶7] The Court is not persuaded by Wrigley's argument and instead agrees with the logic of the WWRC. After the Supreme Court publishes its opinion on a case, the parties have 25 days in which to seek a petition for rehearing on the matter. *See* Sup. Ct. R. 44. Although exceedingly rare, during the time for a petition for rehearing, the Supreme Court could alter or amended its original judgment and decisions, thereby rendering the original opinion moot. Without the formal certification of the Supreme Court's opinion, the lower courts cannot be guaranteed of the finality of the Supreme Court's decision. Therefore, this Court finds the language contained to trigger § 12.1-31-12 requires the formal issuance of the Supreme Court's judgment through the certification and mandate.

[¶8] Additionally, this Court finds the Legislature's altering of the triggering language between the original language implemented in 2007 and the language currently in place, persuasive. Under the original language, all that was required was for the attorney general to recommend to the legislative council that § 12.1-31-12 would be upheld as constitutional. However, in 2019, the Legislature saw fit to amend the language and implement a more restrictive process to trigger the statute. Wrigley's certification prior to the Supreme Court's certified judgment would have been proper under the triggering language in 2007, but the Court is not persuaded that such action meets the heightened procedural requirements adopted in 2019.

[¶9] The Court finds in certifying the Legislative Counsel on June 28, 2022, Wrigley prematurely attempted to execute the triggering language of § 12.1-31-12. Such certification was

improper until the United States Supreme Court issued its certified judgment on July 26, 2022.  
Therefore the Court finds a temporary restraining order appropriate at this time.

**ORDER**

[¶10] The Court hereby GRANTS WWRC's motion for a temporary restraining order, prohibiting North Dakota Century Code § 12.1-31-12 from taking effect until attorney general follows the provisions outline in the triggering language or until future order of the Court.

Dated this 27th day of July, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'BRUCE ROMANICK', is written over a horizontal line. The signature is stylized and includes a large loop at the end.

Bruce Romanick, Presiding Judge  
South Central Judicial District.