

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

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 PRELIMINARY  
INJUNCTION**

---

[¶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 restraining order and preliminary 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 “the State”), 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*. On July 27, 2022, the Court granted RRWC’s motion for a temporary restraining order. A motion hearing for the preliminary junction was held on August 19, 2022.

**BACKGROUND**

[¶2] RRWC filed the above suit to prevent Wrigley from enforcing North Dakota Century Code § 12.1-31-12, (“the statute”). The statute 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 affect should the conditions outlined be met. The United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*, overruled *Roe* and *Casey*, and restored to the states authority to prohibit abortion. 142 S.Ct. 2228 (2022).

[¶3] Previously, the Court addressed whether a temporary restraining order was appropriate in the above case. Under the circumstances as they existed at the time, the Court granted RRWC's request for a temporary restraining order, halting the enforcement of the statute. The current issue before the Court is whether to extend the temporary restraining order into a formal preliminary injunction.

### LEGAL ANALYSIS

[¶4] North Dakota Century Code section 32-06-02 outlines the situations where the Court can issue an injunction, including: "When, during the litigation, it shall appear that the defendant is doing or threatening, or is about to do, or is procuring or suffering, some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual[.]" Before deciding whether to grant a preliminary injunction, a trial court must consider four 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." *Nodak Mut. Ins. Co. v. Ward County Farm Bureau*, 2004 ND 60, ¶ 24, 676 N.W.2d 752.

[¶5] The party seeking the preliminary injunction has the burden of establishing the necessity of the injunction. *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990).

“The most important prerequisite for the issuance of a preliminary injunction is a demonstration that, if the preliminary injunction is not granted, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Id.* Additionally, “the purpose of a temporary or preliminary injunction ‘is to maintain the cause in status quo until a trial on the merits.’” *State v. Holecek*, 545 N.W.2d 800, 804 (N.D. 1996) (quoting *Gunsch v. Gunsch*, 69 N.W.2d 739, 7456 (N.D. 1954)). The ultimate “decision to grant or deny a preliminary injunction is within the discretion of the trial court[.]” *Fargo Women’s Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992).

[¶6] In assessing whether to grant RRWC’s motion for a preliminary injunction, the Court will consider each of the four factors, outlined in *Nodak Mut. Ins. Co.*, individually and then weigh them collectively. The Court will note, that at the hearing held on August 19, 2022, to address whether the Court should grant RRWC’s motion for preliminary injunction, neither party provided any evidence to the Court; rather, all parties relied solely on arguments. Because the Court did not receive any evidence at the hearing, the Court is left with the two declarations, (“the declarations”), filed by RRWC in support of its motion in which to base any of its factual findings. *Docket Nos. 7, 8*. The declarations were submitted by Tammi Kromenaker, the Director of the Red River Women’s Clinic, and Dr. Mark Nichols. *Id.* The Court would also note that in addition to not submitting any affidavits or providing any evidence, the State failed to counter or object to any factual statements made by RRWC through its declarations.

### *1. Substantial Probability of Succeeding on the Merits*

[¶7] The central question in the above case is one of a purely legal matter, that is, the constitutionality of § 12.1-31-12. Although both parties spend substantial time arguing the first

prong, the underlying issue before the Court has no questions of facts; the determination of the substantial probability of succeeding on the merits would essentially have the Court determine the final validity of the parties' claims. As such, the Court makes no findings towards the substantial probability of succeeding on the merits prong and instead, reserves such analysis for the proper time, on a motion for summary judgment or trial.

## 2. Irreparable Injury

[¶8] RRWC argues in support of a preliminary injunction that if § 12.1-31-12 takes effect, the Clinic will have to close, women will be denied access to abortions in North Dakota, patients will suffer because they may face irreversible and potentially devastating health consequences, and patients may suffer economic consequences. In support of its arguments, RRWC cites to Dr. Nichols Declaration.

[¶9] RRWC also argues:

The availability of abortion care in neighboring states does not relieve North Dakota of its obligations to safeguard its citizens' constitutional rights. Indeed, in other cases involving abortion restrictions, courts have held that "the proper formulation of the undue burden analysis focuses solely on the effects *within the regulating state*" because "a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Circ. 2014) (emphasis added).

[¶10] However, the Court is not persuaded by this argument. At this time, this Court, nor the North Dakota Supreme Court, has not declared a right to abortion under the North Dakota Constitution. Additionally, as outlined by RRWC's own quoting of *Jackson Women's Health Org.*, states cannot rely on other states to protect *federal* constitutional rights. After *Dobbs*, and the overturning of *Roe* and *Casey*, the United States Supreme Court made it clear that United States Constitution does not include a right to an abortion.

[¶11] The State argues it will suffer irreparable injury if the Court grants RRWC's motion for a preliminary injunction because when the State is prohibited from enacting statutes enacted by the people, irreparable injury occurs. The State also argues that it has a legitimate interest in human life at all stages of development, and that if the statute is not enacted, it will result in irreversible loss of unborn children.

[¶12] As stated above, the State provided no evidence to the Court, through testimony or sworn statements, of any impact a preliminary injunction would have on the State or its citizens. At this time, all that is before the Court is conclusory statements by the State and RRWC's two declarations. Dr. Nichols's declaration outlines the various risks which can occur during pregnancies, specifically, high risk pregnancies. He lays out the heightened chances of complications and necessary medical intervention when a pregnancy progresses rather than terminated through an abortion. Additionally, although the Court recognizes that the State, and its citizens, have an interest in having statutes and legislature enacted, the Court would be remiss if it did not acknowledge the fact that the statute was enacted in 2007. The citizens have waited 15 years to have the statute enacted, in light of this length of time, any additional delay in the enactment of the statute would be minimal. Therefore, any interest the State may have in effectuating the statute, at this time, is less than the injuries caused to RRWC.

### *3. Harm to Other Interested Parties*

[¶13] RRWC argues that the harm of the statute taking effect would be significant, reiterating its arguments above, and that the defendants would not be injured because a preliminary injunction merely preserves the status quo. For the third and fourth factor, Wrigley combines his arguments into one. He argues that the people of North Dakota have made it clear, through the legislative

process, that they support and believe that the provisions in § 12.1-31-12 are appropriate.

[¶14] The Court finds RRWC's arguments more persuasive. Once again, the State fails to provide any evidence of any harm to other interested parties. Rather, the State rests on the argument that the harm comes from simply not allowing the statute to be enacted. However, as stated above, the statute has been lying dormant for approximately 15 years before it was allowed to take effect with the repeal of *Roe* and *Casey*. The State has offered no evidence on how delaying the enactment of the statute during the pendency of this litigation implicates any additional harm than has already been in place for the last 15 years. Whereas, RRWC outlines real and tangible harm to others if the statute goes into effect during this litigation.

#### *4. Effect on the Public Interest*

[¶15] In arguing that the public has an interest in granting the preliminary injunction RRWC states that the public always has an interest in protecting constitutional rights. Although the Court agree with the public having an interest in protecting the constitutional rights of citizens, at this time, the determination of whether the North Dakota Constitution includes a right to abortion has yet to be made. RRWC also argues that without a preliminary injunction, patients who are denied the ability to have an abortion will cause poverty and financial distress to patients and the public has an interest in preventing this. Lastly, RRWC argues that the statute will undermine the public's trust in law enforcement; that is, law enforcement will be called to deprive the citizens of North Dakota a fundamental right before the courts decide the constitutionality of the statute.

[¶16] As stated above, Wrigley combined his arguments for the last two prongs and stands on the argument that the people have made it clear of their intent to prohibit abortion, except in a very limited number of circumstances, throughout the history of North Dakota.

[¶17] Essentially, for this last prong, both parties argue the longstanding tradition of either permitting or penalizing abortions in North Dakota. RRWC argues that there has been a longstanding tradition of allowing abortions because for the last 50 years, *Roe* and *Casey* have controlled and allowed for women's rights to choose whether to seek abortions. Whereas Wrigley argues that the longstanding tradition should not be limited to the last 50 years, but rather, should be analyzed from the perspective of North Dakota from its statehood. The Court can see the validity of both parties' arguments. However, as stated above, the purpose of preliminary injunctions is to maintain the status quo during the pendency of the litigation and prevent harm. At this time, the status quo in North Dakota is not to restrict or limit abortions as outlined in § 12.1-31-12.

[¶18] Lastly, although not necessarily a part of any of the four factors under the Court's consideration, the Court will address the fact that RRWC has relocated into Minnesota. RRWC was the only abortion clinic operating in the state of North Dakota. Although the enactment of the statute would have impacted RRWC and its operation greatly, RRWC is not the only entity or individual which would be affected. The statute would implicate others, including physicians at regional hospitals if it were to go into effect. Therefore, even without RRWC's operation in North Dakota, the Court's determination of a preliminary injunction is still pertinent and appropriate.

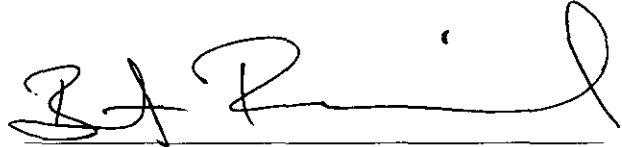
## CONCLUSION

[¶19] For the foregoing reasons:

[¶20] RRWC's *Motion for Preliminary Injunction* is GRANTED. The enactment and enforcement of N.D.C.C. § 12.1-31-12 shall be suspended until final disposition of the above case or further order of the Court.

Dated this 25 day of August, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'B. Romanick', written over a horizontal line.

Bruce Romanick, Presiding Judge  
South Central Judicial District