

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Access Independent Health Services, Inc.,
d/b/a Red River Women's Clinic, on
behalf of itself and its patients; Kathryn L.
Eggleston M.D., on behalf of herself and
her patients; Ana Tobiasz, M.D. on behalf
of herself and her patients; Erica Hofland,
M.D., on behalf of herself and her
patients; Collette Lessard, M.D. on behalf
of herself and her patients; and Brendan
Boe, M.D., Pharma.D., on behalf of
himself and his patients,

Plaintiffs,

v.

Drew H. Wrigley, in his official capacity
as Attorney General for the State of North
Dakota; Kimberlee Jo Hegvik, in her
official capacity as the State's Attorney
for Cass County; Julie Lawyer, in her
official capacity as the State's Attorney
for Burleigh County; Amanda Engelstad,
in her official capacity as State's Attorney
for Stark County; and Haley Wamstad, in
her official capacity as the State's
Attorney for Grand Forks County,

Defendants.

Case No. 08-2022-CV-01608

**ORDER ON PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION
AND DEFENDANTS' MOTION TO
STRIKE**

INTRODUCTION

[¶1] This matter is before the Court on the Plaintiff's *Motion for Preliminary Injunction*, prohibiting enforcement of N.D.C.C. [Ch.] 12.1-19.1 "against physicians who exercise their good-faith medical judgment to perform an abortion to preserve a pregnant person's life or health." *Docket No. 184 (Brief in Support of Plaintiffs' Motion for Preliminary Injunction)* at ¶ 46. The Defendants filed a *Response in Opposition to Plaintiffs' Motion for Preliminary Injunction* opposing the Plaintiffs' Motion. *Docket No. 203 (State's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction)*. Plaintiffs filed a *Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction* opposing the Defendants' arguments. *Docket No. 239 (Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction)*.

[¶2] Also before the Court is the Defendants' *Motion to Strike* the Declaration of Meetra Mehdizadeh in support of Plaintiffs' *Motion for Preliminary Injunction*. In this *Motion*, Defendant argues the Declaration should be stricken because it violates Rule 408 of the North Dakota Rules of Evidence regarding settlement negotiations. Plaintiffs filed a *Brief in Opposition to Defendant Drew H. Wrigley's Motion to Strike*, arguing the Declaration was filed to provide context for the timing of the Plaintiffs' request for a preliminary injunction. *Docket No. 235 (Brief in Opposition to Defendant Drew H. Wrigley's Motion to Strike)*. Defendants filed a *Reply Brief in Support of Motion to Strike*. *Docket No. 242 (Reply Brief in Support of Motion to Strike)*.

[¶3] A hearing was held on both *Motions* on December 20, 2023. Both parties presented oral argument to the Court regarding their respective arguments.

BACKGROUND

[¶4] The factual and procedural background of this case have been detailed extensively in

prior Court orders and in the North Dakota Supreme Court's decision in *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d (2023). That decision followed a supervisory writ challenging this Court's prior issuance of a preliminary injunction enjoining enforcement of N.D.C.C. § 12.1-31-12. The *Wrigley v. Romanick* Court left the preliminary injunction in place concluding the North Dakota Constitution "provides a fundamental right to receive an abortion to preserve a pregnant woman's life or health." 2023 ND 50 at ¶¶26-27.

[¶5] Following the Court's decision in *Wrigley v. Romanick*, the North Dakota Legislature amended North Dakota's abortion statutes by enacting Senate Bill 2150. Senate Bill 2150 repealed N.D.C.C. § 12.1-31-12 – the statute previously enjoined in this action. Senate Bill 2150 also created a new chapter to N.D.C.C. Title 12.1, which became codified at N.D.C.C. Ch. 12.1-19.1, and eliminated the affirmative defense mechanism with respect to the criminal charges that could be brought under then existing N.D.C.C. § 12.1-31-12. Senate Bill 2150 converted these affirmative defenses into exceptions from the application of the criminal statute. The law now provides an exception, among other exceptions or exclusions, for "[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶6] Plaintiffs now seek a new preliminary injunction, arguing that Senate Bill 2150 has a chilling effect for health care providers providing care to pregnant women because physicians do not know when an abortion would be "deemed necessary based on reasonable medical judgment . . . to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). Plaintiffs specifically assert that the alleged uncertainty around the serious health risk exception, and when it does or does not apply, prevents physicians

from exercising their good faith medical judgment to treat patients with pregnancy complications without fear of liability and criminal prosecution. Plaintiffs, therefore, request that the Court issue a preliminary injunction enjoining enforcement of “the Amended Abortion Ban against physicians who exercise their good-faith medical judgment to perform an abortion to preserve a pregnant person’s life or health. . . .” *Docket No. 184* at ¶ 46.

LAW AND DECISION

1. Defendants’ Motion to Strike

[¶7] The Defendants request that this Court strike the Declaration of Meetra Mehdizadeh in support of Plaintiffs’ *Motion for Preliminary Injunction*, and *Exhibit A* attached thereto, because Defendants assert the documents disclose settlement negotiations between the parties in violation of Rule 408 of the North Dakota Rules of Evidence. *See Docket No. 187 (Declaration of Meetra Mehdizadeh with attached Exhibit A)*. Plaintiffs argue the Declaration and Exhibit were submitted, not as substantive evidence, but to provide context to the Court of the timeline of events leading to their *Motion for Preliminary Injunction* and to rebut any implication that Plaintiffs delayed seeking relief from the Court.

[¶8] Rule 12(f) of the North Dakota Rules of Civil Procedure provides “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” N.D.R.Civ.P. 12(f). Motions to strike generally are disfavored, and the North Dakota Supreme Court has stated “[t]his form of motion was not designed as a method of dismissing all or part of a complaint or counterclaim.” *Dangerfield v. Markel*, 222 N.W.2d 373, 377 (N.D. 1974). Rather, a motion to strike “is the remedy for eliminating redundant, immaterial, impertinent or scandalous matters in the pleading.” *Id.* at 376.

[¶9] North Dakota Rule of Evidence 408 provides:

(a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations.

N.D.R. Evid. 408(a). Rule 408 “encourages complete candor during settlement discussions by expanding the common-law rule and rendering inadmissible evidence of conduct or statements made in compromise negotiations.” *Schlossman & Gunkelman, Inc. v. Tallman*, 1999 ND 89, ¶ 16, 593 N.W.2d 374.

[¶10] The Court has reviewed the Declaration and the attached Exhibit. The Declaration and communications contain compromise negotiations between the parties regarding a potential nonenforcement agreement. Plaintiffs assert they submitted the documents to explain the timeline of events after Senate Bill 2150 took effect that led to Plaintiffs filing a motion for preliminary injunction.

[¶11] For the purposes the Plaintiffs assert they have filed and offered the documents, the Court agrees with the Defendants’ assertion that Plaintiffs could have simply stated the start and end date of the compromise discussions. The start and end date of the discussions would have provided sufficient information regarding the timeline of events that led to Plaintiffs filing their *Motion for Preliminary Injunction*. Even if not offered for substantive purposes, the Court prefers not to see compromise negotiations between the parties, particularly when there is very little utility for the purposes for which the evidence is actually offered.

[¶12] However, Rule 408 itself also states “[t]he court may admit this evidence for another purpose, such as . . . negating a contention of undue delay The Court need not exclude

evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” N.D.R.Evid. 408(b). “This rule is designed to exclude the offer of compromise only when it is tendered as an admission of the weakness of the offering party’s claim or defense, not when the purpose is otherwise.” *Reiger v. Wiedmer*, 531 N.W.2d 308, 311 (1995) (quoting 2 John W. Strong, *McCormick on Evidence*, 196 (4th ed. 1992).

[¶13] The Plaintiffs have not offered the Declaration and Exhibit to substantively prove or disprove any aspect of the claims. The Court agrees that the Declaration and attached Exhibit do not particularly help the Plaintiffs explain any perceived delay in seeking a preliminary injunction. Regardless of how defective the Declaration and Exhibit may be at explaining the month’s long delay, it is the purpose for which Plaintiffs have offered the evidence. Plaintiffs have not offered the documents for any other purpose, and the Court has not, and will not, use the documents for any other purpose.

[¶14] The Court concludes that for the purpose currently offered and solely on the preliminary injunction motion currently before the Court, the Declaration and Exhibit are properly submitted. To the extent Plaintiffs intend to use the documents for some other reason currently unknown to the Court, they are on notice that the probative value of the documents is very low – even for the purposes for which they currently have offered the evidence.

[¶15] While the Court agrees that Plaintiffs could have simply submitted dates of compromise discussions for the Court’s consideration, Rule 408 does not require exclusion in the circumstances currently presented to the Court. The Defendants’ *Motion to Strike* must, therefore, be denied.

2. Plaintiffs’ Motion for Preliminary Injunction

[¶16] North Dakota Courts apply a four-part balancing test when deciding whether to grant a

preliminary injunction: “(1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest.” *Black Gold OilField Services, LLC v. City of Williston*, 2016 ND 30, ¶ 12, 875 N.W.2d 515. “Generally, ‘a preliminary injunction is an extraordinary and drastic remedy and should not be granted unless the movant, by a clear showing, carries the burden of persuasion.’” *Id.* (quoting *Vorachek v. Citizens State Bank*, 461 N.W.2d 580, 585 (N.D. 1990)). “The decision to grant or deny a preliminary injunction is within the district court’s discretion, and its determination will not be disturbed absent an abuse of discretion.” *Id.* “A preliminary injunction prevents irreparable injury until the court decides whether to issue a permanent injunction at trial.” N.D.R.Civ.P. 65(b).

[¶17] “[T]o be entitled to injunctive relief, generally, a party must show that no adequate remedy at law exists and that irreparable injury will result if relief is not granted.” *Black Gold OilField Services, LLC v. City of Williston*, 2016 ND 30, ¶ 14, 875 N.W.2d 515 (quoting *Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289, 294-96 (N.D. 1995)).

[¶18] The Court first notes the unusual nature of the request for relief in the Plaintiffs’ current *Motion for Preliminary Injunction*. Plaintiffs do not request that the Court enjoin N.D.C.C. § 12.1-19.1-02 in whole, or the exceptions thereto. Instead, Plaintiffs request that the Court enjoin enforcement of the statute only in certain circumstances, specifically, in circumstances where physicians exercise “their good faith medical judgment to perform an abortion to preserve a pregnant person’s life or health” Docket No. 184 at ¶ 46 (emphasis added). Section 12.1-19.1-03 currently provides an exception for “[a]n abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious

health risk to the pregnant female.” N.D.C.C. § 12.1-19.1-03(1).

[¶19] In other words, it appears that the Plaintiffs request that the Court, by way of a preliminary injunction, change application of the exception from “reasonable medical judgment” to “good faith medical judgment.” Plaintiffs have cited the Court with no legal authority that would allow the Court to re-write the statute in this manner under the pretense of providing injunctive relief. Plaintiffs also do not request that the Court enjoin any other portion of the statutes for purposes of their current *Motion for Preliminary Injunction*.

[¶20] “The exercise of the power to hold Acts of a legislature invalid is one of the highest functions of the courts.” *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414, 420 (N.D. 1967). “It has been held that this power involves one of the greatest responsibilities of the courts, and that it should be exercised with great restraint, caution, and even with reluctance.” *Id.* Similarly, the “Court is not free to ‘amend’ or ‘clarify’ the clear language of the statute, and if changes are to be made in the statute, we leave that matter to the legislature, as it is for the legislature to determine policy, not for the courts.” *Estate of Christeson v. Gilstad*, 829 N.W.2d 453, 2013 ND 50, ¶ 14.

[¶21] The Court concludes the Plaintiffs’ request in their *Motion for Preliminary Injunction*, is inappropriate for injunctive relief. To state it simply, the Plaintiffs’ *Motion for Preliminary Injunction* does not request the Court to stop the enforcement of anything to maintain the status quo pending the Court’s final decision in this matter. Instead, they request that the Court change the wording of the law by way of a preliminary injunction. Injunctive relief is meant to maintain the status quo prior to a decision on the merits, not to re-word the law. The relief the Plaintiffs currently seek is simply not authorized by law and Separation of Powers principles.

[¶22] The Court specifically notes that it will certainly have to decide the ultimate constitutional issues in this case following the presentation of testimony and evidence to the Court. The parties, thus far, have only presented written and oral arguments to the Court. The Court's decision in this Order in no way limits the Court's ultimate decisions in this matter. However, as currently presented to the Court, the specific injunctive relief requested by the Plaintiffs is not appropriate and the Plaintiffs have presented no authority for the Court to grant the specific relief requested.

CONCLUSION

[¶23] For the foregoing reasons, the Defendants' Motion to Strike is hereby DENIED. As currently presented to the Court, a preliminary injunction is not appropriate. Accordingly, the Plaintiffs' *Motion for Preliminary Injunction* is hereby DENIED.

IT IS SO ORDERED.

Dated on this the 22nd day of January, 2024.

BY THE COURT:

Signed: 1/22/2024 2:30:39 PM



District Judge