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.

FINDINGS ON SUBSTANTIAL PROBABILITY FACTOR

[¶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, ("the Statute"). *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 injunction was held on August 19, 2022.

[¶2] On August 25, 2022, the Court granted RRWC's motion for a preliminary injunction. *Docket No. 95.* On September 8, 2022, Wrigley filed an expedited motion for stay of the Court's order pending an appeal to the North Dakota Supreme Court and a notice of appeal. *Docket Nos. 97, 100.* This Court denied Wrigley's request to stay the Court's order. *Docket No. 104.* Although,

Wrigley originally attempted to appeal the Court's order granting the preliminary junction, the Supreme Court determined such order was not appealable without a N.D.R.Civ.P. 54(b) certification and directed Wrigley to follow the proper procedures if he intended to request the Court exercise its supervisory jurisdiction through a writ. *See NDSC Docket No. 20220260, Seq. 22.* On October 11, 2022, the Supreme Court granted Wrigley's request for a writ in part and directed this Court "to determine the substantial probability of succeeding on the merits and then to determine whether the injunction remains appropriate based on all the factors." *NDSC Docket No. 20220260, Seq. 26.* The Supreme Court ordered this Court to enter its decision by 12 p.m. on October 17, 2022. *Id.* Given a number of circumstances, the Court requested and was granted an extension to October 31, 2022, in which to file its findings. These findings follow such directive.

LEGAL ANALYSIS

[¶3] As outlined previously, in granting 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. 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).

[¶4] The Court is called to analyze the first factor and then consider whether its decision of granting the preliminary injunction is still appropriate given the additional analysis of the first factor. The Court will do so at this time.

1. Substantial Probability of Succeeding on the Merits

[¶ 1] The Supreme Court directed this Court to determine whether RRWC had a "substantial probability of succeeding on the merits" on its claim. Under this standard, the Court need not

determine the ultimate validity of the Statute; rather, the Court need only determine whether RRWC's arguments lead to a "substantial probability" that the Statue is unconstitutional.

[¶5] RRWC brought the above case seeking to enjoin the State from enforcing North Dakota Century Code § 12.1-31-12. In its claims for relief, RRWC argues the abortion ban infringes upon a "patients' right to life, safety, and happiness," provided to the citizens under the North Dakota Constitution. *Docket No. 2*. Therefore, the central question to the litigation is the constitutionality of the Statute.

[¶6] In support of its argument against the constitutionality of the Statute, RRWC argues the Statute infringes upon North Dakotas' fundamental rights, guaranteed under the North Dakota Constitution. Specifically, RRWC argues that the North Dakota Constitution guarantees all people the inalienable right to enjoy and defend life and liberty and pursue and obtain safety and happiness. They further argue that the due process language in article I, § 12 of the Constitution "protects and insures the use and enjoyment of [these rights]." Conversely, the State argues there is no fundamental right to an abortion under the North Dakota Constitution.

[¶7] The parties' arguments are substantively identical to the arguments raised by the parties in *MKB Management Corp. v. Burdick*, 2014 ND 197, 955 N.W.2d 31. In *MKB*, the Supreme Court was tasked with deciding the constitutionality of another statute which limited the use of chemical abortions in North Dakota. The Court's decision was a per curiam decision, upholding the statute and its restrictions because the Court could not reach the majority of four members required under Article VI, § 4 of the North Dakota Constitution to rule a statute unconstitutional. Nonetheless, the expansive analysis compiled by both sides of the argument is informative and guides the Court's analysis through the current litigation.

[¶8] The word "substantial" has never clearly been defined by the Supreme Court in terms of a preliminary injunction, nor has it been quantified. However, the Court takes guidance from the Supreme Court's description of the first factor of a preliminary injunction in *Gunsch v. Gunsch*, stating "[i]t is not necessary that the complainant's rights be clearly established, or that the court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity[.]"69 N.W.2d 739, 750 (N.D. 1954). This description of the "substantial probability" analysis is consistent with one of the definitions of "substantial," which states "real and tangible rather than imaginary." *New Oxford American Dictionary* 1736 (3rd Ed. 2017).

[¶9] At this time, the North Dakota Supreme Court has not expressly, nor implicitly, determined whether North Dakota citizens have a constitutional right to an abortion. The last time this issue was before the Supreme Court was in *MKB*. As stated, in *MKB* the Supreme Court was unable to reach a consensus to the question. Rather, the Supreme Court issued a per curiam decision essentially outlining that they were unable to reach the majority needed to declare the statute unconstitutional. The per curiam was one paragraph in length. However, the opinion continues with four justices writing separate opinions. In the following 180 paragraphs, Chief Justice VandeWalle and Justice Kapsner write lengthy opinions, both coming to different conclusions on the issue.

[¶10] The parties in this case both cite heavily to the opinions written in *MKB*, each relying almost exclusively on the opinion that supports their conclusion. There can be no doubt, that the issue before the Court is not only pressing, but highly contentious, even amongst the judiciary. The answer to whether the Statute is constitutional is not obvious.

[¶11] It is clear to the Court that there is a real and substantial question before it. Whether the North Dakota Constitution conveys a fundamental right to an abortion is an issue that is very much alive and active. This issue does not have a clear and obvious answer. Therefore, the Court finds that RRWC has a substantial probability of succeeding on the merits through showing that there is a "real and substantial question" before the Court.

[¶12] Although the Court has found the first factor to favor RRWC without addressing whether the North Dakota Constitution provides for a constitutional right to an abortion, it will continue its analysis with the level of scrutiny in which to review the Statute. The Court proceeds for the sake of completeness and to reinforce its conclusion above.

[¶13] When the due process clause is at issue, various levels of scrutiny are implicated. *Hoff v. Berg*, 595 N.W.2d 285, 290 (N.D. 1999). The Supreme Court, in *Hoff v. Berg*, outlined the two levels of scrutiny to consider – strict scrutiny and rational basis:

> The Fourteenth Amendment forbids the government to infringe fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. If a fundamental liberty interest is not involved, a statute need only be rationally related to legitimate government interests. Narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest demands no more than a reasonable fit between governmental purpose and the means chosen to advance that purpose. The level of scrutiny employed in analyzing due process claims has been recently summarized:
>
> > Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Therefore, state limitations on a fundamental right such as the right of privacy are permissible only if they survive strict constitutional scrutiny. However, where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test. . . . Under rational basis review, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.

Id. (quoting *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997)) (internal quotation and citations omitted.)

a. Analysis Under Strict Scrutiny

[¶14] If the Court agrees with RRWC's argument and finds there is a constitutional right to an abortion under the North Dakota Constitution, the proper level of scrutiny for the Statute is strict scrutiny. To survive a strict scrutiny analysis, the State must show "that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose." *Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71, ¶ 34, 908 N.W.2d 442 (quoting *Gange v. Clerk of Burleigh Cty. Dist. Court*, 429 N.W.2d 429, 433 (N.D. 1988)).

[¶15] The State does not even attempt to argue that the Statute would meet the strict scrutiny burden of an infringement upon a fundamental right. It is clear to the Court that the restrictions imposed by the Statute fall far from being "necessary" to further any state purpose. As will be discussed further down in the Court's analysis, the Statute, as written, essentially functions as a complete prohibition to abortion. Therefore, the Court finds the State has failed to show how the Statute would survive a strict scrutiny review and how the restrictions are necessary to further its goals.

[¶16] Therefore, if the North Dakota Constitution is found to contain a fundamental right to an abortion, the Court finds RRWC has a substantial probability of succeeding on its claims.

b. Analysis Under Rational Basis

[¶17] If the Court agrees with the State and finds there is no constitutional right to an abortion in North Dakota, the Court will conduct the analysis of the Statute under a rational basis review. As

stated above, "a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute." *Hoff*, 595 N.W.2d at 290. Under the rational basis level of scrutiny, "the legislation will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." *Condon v. St. Alexius Medical Center*, 2019 ND 113, ¶ 10, 926 N.W.2d 136 (internal quotation omitted).

[¶18] Throughout this cases' history, the State has only indirectly asserted an interest in upholding the Statute. Specifically, the State has only asserted an interest in "promoting respect for human life" in its analysis for the other factors for a preliminary injunction. The Court would note that the State is silent as to how the Statute properly asserts its interest in respect to promoting human life. At this time, the State has offered no analysis or asserted any facts which show the Statute will promote human life.

[¶19] The Statute states:

1. As used in this section;
    a. "Abortion" means the use or prescription of any substance, device, instrument, medicine, or drug to intentionally terminate the pregnancy of an individual known to be pregnant. The term does not include an act made with the intent to increase the probability of a live birth; preserve the life or health of a child after live birth; or remove a dead, unborn child who died as a result of a spontaneous miscarriage, an accidental trauma, or a criminal assault upon the pregnant female or her unborn child.
    b. "Physician" means an individual licensed to practice medicine under chapter 43-17.
    c. "Professional judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.
2. It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.
3. The following are affirmative defenses under this section:

a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.
b. That the abortion was 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.
c. That the individual was acting within the scope of that individual's regulated profession and under the direction of or at the direction of a physician.

[¶20] The Supreme Court has stated substantive due process requires a close connection between legislation and the goals it advances. *Hoff*, 595 N.W.2d at 290. A statute may be declared "unconstitutional on substantive due process if the Legislature had no power to act in the particular matter or, having power to act, such power was exercised in an arbitrary, unreasonable, or discriminatory manner and the method adopted has no reasonable relation to attain the desired result." *Id.* (internal quotation omitted).

[¶21] On its face, the Statute itself does not ban abortion in its entirety. Rather, the Statute provides for "affirmative defenses" to allow for abortions in a few, designated, circumstances. Black's Law Dictionary defines an affirmative defense as "a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Unlike the other elements of a crime, affirmative defenses are the burden of the defendant to prove by a preponderance of the evidence. N.D.C.C. 12.1-01-03.

[¶22] The Statute allows for the circumstances of pregnancy resulting from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest to be raised as affirmative defenses; they are not bars to prosecution. This is an important distinction. If the exceptions had been bars to prosecution, doctors would not have to face the threat of criminal prosecution for performing abortions under the situations outlined. Instead, with the exceptions being affirmative defenses, doctors must first be charged with a felony, proceed through the case, take the matter

before a jury, and plead their case in order to obtain the protections of the Statute. This puts an exuberant burden on doctors and their decision on whether to perform an abortion. The threat of prosecution may be so great that doctors refuse to perform abortions, even if they believe in their medical opinion that it is necessary to preserve the mother's life. *See Declaration of Tammi Kromenaker in Support of Plaintiffs' Motion for Preliminary Injunction, Docket No. 7.*

[¶23] It is clear after the United States Supreme Court's ruling in *Dobbs*, that the North Dakota legislature has the power to regulate and set restrictions on abortions within the state. However, as stated above, even though the legislature has the power to enact laws, it cannot do so in an unreasonable manner with no reasonable relation to the goal of the legislation. The Court finds that the Statutes puts unreasonable burdens upon doctors and pregnant women and the manner in which the Statute restricts doctors and pregnant women is not reasonably related to the goal of preserving life. As outlined in the declarations provided by RRWC, pregnancy is not only dangerous to women, but without the ability to obtain an abortion in some situations, deadly. If women do not have a reasonable avenue in which to get safe abortions when their lives are in danger, the Statute does not serve its intended purpose.

[¶24] Therefore, the Court finds that even if it is determined that the proper review of the Statute is under a rational basis analysis, there is a substantial probability that the Statute is unconstitutional given the severe constraints it imposes upon physicians under threat of criminal prosecution.

[¶25] Whether the Court looks simply at if there is a "real and substantial question" before the Court, or it reviews the Statute under the lens of strict scrutiny or rational basis, the Court finds

RRWC has a substantial probability of succeeding on the merits of its case. For the above reasons, the Court finds the first factor to favor issuing a preliminary injunction.

2. Re-weighing of the Factors

[¶26] Although unnecessary since the Court found the first factor to support granting RRWC's request for a preliminary injunction, the Court will nonetheless follow the Supreme Court's directive and "determine whether the injunction remains appropriate based on all the factors."

[¶27] As explained above, the Court found RRWC has a substantial probability of succeeding on the merits of its case. Couple this finding with the Court's prior analysis on the other three prongs, and the Court's decision to grant RRWC's request for a preliminary injunction is only solidified. However, the Court reiterates, even without a finding the first factor in favor of RRWC, granting a preliminary injunction was, and is, still appropriate. The Supreme Court has been clear, "[t]he 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." *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990). 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, 746 (N.D. 1954)). In issuing a preliminary injunction, "[t]he court's discretion is exercised in light of preserving the status quo and protecting the rights of the applicant pending a determination on the merits." *Vorachek*, 461 N.W.2d at 585.

[¶28] For all of the reasons stated in its prior order, a preliminary injunction not only maintains the status quo in North Dakota, but prevents irreparable harm to RRWC. Therefore, this Court

confirms its decision to GRANT RRWC's motion for a preliminary injunction.

CONCLUSSION

[¶29] For the foregoing reasons:

[¶30] RRWC's *Motion for Preliminary Injunction* is GRANTED and CONFIRMED. 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 31 day of October, 2022.

BY THE COURT:

Bruce Romanick, Presiding Judge
South Central Judicial District