

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

LITTLE ROCK FAMILY PLANNING
SERVICES, *et al.*,

Plaintiffs,

v.

LARRY JEGLEY, *et al.*,

Defendants.

CIVIL ACTION

Case No. 4:21-cv-00453-KGB

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
DISMISS WITHOUT PREJUDICE PURSUANT TO FEDERAL RULE OF PROCEDURE
41(a)(2)¹**

Plaintiffs ask this Court to dismiss this action without prejudice due to the dispositive impact of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) ("*JWHO*"), on Plaintiffs' sole claim. Federal Rule of Civil Procedure 41(a)(2) provides that, after the defendants have answered, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Unless otherwise specified by the court, a dismissal under Rule 41(a)(2) is without prejudice. *United States v. Thirty-two thousand eight hundred twenty dollars & fifty-six cents (\$32,820.56) in U.S. Currency*, 838 F.3d 930, 937 (8th Cir. 2016). "When determining whether to allow a voluntary dismissal without prejudice, a district court should consider 'whether the party has presented a proper explanation for its desire to dismiss; whether a dismissal would result in a waste of judicial time and effort; and whether a dismissal

¹ Unless otherwise noted, internal quotation marks and citations are omitted and emphasis is added.

will prejudice the defendants.” *Id.* (quoting *Donner v. Alcoa, Inc.*, 709 F.3d 694, 697 (8th Cir. 2013)).

As set forth below, the Supreme Court’s reversal of *Roe v. Wade*, 410 U.S. 113 (1973), upon which Plaintiffs’ only claim is grounded, provides a proper explanation for Plaintiffs’ desire to dismiss; dismissal would conserve, rather than waste, judicial time and effort; and Defendants will not be prejudiced by a dismissal without prejudice, given that this case is only in the initial preliminary injunction stage, there has been no discovery, no argument, no evidentiary hearing or trial, and no dispositive motions have been filed. Accordingly, Plaintiffs respectfully request that the Court enter an order dismissing their complaint without prejudice and without costs.

I. PROCEDURAL HISTORY

Plaintiffs filed this action on May 26, 2021, seeking declaratory and injunctive relief against Act 309 (“Act 309” or “the Ban”), which criminalizes the provision of abortion in Arkansas at every point in pregnancy, with only a narrow exception for abortions provided to save the patient’s life. Compl. ¶¶ 20-22, ECF No. 1. Plaintiffs raised only a single claim for relief: that “[b]y prohibiting an individual from making the ultimate decision whether to terminate a pregnancy prior to viability, the Ban violates Plaintiffs’ patients’ rights to liberty and privacy guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Id.* at ¶¶ 67-68.

On June 14, 2021, Plaintiffs moved for a temporary restraining order and/or preliminary injunction against the Ban, arguing that they were entitled to emergency relief because “[t]he Ban unconstitutionally criminalizes the performance of an abortion at all points in pregnancy, in direct conflict with *Roe v. Wade*, and nearly five decades of Supreme Court precedent affirming that a state cannot ban pre-viability abortions.” Pls.’ Mot. for Prelim. Inj. 2, ECF No. 12; *see also* Pls.’ Mem. in Supp. of Mot. for TRO & Prelim. Inj., ECF No. 13.

On June 16, 2021, Defendants filed their answer to Plaintiffs' complaint, ECF No. 14, and on June 28, 2021, Defendants filed their opposition to Plaintiffs' motion for a temporary restraining order/preliminary injunction, ECF No. 22. The parties did not request a hearing on Plaintiffs' motion and the Court concluded that a hearing was not necessary. *See* June 30, 2021 Order, ECF No. 23. On July 20, 2021, the Court granted Plaintiffs' motion for a preliminary injunction, finding Plaintiffs had demonstrated that they were likely to succeed on the merits of their claim that the Ban is "categorically unconstitutional" under *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *See* Prelim. Inj. 17-18, ECF No. 28.

On August 19, 2021, Defendants filed a notice of appeal of this Court's preliminary-injunction decision to the Eighth Circuit. *See* Defs.' Notice of Appeal, ECF No. 31. On September 13, 2021, Defendants moved to hold the appeal in abeyance pending the Supreme Court's decision in *JWHO*, *see* Mot. to Hold Case in Abeyance, *Little Rock Fam. Planning Svcs. v. Jegley*, No. 21-2857 (8th Cir. Sept. 13, 2021), and the Eighth Circuit granted this motion. *See* Clerk Order, *Jegley*, No. 21-2857 (8th Cir. Sept. 14, 2021). The Supreme Court issued its decision in *JWHO* on June 24, 2022, reversing *Roe* and its progeny, the key Supreme Court precedents upon which Plaintiffs' substantive due process challenge to the ban was based. *Dobbs*, 2022 WL 2276808, (U.S. June 24, 2022).

On June 24, 2022, Defendants filed an Emergency Motion for Administrative Stay of Injunction, Stay Pending Appeal, and for Summary Reversal in the Eighth Circuit, notifying the court of the *JWHO* decision and requesting that the court immediately stay and summarily reverse the district court's preliminary injunction on the grounds that *JWHO*'s reversal of *Roe* makes clear Plaintiffs' are no longer likely to succeed on the merits of their due process claim. *See* Emergency Mot., *Jegley*, No. 21-2857 (8th Cir. June 24, 2022).

On June 28, 2022, the Eighth Circuit denied Defendants’ motion for a stay of the injunction on the ground that Defendants should seek a stay from this Court in the first instance, and requested that Plaintiffs respond to Defendants’ request for summary reversal by July 6, 2022. Order, *Jegley*, No. 21-2857 (8th Cir. June 28, 2022).

Plaintiffs now file the present motion in this Court seeking to voluntarily dismiss their case without prejudice.

II. ARGUMENT

Because Defendants have already answered the complaint, Federal Rule of Civil Procedure 41 provides that Plaintiffs may voluntarily dismiss this action “only by court order.” Fed. R. Civ. P. 41(a)(2). Unless this Court states otherwise, the dismissal is without prejudice. *Id.* Whether to grant a motion to dismiss without prejudice is within the Court’s informed discretion, but only substantial prejudice to the defendant, beyond that resulting from a subsequent lawsuit, warrants denial. *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984); *Travelers Indem. Co. of Mo. v. Adame & Assocs. of K.C., LLP*, 2007 WL 9718005, at *2 (W.D. Mo. May 3, 2007) (“Only substantial prejudice to Defendants warrants denying such a motion.”); *Exigence LLC v. Catlin Underwriting Agency US, Inc.*, 2013 WL 655109, at *1 (E.D. Ark. Feb. 21, 2013) (“Courts generally will grant dismissals [without prejudice] where the only prejudice the defendant will suffer is that resulting from a subsequent lawsuit.” (quoting *Paulucci v. City of Duluth*, 826 F.2d 780, 782 (8th Cir. 1987))).

The Eighth Circuit has instructed that in “determining whether to allow a voluntary dismissal without prejudice, a district court should consider ‘whether the party has presented a proper explanation for its desire to dismiss; whether a dismissal would result in a waste of judicial time and effort; and whether a dismissal will prejudice the defendants.’” *Thirty-two*

thousand, 838 F.3d at 937 (quoting *Donner*, 709 F.3d at 697); *SnugglyCat Inc. v. Opfer Commc'ns, Inc.*, 953 F.3d 522, 526 (8th Cir. 2020). Application of all these factors to the case at bar supports granting Plaintiffs' motion for a dismissal without prejudice.

A. Dismissal is Proper in Light of *JWHO*

Plaintiffs have a good-faith basis for requesting dismissal of their Verified Complaint without prejudice. The Supreme Court's decision in *JWHO* – which was unforeseeable when Plaintiffs initiated this case – constitutes a substantial sea change in federal constitutional law. Where there has been a change in law that significantly impacts a plaintiff's claims, courts have found that voluntary dismissal without prejudice is warranted, including to preserve a plaintiff's ability to bring future claims. *See, e.g., Magraw v. Donovan*, 177 F. Supp. 803, 806 (D. Minn. 1959) (dismissing plaintiffs' claims without prejudice due to "substantial change in circumstances brought about by" new legislation); *Exigence*, 2013 WL 655109, at *1 (granting dismissal without prejudice where Arkansas Supreme Court decision rendered action moot and plaintiff sought to preserve right to refile action); *Abraham v. N.Y. Dep't of Educ.*, 2011 WL 890749, at *2 (E.D.N.Y. Mar. 11, 2011) (granting plaintiff's motion for dismissal without prejudice based on "relatively recent change" in "evolving area of law" in order to preserve state law claim).

B. Dismissal Without Prejudice Would Conserve Judicial Time and Effort

Dismissal without prejudice would conserve judicial resources by allowing the Court to remove this action from its docket. And because the case has "not progressed very far," dismissal without prejudice would not be wasteful of the Court's efforts to date. *Mullen v. Heinkel Filtering Sys., Inc.*, 770 F.3d 724, 728 (8th Cir. 2014); *Hastings v. FCA US LLC*, No. 4:18-cv-4079, 2018 WL 3546237, at *2 (W.D. Ark. July 23, 2018) ("Dismissal of this case would not result in a waste of judicial time or resources, as the case is in its early stages, with little, if any, discovery having

taken place.”).

Here, litigation is “still in the early stages” and “discovery has not even commenced.” *Mullen*, 770 F.3d at 728; *Garner v. Union Pac. R.R. Co.*, 2016 WL 612765, at *2 (E.D. Mo. Feb. 16, 2016). Plaintiffs have filed only a complaint and motion for injunctive relief. Defendants have opposed that motion and filed an answer. Given that this case centered on one straightforward legal issue relating to Plaintiffs’ single claim, there was no hearing before the Court granted Plaintiffs a preliminary injunction. Moreover, no discovery was necessary and none has taken place. Nor has the Court even scheduled a conference pursuant to Federal Rules of Civil Procedure 16. And neither party has filed a dispositive motion or engaged in any other extensive motion practice.

Courts in the Eighth Circuit have expressly held that “preliminary injunction proceedings ... do not foreclose a dismissal without prejudice” and routinely grant voluntary dismissal without prejudice in cases that have progressed only to a similarly early stage, if not further. *See, e.g., Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 2016 WL 5118588, at *4 (E.D. Mo. Sept. 21, 2016) (collecting cases); *Mullen*, 770 F.3d at 728 (upholding dismissal without prejudice where the magistrate held two hearings on discovery disputes); *Garner*, 2016 WL 612765, at *2 (granting dismissal without prejudice where Rule 16 conference was continued); *Kern*, 738 F.2d at 970–71 (8th Cir. 1984) (upholding voluntary dismissal after the plaintiff had presented all but one witness at trial); *Gibbs v. Deere & Co.*, 2021 WL 2118342, at *1-2 (W.D. Ark. May 25, 2021) (dismissal not a waste of judicial time and effort because “only one deposition has been taken”); *Blaes v. Johnson & Johnson*, 858 F.3d 508, 513-14 (8th Cir. 2017) (affirming dismissal of a complaint without prejudice in case much farther along, after discovery and pretrial motions over a two-year period); *Exigence*, 2013 WL 655109, at *1 (dismissing case when change in law occurred three years after complaint filed). Because Plaintiffs’ only claim is premised on Supreme

Court precedent that has now been overturned, there is no reason for the parties or this court to expend further time and resources on litigation—dismissal would conserve, not waste, this Court’s time and effort.

C. Defendants Would Not Be Prejudiced by Dismissal

Defendants would not be unduly prejudiced by a dismissal without prejudice of this case at such an early stage of these proceedings. Legal prejudice is more than the fact that a defendant might have to defend another action at some point in the future. *Kern*, 738 F.2d at 970; *see also Thatcher v. Hanover Ins. Grp., Inc.*, 659 F.3d 1212, 1214 (8th Cir. 2011) (“Prejudice does not arise simply because a second action has been or may be filed against the defendant, which is often the whole point in dismissing a case without prejudice.”); *Paulucci*, 826 F.2d at 782 (“Courts generally will grant dismissals where the only prejudice the defendant will suffer is that resulting from a subsequent lawsuit.”). Moreover, the loss of a tactical advantage does not constitute legal prejudice. *Blaes*, 858 F.3d at 513. Rather, legal prejudice is a function of other, practical factors including: “(1) the defendant’s effort and the expense involved in preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, (3) insufficient explanation of the need to take a dismissal, and (4) the fact that a motion for summary judgment has been filed by the defendant.” *Paulucci*, 826 F.2d at 783.

As discussed above, all these factors favor dismissal without prejudice here. Defendants have expended little effort in this case – they have filed only an answer and opposition to Plaintiffs’ motion for injunctive relief, and have not had to argue any motions before this court, been required to expend any effort and expense on any discovery, nor prepared for or conducted an evidentiary hearing or trial. Plaintiffs have been diligent in prosecuting this case since commencing it just over a year ago, and have not excessively delayed in filing this motion, seeking to dismiss less than two

weeks after the Supreme Court issued its decision in *JWHO*, and have presented good reason for dismissal, *see supra*. And no summary judgment motion has been filed by Defendants. Courts have routinely found no prejudice to defendants under Rule 41(a)(2) in similar circumstances. *See, e.g., Garner*, 2016 WL 612765, at *1-2 (granting motion to dismiss without prejudice filed nearly one year after case initiated, where no discovery commenced and no dispositive motions filed); *Hastings*, 2018 WL 3546237, at *2 (dismissing case without prejudice filed months after complaint where little, if any, discovery took place). For these reasons, and based on the early stage of this action, *see supra*, Defendants will not be prejudiced in any way by a dismissal of the Verified Complaint without prejudice and without costs.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion to dismiss their complaint without prejudice and without costs pursuant to Rule 41(a)(2).

Dated: July 6, 2022

Respectfully submitted,

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** Motion for admission pro hac vice granted*

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*On Behalf of the Arkansas Civil Liberties
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all parties who have entered an appearance.

/s/ Meagan Burrows
Meagan Burrows