
IN THE
Supreme Court of Indiana

No. 22S-PL-00338

PLANNED PARENTHOOD GREAT)	Interlocutory Appeal from Monroe
NORTHWEST, HAWAI'I, ALASKA,)	County Circuit Court
INDIANA, KENTUCKY, INC., et al.,)	
<i>Appellees-Plaintiffs,</i>)	
)	Trial Cause No.
v.)	53C06-2208-PL-001756,
)	
MEMBERS OF THE MEDICAL LICENSING)	
BOARD OF INDIANA, in their official)	The Honorable Kelsey Hanlon,
capacities, et al.,)	Special Judge
<i>Appellants-Defendants.</i>)	

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Sarah An Myers, *How Anti-Abortion Laws Affect Women with Schizophrenia*, Psych. Today, June 24, 2022, at <https://www.psychologytoday.com/us/blog/living-outlier/202206/how-anti-abortion-laws-affect-women-schizophrenia> 11

STATEMENT OF THE ISSUE

Whether, in order to prevent profound and potentially irreversible damage to patients who will suffer “a serious health risk” absent an abortion, this Court should grant rehearing of its decision reversing the preliminary injunction entered by the trial court for the limited purpose of ordering that injunction to remain in effect pending the prompt filing and disposition of a renewed preliminary-injunction motion addressed to the breadth of the abortion right that this Court held to be protected by Article 1, Section 1 of the Indiana Constitution.

INTRODUCTION

In its June 30, 2023 decision, this Court determined that the trial court erred in concluding that Plaintiffs were likely to prevail on their claim that Indiana’s near-total abortion ban violates Article 1, Section 1 of the Indiana Constitution on its face. In so doing, however, the Court held that Article 1, Section 1 “protects a woman’s right to an abortion that is necessary to protect her life or to protect her from a serious health risk.” *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.* (“*Planned Parenthood*”), 211 N.E.3d 957, 976 (Ind. 2023). And it left open the possibility that this constitutionally protected right “may be broader than the current statutory exception[],” *id.* at 976-77, which is limited to circumstances in which an abortion is necessary “to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function,” Ind. Code § 16-18-2-327.9.

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Numerous circumstances exist where an abortion may be necessary to prevent an objectively "serious health risk" to a patient even though the patient may not risk "substantial and irreversible physical impairment of a major bodily function," and on remand Plaintiffs therefore intend to seek a preliminary injunction against the enforcement of Indiana's abortion ban as it applies to abortions necessary to prevent these serious risks. This will allow the trial court the opportunity, with the benefit of evidence and briefing devoted to this discrete issue, to address in the first instance the breadth of the constitutional right recognized by this Court.

Pursuant to Appellate Rule 54, Plaintiffs therefore seek rehearing for the limited purpose of requesting that this Court order that the previously issued preliminary injunction remain in effect pending the trial court's prompt receipt and disposition of Plaintiffs' renewed preliminary-injunction request. If Plaintiffs are correct that the abortion right cognizable under Article 1, Section 1 is broader than the life-or-health exception recognized by Indiana law, the alternative is allowing the statute to go into effect immediately upon remand, leading to many abortion patients being forced to suffer serious (and unconstitutional) consequences while the trial court receives the evidence and argument necessary to decide this profoundly important issue of first impression.

PROCEDURAL HISTORY

As this Court is aware, following the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Indiana General Assembly

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enacted Senate Bill 1 (S.B. 1), which was signed into law by the Governor on August 5, 2022 and took effect on September 15, 2022.

This statute bans abortion at all stages of pregnancy with only three extremely limited exceptions. *See Planned Parenthood*, 211 N.E.3d at 961. As is relevant here, notwithstanding S.B. 1's broad prohibition, a physician may perform an abortion if, "based on reasonable medical judgment, performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Ind. Code § 16-34-2-1(a)(3). The term "serious health risk," however, is limited to circumstances where an abortion is necessary "to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function." Ind. Code § 16-18-2-327.9. Expressly excluded from the term are "psychological or emotional conditions." *Id.*

On September 22, 2022—a week after S.B. 1 took effect—the trial court issued its Order Granting Plaintiffs' Motion for Preliminary Injunction, in which it broadly enjoined Indiana from enforcing the statute's abortion prohibition.

This Court issued its decision vacating the preliminary injunction, and remanding the case for further proceedings, on June 30, 2023. After concluding that Plaintiffs have standing and that Article 1, Section 1 of the Indiana Constitution is judicially enforceable, *see Planned Parenthood*, 211 N.E.3d at 965-75, the Court concluded that this constitutional provision only protects a patient's right to an abortion "that is necessary to protect her

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life or to protect her from serious health risk," *see id.* at 975-77. This holding, however, "d[id] not support Plaintiffs' claim for a preliminary injunction," for Plaintiffs "framed their claim as a facial challenge to the entire statute in all conceivable circumstances rather than an as-applied challenge to the law's application in any particular set of circumstances where a pregnancy endangers a woman's life or health." *Id.* at 976. In reaching this conclusion, however, this Court did not "establish the precise contours of a constitutionally required life or health exception" and it left open the possibility that the abortion right protected under Article 1, Section 1 "may be broader than the current statutory [life-or-health] exception." *Id.* at 976-77.

In fact, while the Court vacated the facial injunction against S.B. 1 issued by the trial court, it also made clear that its decision did not preclude any plaintiff with standing "from pursuing . . . an as-applied challenge to the State enforcing the law in a particular set of circumstances." *Id.* at 984 (citation omitted).

ARGUMENT

As indicated, consistent with this Court's decision, on remand Plaintiffs intend to renew their preliminary-injunction request to pursue a claim that S.B. 1 violates Article 1, Section 1 as applied to circumstances where an abortion is necessary to prevent "serious health risks" not contemplated by Indiana's current life-or-health exception. Notwithstanding its conclusion that the trial court improperly enjoined S.B. 1 on its face, this Court possesses authority to temporarily extend this injunction for a period of time

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sufficient to allow the trial court to resolve Plaintiffs' to-be-filed request. Under the unique circumstances of this case, it should do so.

I. This Court has authority to order the preliminary injunction to temporarily remain in effect pending proceedings on remand

Notwithstanding its conclusion that S.B. 1 is not facially unconstitutional, and that the preliminary injunction entered by the trial court cannot stand, this Court plainly possesses authority to order that injunction to temporarily remain in effect to prevent the substantial harm that would otherwise result during proceedings on remand. *Cf. River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 915 (Ind. 2020) ("Courts necessarily have inherent, implied power to manage their own affairs."). While neither this Court nor our Court of Appeals appears to have addressed such a request, under appropriate circumstances federal courts have not hesitated to enter such an order.

For instance, in *Cuesnongle v. Ramos* ("*Cuesnongle I*"), 713 F.2d 881 (1st Cir. 1983), the district court, upon finding a violation of the First Amendment's Free Exercise Clause, entered an injunction against government interference with a private university's affairs. *See Cuesnongle v. Ramos* ("*Cuesnongle II*"), 835 F.2d 1486, 1488 (1st Cir. 1987) (detailing the proceedings that led to *Cuesnongle I*). While the First Circuit rejected the theory of liability on which the district court's holding rested, it was nonetheless "disturbed" by the possibility that the challenged action violated the university's free-speech rights—a claim not previously raised by the university. *Cuesnongle I*, 713 F.2d at 884. Given its conclusion that this issue was "too important a public matter to overlook," rather than merely

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vacating the injunction improperly issued on free-exercise grounds, it ordered that the injunction would remain in effect during remand "to permit an amendment to the complaint if plaintiffs are so minded." *Id.* at 886.

In dissent, Justice Breyer would have followed a similar approach in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which concerned a Presidential Proclamation barring entry into the United States by nationals from several predominantly Muslim countries. In Justice Breyer's view, the legal issue presented by the case—which hinged on "whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content," *id.* at 2429—would be better informed by additional fact-finding pertaining to "the Proclamation's elaborate system of exemptions and waivers," *id.* at 2429-33. In light of "the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a 'Muslim ban,' and the assistance in deciding the issue that answers to the 'exemption and waiver' questions may provide," he would therefore have remanded the case to the district court for further proceedings but would "leave the injunction [against the Proclamation] in effect while the matter is litigated." *Id.* at 2433.

And these cases certainly do not stand alone. *See also, e.g., Greater Yellowstone Coalition v. Timchak*, 323 Fed. App'x 512, 514-15 (9th Cir. 2009) (vacating a preliminary injunction and remanding to district court but ordering challenged activities to be "temporarily stayed until the district court has had an opportunity to consider the

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remaining issues"); *Ellis ex rel. Ellis v. Patterson*, 859 F.2d 52, 56 (8th Cir. 1988) (remanding to district court to review modifications to a state Medicaid plan in the first instance but ordering that an injunction "will remain in effect until review of [this] plan is complete"); *Ayaz v. Livewire Mobile, Inc.*, 2013 WL 3943539, at *6 (D. Mass. July 29, 2013) (remanding to state court but ordering that a preliminary injunction would "remain in effect for 30 days after remand so that the state court has time to make an independent ruling"). This Court plainly has authority to enter a similar order.

II. This Court should exercise its authority to order the preliminary injunction to temporarily remain in effect pending proceedings on remand

For three reasons, this Court should grant rehearing and order that the trial court's preliminary injunction remain in effect pending the filing and disposition of a renewed preliminary-injunction motion addressed to the performance of abortions that are "necessary to protect [a patient's] life or to protect her from serious health risk." *See Planned Parenthood*, 211 N.E.3d at 976.

First, while this Court declined "to establish the precise contours of a constitutionally required health or life exception and the extent to which that exception may be broader than the current statutory exceptions," *id.* at 976-77, Plaintiffs believe that the evidence on remand will demonstrate the existence of "serious health risks" necessitating abortions that are not covered by Indiana's current health-or-life exception. *See, e.g.,* Nicole T. Christian & Virginia F. Borges, *What Dobbs Means for Patients with Breast Cancer*, 387 N. Engl. J. Med. 765, 765 (2022) ("There remain situations . . . in which we

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cannot offer complete or safe treatment to a pregnant person with a breast cancer diagnosis.”); Sarah An Myers, *How Anti-Abortion Laws Affect Women with Schizophrenia*, *Psych. Today*, June 24, 2022, at <https://www.psychologytoday.com/us/blog/living-outlier/202206/how-anti-abortion-laws-affect-women-schizophrenia> (last visited July 28, 2023) (“Research has found that antipsychotics [prescribed to patients with schizophrenia] can cross the placenta barrier and potentially cause birth defects, but the risk of forgoing the drug may have worse ramifications.”); *cf. A Woman’s Choice-East Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 108-111 (Ind. 1996) (broadly interpreting a “medical emergency” exception to mandatory-disclosure requirements to require an evaluation of “all relevant factors pertaining to a woman’s health,” including potential psychological harms). If this is correct, then absent intervention by this Court, many pregnant Hoosiers constitutionally entitled to an abortion will, *by definition*, be forced instead to endure serious health risks while the trial court receives evidence and argument devoted to the breadth of the constitutional right.

Second, on remand the trial court will be called on to resolve an issue of first impression in Indiana. Allowing the preliminary injunction to remain in effect during this process will ensure that an eventual decision concerning the breadth of Article 1, Section 1 is fully informed by a detailed factual record, by adequate briefing on an issue of profound importance, by an evidentiary hearing that allows for the resolution of any factual disputes, and by the trial court’s own careful contemplation.

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And third, Plaintiffs recognize that the State has an interest in enforcing its duly enacted statutes. However, other than the single week between when S.B. 1 took effect and when the trial court issued its preliminary injunction, abortion has been widely legal in Indiana since *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Any harm to the State occasioned by allowing an injunction to temporarily remain in effect pending further proceedings is surely minimal when that injunction merely maintains the law as it has existed for more than half a century.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing for the limited purpose of ordering that the trial court's preliminary injunction shall remain in effect pending the prompt filing and disposition of a renewed preliminary-injunction motion on remand. Plaintiffs believe that the precise timing of these proceedings should be left to the sound discretion of the trial court. In the alternative, this Court may wish to order that the preliminary injunction will remain in effect for a set period of time—perhaps sixty or ninety days—following certification pursuant to Appellate Rule 65(E).

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Respectfully submitted.

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CERTIFICATE OF WORD COUNT

I verify that this petition contains no more than 4,200 words. It contains 2,215 words, including footnotes, in accordance with Appellate Rule 44(E), and excluding the items permitted to be excluded by Appellate Rule 44(C).

/s/ Gavin M. Rose

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2023, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.

I also certify that on this 31st day of July, 2023, the foregoing was served by electronic filing using the Indiana E-filing system upon:

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