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IN THE
Indiana Supreme Court

No. 22S-PL-00338

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

APPELLANTS' RESPONSE TO PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATUTES AND RULES [CONT'D]

ARGUMENT

This Court has already held that plaintiffs "have failed to show a reasonable likelihood of success on the merits of their facial challenge" to S.B. 1 and concluded "the preliminary injunction must be vacated." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 975, 985 (Ind. 2023); *see id.* at 962. Yet plaintiffs' eleventh-hour petition for rehearing seeks to keep the injunction in place indefinitely. That request is improper in the extreme. Artificially prolonging an erroneously issued injunction through an exercise of raw judicial power would contravene this Court's precedents, subvert the purpose of preliminary relief, and undermine the democratic process.

I. Prolonging an Erroneously Issued Injunction by Judicial Fiat Would Contravene Precedent and Raise Serious Constitutional Issues

This Court has already decided plaintiffs cannot have the relief they now seek—a ban on S.B. 1's enforcement pending further litigation in the trial court. In its decision, the Court "conclude[d] the record does not support the preliminary injunction" prohibiting enforcement of S.B. 1. *Planned Parenthood*, 211 N.E.3d at 962. To have an injunction in place pending final judgment, the Court explained, the plaintiffs had to show that "there are no circumstances in which any part of Senate Bill 1 could ever be enforced consistent with Article 1, Section 1." *Id.* But it held they failed to "demonstrate a reasonable likelihood of success on their facial challenge to Senate Bill 1," which meant the "preliminary injunction must be vacated." *Id.* at 975.

Plaintiffs ask this Court to preserve the preliminary injunction nevertheless. But they cite no authority from this Court or the Court of Appeals holding that an

appellate court may refuse to vacate a preliminary injunction after concluding that the trial court exceeded its authority in issuing it. To the contrary, this Court's regular practice is to vacate improperly issued injunctions. *See, e.g.*, *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 156 (Ind. 2019); *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 807 (Ind. 2011); *Leone v. Comm'r, Ind. Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1258 (Ind. 2010); *Ind. Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 169 (Ind. 2002). The Court has emphasized that it would be an "abuse of discretion" to uphold a preliminary injunction where—as here—a plaintiff has failed to establish a likelihood of prevailing on the merits. *Walgreen*, 769 N.E.2d at 161.

Plaintiffs cite a handful of federal cases. *See* Rehr'g Pet. 8–10. None, however, identifies a legal principle that authorizes courts to leave erroneously issued injunctions in place, even though the "equitable powers of federal courts are limited by historical practice." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021). Those decisions represent exercises of raw judicial power. To accept plaintiffs' invitation to perpetuate an injunction by fiat would raise serious constitutional concerns. Under the Indiana Constitution, the judiciary's role is limited. The power to make laws—including laws on abortion—resides with the General Assembly. *See Planned Parenthood*, 211 N.E.3d at 980. The judiciary cannot set aside a statute "which violates no provision of the . . . state Constitution." *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 22 (1918) (quoting *Churchman v. Martin*, 54 Ind. 380, 383–84 (1876)). It therefore cannot issue the "extraordinary" remedy of a preliminary injunction absent a basis for concluding a law is likely unconstitutional. *Econ. Freedom*

Fund, 959 N.E.2d at 801 (citation omitted). Continuing to forbid enforcement of a statute regulating a matter that the Constitution leaves to the "General Assembly['s] . . . broad legislative discretion" would take the judiciary outside its constitutional lane, undermining the democratic process. *Planned Parenthood*, 211 N.E.3d at 981.

That plaintiffs plan to seek additional injunctive relief on remand does not change matters. The trial court's original injunction reaches well beyond the scope of any relief that plaintiffs could hope to obtain in pursuing a claim that "S.B. 1 violates Article 1, Section 1 as applied to circumstances" involving "'serious health risks.'" Rehr'g Pet. 7. That injunction enjoins application of S.B. 1 in any circumstance—and (in contradiction of the express terms of the statute) allows abortion *clinics* to operate. App. II 42; *see Planned Parenthood*, 211 N.E.3d at 962. Plaintiffs, however, do not claim that the challenge they plan to pursue on remand would permit abortions for any reason. Nor do they explain how their contention that S.B. 1's health exception is too narrow would allow abortion clinics to continue operating. Continuing the current injunction would give plaintiffs relief to which they are not entitled under this Court's decision and for which they have identified no colorable legal support.

II. Plaintiffs' Rehearing Petition Constitutes an Improper, Prejudicial Attempt to Short-Circuit the Process for Obtaining Injunctive Relief

Plaintiffs' rehearing petition is improper for other reasons as well. First, a "new question cannot first be raised on petition for rehearing." *Browne v. Blood*, 245 Ind. 447, 199 N.E.2d 712, 713 (1964). Plaintiffs, however, seek to have this Court pass on an issue that was not raised in the trial court, discussed in briefing on appeal, or mentioned at oral argument—whether "S.B. 1 violates Article 1, Section 1 as applied

to circumstances" involving "'serious health risks.'" Rehr'g Pet. 7. If plaintiffs had wanted to pursue an as-applied challenge to the contours of S.B. 1's exceptions for serious health risks, or if plaintiffs wanted to seek injunctive relief on additional grounds, they could have pled it in their complaint, raised the issue in their preliminary injunction motion, or argued for such alternative grounds on appeal. Apparently not seeing any basis for advancing such a theory, they did none of that. It would be improper to entertain their request for delay for the first time on rehearing.

Second, plaintiffs request relief that should be pursued in the trial court. Under the Indiana Trial Rule 65, preliminary injunctive relief must be sought from the trial court—not this Court. *See* Ind. Trial R. 65; *cf. Burris v. State*, 218 Ind. 601, 34 N.E.2d 928, 929 (1941) ("This is primarily a court of review."). That requirement ensures that all parties have the opportunity to develop the factual record and be heard. In their rehearing request, plaintiffs themselves recognize that important procedure. They admit that any "decision concerning the breadth of Article 1, Section 1" should await the development of a "detailed factual record," "adequate briefing," and potentially an "evidentiary hearing." Rehr'g Pet. 11. Yet plaintiffs seek to short-circuit that process by requesting relief from this Court *before* any factual development or briefing has taken place. That is improper and prejudicial to the State.

Third, while plaintiffs effectively seek a preliminary injunction from this Court, they do not meet the requirements for injunctive relief. This Court has already decided the trial court's injunction "must be vacated." *Planned Parenthood*, 211 N.E.3d at 975. And plaintiffs do not address the requirements for a second, narrower

injunction encompassing a vaguely defined set of "serious health risks." Rehr'g Pet. 10. Instead, plaintiffs speculate about what they "believe the evidence on remand *will* demonstrate," pointing to articles that—"*[i]f* . . . correct"—they say will support a request for another preliminary injunction. *Id.* at 10–11 (emphasis added). But speculation about what one hopes evidence will show cannot support the "extraordinary" relief of a preliminary injunction. *Econ. Freedom Fund*, 959 N.E.2d at 801 (citation omitted). The party seeking relief "has the burden" of showing all the requirements for preliminary relief are met. *Walgreen*, 769 N.E.2d at 161.

Plaintiffs, moreover, face insurmountable obstacles to obtaining further injunctive relief that they do not address. Plaintiffs have not indicated that they will amend their complaint on remand or join as plaintiffs women who claim an abortion is constitutionally permissible given their individual circumstances. Rather, plaintiffs broadly theorize there may be "pregnant Hoosiers constitutionally entitled to an abortion" who will not be able to obtain one. Rehr'g Pet. 11. That amounts to another facial challenge to S.B. 1—and one not even pled in the complaint. As this Court has already held, however, succeeding on a facial challenge requires plaintiffs "to show a reasonable likelihood of success in proving there are *no* circumstances in which *any part* of Senate Bill 1 could *ever* be enforced consistent with Article 1, Section 1." *Planned Parenthood*, 211 N.E.3d at 962 (emphasis added). And this Court has already held that Plaintiffs have *failed* to do that.

Additionally, plaintiffs have identified no support for their theory that S.B. 1 could be unconstitutional in even *some* applications. As this Court has explained, the

task in construing Section 1 "is to discern the contours of constitutionally protected liberty as Section 1's framers and ratifiers understood them." *Planned Parenthood*, 211 N.E.3d at 978. When the Constitution was adopted, however, Indiana law did not permit abortions for general health reasons. It permitted abortions *only* to "preserve the life of [a] woman." 1835 Ind. Laws ch. XLVII, p. 66, § 3; *see* 1859 Ind. Laws ch. LXXXVI, p. 469, § 2. Most other States took a similar approach. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285–2300 (2022) (collecting historical abortion statutes). That historical record forecloses any contention that S.B. 1—which provides exceptions for *both* life *and* serious health risks—somehow violates Section 1 on its face (as this Court ruled). *See Planned Parenthood*, 211 N.E.3d at 977. Any challenge on health-related grounds would have to prove the precise risks an actual woman desiring an abortion faces *and* cite materials showing that abortion was historically allowed to alleviate those particular risks. Planned Parenthood supplies no evidence or argument touching on these critical issues.

Finally, it bears mention that plaintiffs have no personal stake in the outcome of any further litigation over the precise contours of a health exception. S.B. 1 both limits the circumstances under which physicians may perform legal abortions and separately requires any lawful abortions to be performed at hospitals or ambulatory surgical centers. *See* Ind. Code § 16-34-2-1(a). Although plaintiffs challenged both requirements, the trial court denied plaintiffs' challenge to the requirement that abortions be performed at hospitals and ambulatory surgical centers. *See Planned Parenthood*, 211 N.E.3d at 984. That means the plaintiff abortion clinics and their

physicians will not be able to perform abortions no matter how the trial court rules on a future motion for a preliminary injunction concerning S.B. 1's health limitation, rendering their interest "academic." *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019).

III. The Court Should Promptly Deny Plaintiffs' Rehearing Petition

The Court should promptly deny plaintiffs' groundless and exceedingly calculated rehearing petition. That petition—filed at 3:47 p.m. on the last possible day for seeking rehearing—is a transparent attempt to delay certification of this Court's opinion and the vacatur of an injunction that should never have been issued in the first place. Delaying vacatur of that injunction any longer would cause irreparable harm to "the State's interest in protecting the life that abortion would end" and enforcing laws adopted by the people's "elected representatives." *Planned Parenthood*, 211 N.E.3d at 961. The State, its citizens, and especially the unborn lives protected by S.B. 1 all will suffer grievously from an unjustified extension of the injunction. For the unborn children protected by this law, this is a life-and-death matter.

Plaintiffs' attempt to minimize the harm to the State because "abortion has been widely legal in Indiana since *Roe v. Wade*, 410 U.S. 113 (1973)," Rehr'g Pet. 12, borders on farcical. As the U.S. Supreme Court has explained, *Roe* represented an unjustified federal intrusion into a realm the U.S. Constitution leaves to "'the people and their elected representatives' in each state." *Planned Parenthood*, 211 N.E.3d at 963 (quoting *Dobbs*, 142 S. Ct. at 2284). And as this Court has recognized, from the very beginning of the *Roe* era, Indiana "made clear it disagreed with *Roe*." *Id.* at 983.

Plaintiffs' invocation of *Roe* reveals what this case is about—whether "policy-making responsibility" for abortion should be vested in democratically accountable representatives or "our five-member, unelected Court, which does not have the institutional tools to discern Hoosiers' divergent views on whether" and when abortion should be legal. *Planned Parenthood*, 211 N.E.3d at 980. But *Roe*—an unprincipled exercise of "raw judicial power" by the U.S. Supreme Court that "has embittered our political culture for a half century"—provides a cautionary tale against exercising such raw power here. *Dobbs*, 142 S. Ct. at 2241 (citation omitted). The Court should not tolerate plaintiffs' continued attempts to make the judiciary abortion policy czars.

CONCLUSION

The petition for rehearing should be denied and certification of the judgment should happen forthwith.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this response to a petition for rehearing contains 2,119 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on August 1, 2023, the foregoing document was served upon the following persons using the IEFS:

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