UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., Plaintiff, v. COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, in his official capacity, *et al.*, Defendants.	)	Case No. No. 1:17-cv-01636-SEB-DML

BRIEF IN SUPPORT OF EXPEDITED MOTION TO LIFT STAY AND VACATE PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF INDIANA CODE § 16-34-2-4

The Court's preliminary injunction against enforcement of Indiana Code section 16-34-2-4 rests on two cases that have now been unambiguously overruled—*Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392 (June 24, 2022), the Supreme Court "h[e]ld that the Constitution does not confer a right to abortion." Slip op. at 69. It explained that *Roe*'s and *Casey*'s contrary holdings were "egregiously wrong," "exceptionally weak," and "deeply damaging." *Id.* at 44–45, 55–56. "*Roe* and *Casey*," the Court concluded, therefore "must be overruled," and the "authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at 5, 69; *see id.* at 79.

With that change in the law, this Court's preliminary injunction against enforcement of Indiana Code section 16-34-2-4 can no longer stand. That decree presumes the existence of a constitutional right that *Dobbs* holds not to exist, rests on decisions that have been overruled, and

impairs the State's ability to protect legitimate interests in protecting minors, their relationship with their parents, and the unborn. The Court should promptly return to the State the authority to enforce Indiana Code section 16-34-2-4 and to protect minors, families, and the unborn.[1]

The defendants understand that the plaintiff intends to oppose this motion. They ask that the Court require any response to be filed within 3 days.

BACKGROUND

This case involves a challenge to amendments that the State enacted in 2017 to Indiana Code section 16-34-2-4, which governs the process by which an unemancipated minor can obtain an abortion without the consent of her parent or guardian. As amended, that statutory provision requires a juvenile court to notify the minor's parent or guardian of her intent to obtain an abortion unless the court "finds that it is in the best interests of an unemancipated pregnant minor to obtain an abortion without parental notification." Ind. Code § 16-34-2-4(d).

On June 28, 2017, this Court preliminarily enjoined enforcement of the new procedures in Indiana Code section 16-34-2-4. ECF No. 26 at 49. The Court determined that the plaintiff was likely to succeed on the merits. *Id.* at 46. Relying heavily on *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court ruled that the new notice-with-judicial-bypass procedures unduly burdened the right to seek an abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973). ECF No. 26 at 16–33. It rejected arguments that the State's countervailing interests in protecting minors, the parent-child relationship, and the unborn justified the new procedures. *Id.* The Court also rejected arguments that the equities and public interest weighed

[1] At this time, the defendants do not seek vacatur of the preliminary injunction against enforcement of Indiana Code section 16-34-2-4(a) and (k) and section 16-34-2-4.2(c). Nor do they ask for the stay to be lifted for any other purpose.

against a preliminary injunction on the ground that Planned Parenthood "has made a strong showing that it is likely to succeed on the merits." *Id.* at 46; *see id.* at 47 (similar).

The Seventh Circuit affirmed. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019) (*Planned Parenthood I*). Applying *Casey*'s undue-burden standard, the court held that the challengers were likely to prevail on the merits. *Id.* at 985–89. It expressed concern that the notice requirement could have the practical effect of obstructing abortions in some cases and rejected arguments that the State's countervailing interests—which, the court observed, "could be legitimate"—were sufficient to justify the burden. *Id.* at 985–88. The Seventh Circuit also rejected arguments that the equities and public interest weighed against a preliminary injunction. *Id.* at 990–91. It, too, relied heavily on its conclusion that "Planned Parenthood's likelihood of success on the merits is substantial." *Id.* at 991.

The defendants filed a petition for a writ of certiorari. The Supreme Court granted the petition, vacated the Seventh Circuit's decision, and remanded for further consideration in light of *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020) (*Planned Parenthood II*).

On remand, the Seventh Circuit adhered to its original decision. *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 741–42 (7th Cir. 2021) (*Planned Parenthood III*). It explained that the intervening decision in *June Medical* "did not overrule the precedential effect of . . . *Casey*" and other abortion decisions. *Id.* at 752.

The defendants filed another petition for a writ of certiorari. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 20-1375 (U.S.). That petition remains pending before the Supreme Court. Proceedings in this Court are currently stayed pending the petition's disposition. ECF No. 64.

Recently, on June 24, 2022, the Supreme Court overruled *Roe* and *Casey*—the decisions underpinning this Court's and the Seventh Circuit's analysis of Indiana Code section 16-34-2-4. The Supreme Court "h[e]ld that the Constitution does not confer a right to abortion"; that "*Roe* and *Casey* must be overruled"; and that the "authority to regulate abortion" now lies with "the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392, slip op. at 69 (June 24, 2022). In overruling *Roe* and *Casey*, the Supreme Court specifically rejected the "undue-burden standard" applied in this case, observing that it has "obscure" origins, is "full of ambiguities," and begets "many other problems." *Id.* at 56, 61; *see id.* at 60 n. 54 (citing *Planned Parenthood I* in illustrating the standard's problems). As a constitutional matter, the Supreme Court explained, States are free to "regulat[e] or prohibit[] abortion" so long as "there is a rational basis on which the legislature could have thought that [the regulation] would serve legitimate state interests." *Id.* at 77, 79.

This motion to partially vacate the preliminary injunction followed.

ARGUMENT

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392 (June 24, 2022), warrants vacatur of the preliminary injunction against enforcement of Indiana Code section 16-34-2-4. Preliminary injunctions may be altered where "th[e] change ha[s] benefits for the parties and the public interest." *CFTC v. Battoo*, 790 F.3d 748, 750-51 (7th Cir. 2015). That includes where a change of law "make[s] the original preliminary injunction inequitable." *Favia v. Ind. Univ. of Penn.*, 7 F.3d 332, 340 (3d Cir. 1993).

Here, maintaining the preliminary injunction would be inequitable. After *Dobbs*, no legal basis exists for enjoining the new notice-with-judicial-bypass procedures in Indiana Code section

16-34-2-4. And *Dobbs* alters the analysis of the equities and public interest. Those considerations now militate against an injunction.

I. No Basis Exists for Enjoining the Amended Parental-Notice Procedures

To obtain a preliminary injunction, a party "must establish that he is likely to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A party with no chance of success on the merits cannot attain a preliminary injunction." *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002). Previously, the Seventh Circuit and this Court ruled that Planned Parenthood was likely to succeed on the merits because, under *Casey*'s undue-burden framework, the State's new parental-notice requirement unduly burdened to right to an abortion recognized in *Roe*. *See Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 741-42 (7th Cir. 2021) (*Planned Parenthood III*); *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 985-89 (7th Cir. 2019) (*Planned Parenthood I*); ECF No. 26 at 16-33. After *Dobbs*, however, *Roe* and *Casey* are no longer good law.

In *Dobbs*, the Supreme Court "h[e]ld that the Constitution does not confer a right to abortion" and that "*Roe* and *Casey* must be overruled." Slip op. at 69; *see id.* at 5, 79. The Supreme Court explained that *Roe* and *Casey* were "far outside the bounds of any reasonable interpretation" of the constitutional text, "egregiously wrong," "deeply damaging," "exceptionally weak," and an exercise of "nothing but 'raw judicial power.'" *Id.* at 44–45; *see id.* at 55–56. In overruling *Roe* and *Casey*, moreover, the Supreme Court specifically rejected *Casey*'s "undue-burden standard" as unmoored from the "constitutional text, history, or precedent," as being "full of ambiguity," and as having "many other problems." *Id.* at 56, 61. It explained that decisions of whether and how to "regulat[e] or prohibit[] abortion" are for "the people and their elected representatives" to make. *Id.* at 79; *see id.* at 69.

Dobbs negates the basis for a preliminary injunction against Indiana Code section 16-34-2-4. Under *Dobbs*, Planned Parenthood cannot claim that women have a constitutional right to an abortion at any stage of pregnancy or suffer any constitutional injury from procedures that allegedly impose an undue burden on that right. States are free to "regulat[e] or prohibit[] abortion" at any stage of pregnancy. *Dobbs*, slip op. at 79. That makes it improper to continue enjoining the implementation and enforcement of Indiana Code section 16-34-2-4. A decree against duly enacted state laws does not "serve[] any federal purpose" where—as here—the "underlying claims [a]re not supported by the United States Constitution." *Komyatti v. Bayh*, 96 F.3d 955, 962–63 (7th Cir. 1996) (citing *Balark v. City of Chicago*, 81 F.3d 658 (7th Cir. 1996)); *Evans v. City of Chicago*, 10 F.3d 474, 479–83 (7th Cir. 1993) (en banc) (plurality op.) (vacating consent decree where intervening precedent established the plaintiffs did not "have a substantial claim under the due process clause"). "When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." *Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1187 (7th Cir. 1994).

Nor did Planned Parenthood advance a rational-basis challenge to the parental-notice law in its complaint, *see* ECF No. 1, at 18-19, or its briefing on the requested preliminary injunction, *see* ECF No. 14, at 11–21; ECF No. 23, at 1–7. And no court has suggested that the State lacks a rational basis for requiring a juvenile court to notify the minor's parent or guardian of her intent to obtain an abortion unless the court "finds that it is in the best interests of an unemancipated pregnant minor to obtain an abortion without parental notification." Ind. Code § 16-34-2-4(d).

Regardless, the amendments survive rational-basis review. Under *Dobbs*, a "law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" Slip op. at 77 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). "It must be sustained if there is a

rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.* Here, as previously explained, the State's parental-notification requirement promotes important state interests in protecting minors, families, and the unborn. ECF No. 22, at 4–15.

Those interests are unquestionably sufficient under the permissive rational-basis test that now applies. As this Court has observed, the State has "legitimate" interests "in protecting children and adolescents, preserving family integrity, and encouraging parental authority," and "the preferred method by which a state may limit a child's decision-making freedom is to encourage parental consultation." ECF No. 26, at 18–19. A "parent's interest in, as well as responsibility for, the rearing and welfare of his or her unemancipated minor does not end at the abortion decision, nor is it completely extinguished by a judicial finding of maturity." *Id.* at 32; *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 326-27 (2006) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy"). Moreover, as *Dobbs* observes, States may "regulat[e]" abortion to promote a "legitimate" interest in "respect for and preservation of prenatal life at all stages." Slip op. at 77–78.

Requiring parental notification is rationally related to the State's interests in protecting minors, their relationships with their parents, and the unborn. Timely notification aids parental consultation in what may be a "difficult and painful moral decision," *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007), with "profound and lasting meaning," *Casey*, 505 U.S. at 873. Where a minor seeks an abortion based on the incorrect assumption that her parents would disapprove of her carrying the pregnancy to term or based on a fear that she lacks sufficient financial resources to care for a child, timely notification may allow parents to correct misapprehensions or offer financial support. Parental notification also enables parents to provide counsel and comfort to

minors who go through with abortions and who are grappling with emotions or regrets. And parental notification ensures that parents know their child's complete medical history, which may be important in making future medical decisions for the child.

II. The Equities and Public Interest Now Militate Against the Preliminary Injunction

Dobbs alters the other considerations underpinning the preliminary injunction against implementation of Indiana Code section 16-34-2-4 as well. Obtaining a preliminary injunction requires a party to demonstrate that "he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Previously, the Seventh Circuit and this Court found those factors satisfied because they deemed it likely that Planned Parenthood would succeed on the merits. *See Planned Parenthood I*, 937 F.3d at 990–91; ECF No. 26, at 45–47. As this Court put it, Planned Parenthood "faces the denial of its constitutional rights, which is the quintessential irreparable harm," and however compelling the State's interests, the public has no interest in promoting them "by enacting statutes that do not pass constitutional muster." ECF No. 26, at 46-47.

Dobbs upends that analysis. After *Dobbs*, Planned Parenthood can no longer claim a constitutional right to choose abortion. Slip op. 5, 69, 79. A fortiori it can claim no irreparable harm from its denial. That alone is reason enough to vacate the preliminary injunction. *See Winter*, 555 U.S. at 22–23. An injunction is an "extraordinary" remedy that may issue "*only* where the intervention of a court of equity 'is essential . . . to protect . . . against injuries otherwise irremediable.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (emphasis added).

After *Dobbs*, moreover, the balance of equities and public interest now tip decisively against a preliminary injunction. As previously explained, ECF No. 22, at 7–12, 28–29, the notification requirements in Indiana Code section 16-34-2-4 promote "unquestionabl[e]" state

interests in protecting minors and their relationship with their parents, *Ayotte*, 546 U.S. at 326–27. It also protects "respect for and preservation of prenatal life" from hasty decisions to end the lives of unborn children made without adequate parental counsel and involvement. *Dobbs*, slip op. at 78. Those interests weigh against a preliminary injunction. And so too does the public's interest in preventing unwarranted "judicial interference" with "democratic governance." *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

III. The Court Should Lift the Stay and Vacate the Preliminary Injunction Against Enforcement of the Parental-Notice Procedures

Given that the preliminary injunction against implementation of Indiana Code section 16-34-2-4 is without legal basis, and given the State's compelling interests in enforcing that statutory provision, the Court should vacate that portion of the preliminary injunction without delay. Federal courts must "'promptly'" permit state officials to make and enforce laws where an order no longer serves to eliminate a violation of federal law. *Horne v. Flores*, 557 U.S. 433, 450 (2009) (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

The defendants' pending petition for a writ of certiorari is no obstacle to partially vacating the preliminary injunction. The Seventh Circuit has already issued its mandate in the defendants' appeal of the preliminary injunction, ECF No. 66, and a pending certiorari petition does "not divest . . . lower courts of jurisdiction," *United States v. Sears*, 411 F.3d 1240, 1242 (11th Cir. 2005). And while the defendants expect that the Supreme Court will eventually grant its petition and vacate the Seventh Circuit's judgment upholding the preliminary injunction, that process could take time. In the meantime, no reason exists to block enforcement of duly enacted state laws that promote compelling state interests in protecting minors, families, and the unborn.

CONCLUSION

The Court should vacate the preliminary injunction against enforcement of Indiana Code section 16-34-2-4.

Respectfully submitted,

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