UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAITLIN BERNARD, M.D., et al. Plaintiffs, v. THE INDIVIDUAL MEMBERS OF THE INDIANA MEDICAL LICENSING BOARD, in their official capacities; and THE MARION COUNTY PROSECUTOR, Defendants.	)	Case No. 1:19-cv-01660-SEB-MJD

MEMORANDUM IN SUPPORT OF EXPEDITED MOTION TO VACATE PRELIMINARY INJUNCTION

The Court's preliminary injunction against enforcement of Indiana's dismemberment abortion ban rests on the now-defunct constitutional right to choose abortion and that right's now-overruled central precedents, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). It must therefore be vacated.

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392 (U.S. 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. "*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 the dismemberment abortion ban can no longer stand. The preliminary injunction presumes a constitutional right that *Dobbs* negates, rests on precedents that *Dobbs* overrules, and impairs

legitimate State interests that *Dobbs* embraces. The Court should promptly vacate the preliminary injunction and permit State officials to protect women and babies by enforcing Indiana's dismemberment abortion ban. Counsel for Plaintiff, Ken Falk, has indicated that his client will oppose this motion. Because the Supreme Court's decision in *Dobbs* is exceptionally clear, the State asks that the Court require any response to be filed within three days to facilitate prompt consideration.

BACKGROUND

This case involves a challenge to Indiana's dismemberment abortion ban, which prohibits "knowingly or intentionally perform[ing] a dismemberment abortion unless reasonable medical judgment dictates that performing the abortion is necessary: (1) to prevent any serious health risk to the mother; or (2) to save the mother's life." Ind. Code § 16-34-2-1(c). Dismemberment abortion is defined as "an abortion with the purpose of killing a living fetus in which the living fetus is extracted one (1) piece at a time form the uterus through clamps, grasping forceps, tongs, scissors, or another similar instrument that, through the convergence of two (2) rigid livers, slices, crushes, or grasps a portion of the fetus's body to cut or rip it off." Ind. Code § 16-18-2-96.4(a).

On June 28, 2019, this Court issued a preliminary injunction preventing the State from enforcing Ind. Code §§ 16-18-2-96.4, 16-34-2-1(c), 16-34-2-7(a), 16-34-2-9, 16-34-2-10. ECF No. 48, Order on Plaintiff's Motion for a Preliminary Injunction 52. The Court's order held that these provisions imposed an undue burden on a woman's decision to have an abortion in violation of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Id.* at 33–49. On September 15, 2021, this Court issued an order continuing trial in this case until after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. ECF No. 151,

Order Granting in Part and Denying in Part Plaintiff's Motion to Continue Trial and Stay All Proceedings.

Three days ago, on June 24, 2022, the Supreme Court overruled *Roe* and *Casey*—the decisions underpinning this Court's assessment of the dismemberment abortion ban. 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 Org.*, 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. 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.

In its September 15, 2021, Order, this Court required the parties to "file a joint status report within two weeks of the Supreme Court's decision in *Dobbs* to inform the Court as to the steps they propose to be taken in light of that decision." ECF No. 151, at 8. The State intends to consult with Plaintiffs and file by that deadline a status report that proposes actions to dispose of the entire case. In the meantime, the State moves to vacate the preliminary injunction on an expedited timeline.

ARGUMENT

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392 (U.S. June 24, 2022), warrants vacatur of the preliminary injunction against enforcement of the dismemberment abortion ban. Preliminary injunctions may be altered where the "change ha[s] benefits for the parties and the public interest." *Commodity Futures Trading Comm'n v. Battoo*, 790 F.3d 748, 751 (7th Cir. 2015). That includes where a change of law "make[s] the original preliminary injunction inequitable." *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 340 (3d Cir. 1993).

Here, maintaining the preliminary injunction would be inequitable. After *Dobbs*, there is no longer any legal basis for enjoining the dismemberment abortion ban. And *Dobbs* alters the analysis of the equities and public interest. Those considerations now militate against an injunction.

I. No Basis Now Exists for Enjoining the Dismemberment Abortion Ban

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 (2009). "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, this Court ruled that Dr. Bernard was likely to succeed on the merits because, under *Casey*'s undue-burden framework, the dismemberment abortion ban unduly burdened to right to an abortion recognized in *Roe*. *See* ECF No. 48, Order on Plaintiffs' Motion for a Preliminary Injunction 33–49 After *Dobbs*, however, *Roe* and *Casey* are no longer good law.

Dobbs negates the basis for a preliminary injunction against the dismemberment abortion ban. Under *Dobbs*, Dr. Bernard 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. Slip op. at 79. That makes it improper to continuing enjoining the implementation and enforcement of the dismemberment abortion ban.

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, 963 (7th Cir. 1996) (citing *Barlak 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 opinion) (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) (quoting *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C.Cir. 1982)).

Under *Dobbs*, "rational-basis review is the appropriate standard" for challenges to state abortion regulations. Slip op. at 79. Dr. Bernard, however, did not advance a rational-basis challenge to the dismemberment abortion ban in her complaint, *see* ECF No. 1, Complaint for Declaratory and Injunctive Relief/Challenge to Constitutionality of Indiana Statute ¶¶ 49, 50, or in her statement of claims, *see* ECF No. 68, Plaintiffs' Statement of Claims ¶¶ 1, 2. No rational-basis issue, therefore, is properly before the Court.

Regardless, the dismemberment abortion ban survives 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, the dismemberment abortion ban is rationally related to the State's legitimate interests in expressing respect for the dignity of human life, protecting the integrity and ethics of the medical profession, and protecting women's mental health. First, the dismemberment ban protects the dignity and value of fetal life, *see* ECF No. 29, Defendants' Memorandum in Opposition to Preliminary Injunction 12–13, expressly affirmed in *Dobbs.* Slip Op. at 78 ("These legitimate interests include respect for and preservation of prenatal life at all stages of development, . . . [and] the elimination of particularly gruesome or barbaric medical procedures."). If a State may "prohibit[] abortion" altogether, *id.* at 79, then it may prohibit one particularly gruesome abortion procedure. *See also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.").

Second, the dismemberment ban "preserv[es] . . . the integrity of the medical profession," Slip Op. at 78, by ensuring that doctors do not participate in such a brutal and inhumane procedure. *See* ECF No. 29, Defendants' Memorandum in Opposition to Preliminary Injunction 13–14.

And third, the dismemberment ban "protect[s] . . . maternal health and safety," Slip Op. at 78, by ensuring that women seeking abortion do not suffer the mental health consequences of having a dismemberment abortion only to discover later the brutal and inhumane way in which the fetus was killed. *See* ECF No. 29, Defendants' Memorandum in Opposition to Preliminary Injunction 14–15.

Because the dismemberment ban is rationally related to these unquestionably legitimate state interests, Dr. Bernard cannot succeed on the merits of her claims, and this Court should lift the preliminary injunction.

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

Dobbs alters the other considerations underpinning the preliminary injunction against implementation of the dismemberment abortion ban 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 v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7,20 (2008). Previously, this Court found those factors satisfied because it deemed Dr. Bernard likely to succeed on the merits. *See* ECF No. 48, Order on Plaintiffs' Motion for a Preliminary Injunction 50–51.

Dobbs upends that analysis. After *Dobbs*, Dr. Bernard's patients can claim no constitutional right to an abortion. Slip op. at 5, 69, 79. A fortiori, Dr. Bernard can claim no irreparable harm from the denial of a non-existent right. 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, the dismemberment abortion ban is rationally related to the State's legitimate interests in expressing respect for the dignity of human life, protecting the integrity and ethics of the medical profession, and protecting women's mental health. 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 Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

Given that the preliminary injunction against implementation of the dismemberment abortion ban is without legal basis, and given the State's legitimate interests, the Court should vacate 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)).

CONCLUSION

The Court should vacate the preliminary injunction against enforcement of Indiana's dismemberment abortion ban.

Respectfully submitted,

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