In the
Indiana Supreme Court

Individual Members of the Medical Licensing Board of Indiana, et al.,
Appellant(s),

v.

Anonymous Plaintiff 1, et al.,
Appellee(s).

Court of Appeals Case No.
22A-PL-02938

Trial Court Case No.
49D01-2209-PL-31056

Published Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 12/10/2024.

Loretta H. Rush
Chief Justice of Indiana

Goff, J., concurs.

Molter, J., concurs in the denial of transfer with separate opinion in which Rush, C.J., joins.

Slaughter, J., dissents from the denial of transfer with separate opinion in which Massa, J., joins.

Molter, J., respecting the denial of transfer.

Trial judges have discretion to issue preliminary injunctions, which merely maintain the status quo or protect a party from injury while a case is being resolved. Guiding that discretion is the judge's early assessment of how the case may unfold and what harms may result with or without the injunction. And because trial judges have discretion to issue preliminary injunctions based on such an early assessment, appellate review of those preliminary injunctions is more deferential than the later review of the court's final judgment resolving the merits of the dispute.

This case involves an unusual preliminary injunction—the trial court temporarily enjoined state officials from enforcing the State's abortion law, but only for a particular group of women who are not pregnant and therefore are not seeking an abortion. The Court of Appeals concluded that the trial court didn't exceed its discretion by entering a preliminary injunction while the case continues to be litigated. But the panel also directed the trial court to narrow the preliminary injunction on remand. So thus far, this case is not stopping the defendants from doing anything. And we don't yet know if it ever will, including because the defendants may ultimately prevail in the lawsuit.

Although I expect our Court may eventually need to decide important questions this case presents, I concur in the Court's decision to deny transfer at this point. That is because I conclude the more prudent course is for the Court to review the case after a final judgment rather than following a preliminary injunction, which remains a work in progress and subject to more deferential appellate review. In essence, it is better that we review the trial court's final answer rather than its first guess.

I.

At the center of this case are two intersecting statutes. The first is Indiana's Religious Freedom Restoration Act ("RFRA"), which says the government can't "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless the burden "is in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental

interest." Ind. Code § 34-13-9-8. RFRA allows the General Assembly to exempt a law from this restriction, but courts can't interpret a statute as exempt unless the General Assembly recognizes the exemption "expressly." I.C. § 34-13-9-2.

The second statute is Indiana's abortion law, I.C. § 16-34-2-1 *et seq.*, which generally limits abortions to three circumstances: (1) when an abortion is necessary either to save a woman's life or to prevent a serious health risk; (2) when there is a lethal fetal anomaly; or (3) when pregnancy results from rape or incest. *Members of Med. Licensing Bd. of Indiana v. Planned Parenthood Great Nw., Hawai'i, Alaska, Indiana, Kentucky, Inc.*, 211 N.E.3d 957, 961 (Ind. 2023).

II.

The plaintiffs are a few individuals and an organization called Hoosier Jews for Choice, and they explain that they have a variety of religious beliefs that would compel them to terminate a pregnancy in various circumstances where Indiana law would generally prohibit abortion. The record reflects that none of them are pregnant, so they don't yet confront the circumstances they fear. And they may never confront those circumstances even if they do become pregnant because a pregnancy could occur in circumstances in which their faith does not require an abortion. But they are currently avoiding pregnancy until they can be sure the State won't interfere with them terminating a pregnancy when consistent with their religious beliefs.

Citing RFRA, they sued—on their own behalf and seeking to represent a class—members of the Medical Licensing Board of Indiana and select prosecutors. The suit seeks an injunction "enjoining defendants from taking any action that would prevent or otherwise interfere with the ability of the individual plaintiffs, the class members, and Hoosier Jews for Choice's members from obtaining abortions as directed by their sincere religious beliefs." Appellant's App. Vol. 2 at 85. The trial court granted a preliminary injunction for the named plaintiffs while they litigate their claims, enjoining the defendants "from enforcing the provisions of S.E.A. 1 [the abortion law] against the Plaintiffs." *Id.* at 59. Later, the trial court certified a class defined as: "All persons in Indiana

whose religious beliefs direct them to obtain abortions in situations prohibited by Senate Enrolled Act No. 1[] who need, or will need, to obtain an abortion and who are not, or will not be, able to obtain an abortion because of the Act." *Id.* at 15. But the court has not extended the injunction to the class.

III.

Through an interlocutory appeal, the Court of Appeals concluded that the trial court did not abuse its discretion by entering a preliminary injunction, but the panel directed the trial court to narrow its injunction on remand. *Individual Members of Med. Licensing Bd. of Indiana v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 459 (Ind. Ct. App. 2024). There is much to unpack in the seventy-two-page appellate opinion.

It did not hold that an injunction was required, but rather that the trial court did not abuse its discretion when concluding a preliminary injunction was warranted while the litigation is pending. *Id.* at 428. On this point, the court noted that "[a]ppellate review of a preliminary injunction is limited and deferential." *Id.* at 448 (quotations omitted). Its holdings also included: that Hoosier Jews for Choice has standing based on the doctrine of associational standing, which is a doctrine our Court has not yet decided whether to adopt, *id.* at 428, 432–38; that the plaintiffs' claims are ripe even though none of them are currently seeking an abortion, *id.* at 438–42; that the trial court properly certified a class, *id.* at 442–47; that prohibiting an abortion compelled by a religious belief may substantially burden religious exercise, *id.* at 448–51; that the State has not prevailed on its burden to establish that the abortion law advances a compelling interest through the least restrictive means, *id.* at 451–56; and that the plaintiffs have shown a risk of irreparable harm that outweighs other interests, *id.* at 456–59.

While the Court of Appeals found no abuse of discretion in entering a preliminary injunction, it concluded the injunction is too broad because, "[f]or instance, the injunction would bar the State from preventing Plaintiffs from obtaining abortions that are outlawed by the Abortion Law but that are not directed by Plaintiffs' sincere religious beliefs." *Id.* at 459. That direction to narrow the injunction on remand will require the trial

court to reevaluate the plaintiffs' request for injunctive relief, and any injunction must be "specific in terms," describing "in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Ind. Trial Rule 65(D). The judge who issued the injunction has since retired from the trial court, so it will be a new judge making that evaluation. And trial courts retain inherent authority to reconsider prior rulings in any event, *Matter of Est. of Lewis*, 123 N.E.3d 670, 673 (Ind. 2019), including that they may revise, rescind, or grant additional preliminary injunctions, T.R. 65(A)(4) (providing that preliminary injunctions may be "dissolved, modified, granted or reinstated"), and they may modify or decertify a class, *see* T.R. 23(D); *see also Ramsey v. Lightning Corp.*, 991 N.E.2d 132, 135 (Ind. Ct. App. 2013) (explaining that "Trial Rule 23 supports the conclusion that the trial court may amend, alter, modify and even revoke or rescind a previous order certifying a class").

IV.

Thus, while the case presents transfer-worthy issues with previously undecided questions of statewide importance, it is still evolving through a preliminary posture; some of the current issues may become moot and new issues may emerge as litigation progresses. And as part of that evolution, the trial court's tentative view of the facts will mature into a final determination, no longer subject to the deferential standard of review for preliminary injunctions. Given the limited impact of the preliminary injunction that is the subject of the appeal, the prudent course is to let the trial court decide what final relief, if any, to grant the parties before we weigh in.

While the Court of Appeals has remanded for a narrower preliminary injunction, the case doesn't have to keep volleying between the trial and appellate courts on the way to a final judgment. Our trial rules allow the court to combine preliminary injunction proceedings with a final trial on the merits, or, even if not, the preliminary injunction record is still automatically incorporated into the record for the trial on the merits. T.R. 65(A)(2). It seems likely, then, that our next chance for review will be from a final order, not a preliminary injunction.

Of course, sometimes things change, or our predictions prove mistaken. While there appears to be no emergent reason for us to intervene at this point in the litigation, an exigency could arise down the road. In which case, able counsel on both sides are well equipped to seek further review and relief in our appellate courts. *See, e.g.*, Ind. Appellate Rule 14(A)(5) (authorizing parties to seek an interlocutory appeal as of right from orders granting or refusing to grant, or dissolving or refusing to dissolve, a preliminary injunction); App. R. 14(H) (granting appellate courts discretion to stay a preliminary injunction pending appellate review); App. R. 39(A) (granting appellate courts discretion to stay lower court orders pending appellate review); App. R. 56(A) (authorizing our Court in limited circumstances to accept jurisdiction over appeals that would otherwise be within the jurisdiction of the Court of Appeals).

Rush, C.J., joins.

Slaughter, J., dissenting from the denial of transfer.

I respectfully dissent from the Court's denial of transfer. I would grant transfer now and not await a later phase to decide key issues this appeal presents.

At issue is the propriety of the trial court's preliminary injunction. The injunction is premised on the court's conclusion that enforcing our state's abortion law will likely violate the plaintiffs' rights under our RFRA statute, Indiana's Religious Freedom Restoration Act, Ind. Code ch. 34-13-9. In my view, three issues warrant review now:

- whether the individual plaintiffs' claimed injuries have sufficiently matured—ripened—into a justiciable controversy since the women are not now pregnant and may never seek an abortion;

- whether we should adopt associational standing, so another plaintiff, Hoosier Jews for Choice, an organization that has not sustained any injury, can sue in its own name on behalf of members who claim injury; and

- whether the trial court correctly interpreted and applied RFRA, which requires that a law burdening religious exercise must advance a compelling governmental interest through the least restrictive means available.

Despite the importance of these issues, two of my colleagues write separately to explain why they believe our review should await a later stage of the litigation: current issues may become moot, new issues may emerge, or facts may evolve between now and entry of final judgment. *Ante*, at 4. Because the ongoing litigation is a "work in progress", they say, "it is better that we review the trial court's final answer rather than its first guess." *Id.* at 1.

While I can appreciate my colleagues' wait-and-see view in the abstract, I cannot agree with their rationale for deferring consideration of this appeal today. Our denial of transfer means the trial court's "final answer" will lack the benefit of our current thinking. By saying nothing, we may leave the misimpression that the injunction's only vulnerability is its scope. As my colleagues acknowledge, this case "presents transfer-worthy issues with previously undecided questions of statewide importance". *Id*. at 4. Many of these "transfer-worthy issues . . . of statewide importance" are legal questions as to which the trial court gets no deference. Answering these questions now may leave the trial court with greater clarity and fewer things to decide on remand.

* * *

For these reasons, I respectfully dissent from our denial of transfer.

Massa, J., joins.