

Amicus Brief of Professor Eric Rasmusen

November 1, 2022

**In the
Indiana Supreme Court**

Case No. 22S-PL-338

MEMBERS OF THE MEDICAL LICENSING
BOARD OF INDIANA, ET AL.,

Appellants (defendants below)

-v-

PLANNED PARENTHOOD GREAT
NORTHWEST, HAWAII, ALASKA, INDIANA,
KENTUCKY, ET AL.,

Appellees (plaintiffs below)

Appeal from Monroe County
Circuit Court
Kelsey B. Hanlon, Special Judge

Court of Appeals Case No. 22A-
PL-2260

Trial Court Case No. 53C06-2208-
PL-1756

AMICUS CURIAE BRIEF OF ERIC RASMUSEN IN SUPPORT OF APPELLANT

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

Eric Rasmusen files this brief as *amicus curiae* pursuant to Indiana Rule of Appellate Procedure . Rasmusen is a retired professor specializing in game theory and law-and-economics, formerly the Dan and Catherine Professor of Business Economics and Public Policy in the Kelley School of Business, Indiana University. He is the author of two books and over seventy articles, including a book and numerous articles on the Japanese judiciary. He has spent two years on sabbatical leave as a visiting scholar at Harvard Law School and one at Yale Law. He has co-authored with faculty from Harvard, Yale, UCLA, and the University of Chicago Law Schools and with Judges John Wiley of the Los Angeles Superior Court and Richard Posner of the 7th Circuit.

Rasmusen has striven to assist courts as *amicus curiae* in various appellate proceedings. He has been granted leave to appear as *amicus curiae* in the Indiana Supreme Court case, *Barnes v. Indiana*, case no. 82S05-1007-CR-343 (2011), as well as in several federal cases, *In re Flynn*, No. 20-5143 (D.C. Circ. 2020), *Mersino v. Sebelius*, No. 13-1944 (6th Circ. 2013), and *Marshall v. Commissioner*, No. 12-20804 (5th Circ. 2013). As a senior scholar who combines knowledge of game theory-- the mathematical analysis of strategic behavior-- with law, he believes he is well positioned to provide the court with input into issues of civil procedure.

Rasmusen is also Treasurer of Concerned Christians for Life (CCFL), an organization in Bloomington, Indiana that organizes events such as the Life Chain and the Rally for Life to raise awareness of the problem of abortion. Rasmusen's intent in this *amicus* brief, however, is not only to strive to see justice done in this case, however, but as a good citizen to address a common misapplication of the criteria for preliminary injunctions. The civil procedure issues in this case are important and recurrent across the United States.

SUMMARY OF THE ARGUMENT

For a court to grant a preliminary injunction, four criteria must be met. This brief will not discuss the first two, which are relatively simple in theory, if sometimes difficult in application to particular cases: that the plaintiffs have a reasonable chance of success on the merits and that they will suffer irreparable harm if the request is not granted. Instead, it will focus on the last two criteria, that the balance of harms favors granting the preliminary injunction and that granting it does not disserve the public interest. Moreover, the trial court's opinion passed so lightly over these criteria that it cannot count as a reasoned explanation. No matter how sure the trial court was that the plaintiffs will win on the merits, that is not the only criterion for grant of a preliminary injunction, and even if the Supreme Court agrees that the plaintiffs' case is strong on the merits, it should deny the preliminary injunction.

There are four criteria, not one, because a motion for a preliminary injunction is not the same as a motion for summary judgment. The law has wisely decided that a preliminary injunction is an extraordinary remedy intended to deal with the problem of irreparable harm before final judgment. Thus, there are two "gateway" requirements that rule out preliminary injunctions in most cases: that the plaintiff have a reasonable chance of success (not a likelihood, just a reasonable chance), and that the plaintiff's harm from delay cannot be repaired by money and pre-judgment interest. If those are met, the court addresses the hardest criterion: whether the irreparable harm to the plaintiff is offset by an even greater irreparable harm to the defendant, which also should involve consideration of the harms to third parties from the court's decision. Finally, the fourth criterion deals with whether this weighing of harms runs into conflict with "the public interest". With all four criteria, it is the plaintiff who has the burden of showing that they

are met. If that is unclear because of lack of argument or evidence, the preliminary injunction should not be granted.

These four criteria for a preliminary injunction are standard across common-law jurisdictions. They are not purely legalistic; they make sense. In most cases at law, the first two criteria will fail and the court need proceed no further. In the present case, the trial court decided that there is a reasonable chance (the criterion does not require a likelihood) that the pro-abortion plaintiffs will win on the merits. It also decided that the plaintiffs would suffer irreparable harm from delay, in the form of such things as abortion-clinic bankruptcy and the need of some pregnant women to carry a pregnancy to term.

Those are the easy criteria. The truly hard one is the third requirement: that the plaintiff show that weighing the irreparable harm of the plaintiff against the irreparable harm to the defendants favors granting the injunction. Here, there is clearly irreparable harm to the defendants and third parties too, in the form of the death of the babies who would be aborted if the preliminary injunction is granted. Thus, these irreparable harms must be weighed against each other, with due consideration too of the likelihood of each side's success on the merits, since a harm may be irreparable without being a "legal harm". The plaintiffs have the burden of showing that the weighing of harms favors them. This they have failed to show, and the court's opinion barely touches upon this difficult calculation.

Lastly, we have the fourth criterion, the public interest. This cannot be simply the public's interest in seeing justice done, since that would be to repeat the first and third criteria's consideration of the likelihood of success on the merits. Doing that would be double-counting and superfluous. Rather, it is whether once the court has decided that the weighing of harms favors the plaintiff's request for a preliminary injunction, the court must still rule against it because the state has declared a clear interest opposed to the grant that must outweigh utilitarian considerations.

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Thus, even if weighing the harms would favor granting a preliminary injunction to a drug dealer in a contract dispute, the court should refuse to grant it because the public interest disfavors the profits of the drug dealer.

Thus, since the plaintiff and the court have not met their burden of showing that weighing the harms favors the grant of a preliminary injunction, it should not have been granted.

INTRODUCTION

A. The Four Criteria for a Preliminary Injunction

The trial court's opinion sets out the preliminary injunction standard on p. 6 of its September 22, 2022 *Order Granting Plaintiffs' Motion for a Preliminary Injunction* (Cause No. 53C06-2208-PL-001756):

- a. Prior to issuance of a Preliminary Injunction, four elements must be established:
 - i. the moving party is reasonably likely to prevail on the merits;
 - ii. the remedy at law is inadequate and the moving party will suffer irreparable harm pending resolution of the action;
 - iii. the threatened injury to the moving party if the injunction is denied outweighs the threatened harm to the adverse party if the injunction is granted; and
 - iv. the public interest will be disserved if the relief is not granted. [*Leone v. Commissioner, Indiana Bureau of*](#)

Motor Vehicles, 933 N.E.2d 1244, 1248

(Ind. 2010).

- b. If the moving party fails to prove any one of the four required elements, the application for injunction should be denied. *Id.*

This is the conventional set of criteria for grant of a preliminary injunction, *cf.* *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008).

This brief will pass over the first two criteria. Reasonable likelihood of success, criterion (i), is highly subjective for cases of first impression, and amicus has too little expertise to either concur or disagree with the trial court. Irreparable harm, criterion (ii), is easy to establish for women wanting an abortion. Both criteria are given much attention in the parties' briefs and the lower court decision. The reasoning behind the application of criteria (iii) and (iv), however, is relatively neglected.

B. Confusions in the Rule for Deciding the Balance of Harms and in the Public Interest Criterion

How to balance the harms ("balance the equities", in the less descriptive terminology of most jurisdictions) is unclear in caselaw at both the state and federal levels.¹ At the federal level, there is a three-way circuit split over the rule to use (the sequential, the sliding-scale, or threshold test), a split that was to be resolved when the United States Supreme Court took up the *Winter* case in 2018. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). But the Court left the split intact. I

¹ An excellent survey of preliminary injunction tests generally and the public interest criterion in particular is M. Devon Moore "The Preliminary Injunction Standard: Understanding the Public Interest Factor," *Michigan Law Review* (2019).

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mention this to show that even though an astonishing amount of attorney and judicial talent has been expended, and even though this is not an obscure topic, but one running through many areas of substantive law, the common law is still unclear. This in large part excuses courts who get it wrong. I will not argue for what The common-sense, workable, way to weigh the harms and introduce the public interest is the sliding-scale rule used by the federal 7th Circuit. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984, Posner, J.) Similarly, the public-interest criterion is ill-defined, but whatever definition one might use, the opinion below does not adequately explain why it arrived at the conclusion that the criterion was met by the plaintiffs in the present case.

THE ARGUMENT

I. The Opinion Below Contains Insufficient Reasoning to Show that the Balance of Harms Weighs in Favor of Granting a Preliminary Injunction

I will give in full the lower court's evaluation of criterion (iii) as applied to this case. The trial said on p. 14 of its September 22, 2022 *Order Granting Plaintiffs' Motion for a Preliminary Injunction* (Cause No. 53C06-2208-PL- 001756) (boldfacing added):

- ss. **Plaintiffs must show** that their threatened injury if the injunction is denied outweighs the threatened harm to the Defendants if the injunction is granted. *Leone* at 248.
- tt. S.B. 1 was effective on September 15, 2022. Because the Plaintiffs have demonstrated a reasonable likelihood of prevailing on the merits, the potential constitutional deprivations for Indiana women and girls should be given significant weight in this balancing.
- uu. As mentioned previously, **the State has an interest in regulating abortion** so long as that regulation is not in violation of the Indiana Constitution. **The Defendants' ability to enforce abortion regulations continues with maintenance of the status quo, however it does not continue to the breadth and degree S.B. 1 contemplates.** The named Defendants have statutory duties of enforcement that will either track S.B. 1 as enacted or, if the relief is granted, would be subject to the status quo.
- vv. **The state constitutional issues have never been directly addressed by our Supreme Court.** *Clinic for Women v. Brizzi* at 978. However,

multiple surrounding State Courts have found likely merit in what appear to be similar claims under their respective state constitutions. See *Doe v. O'Connor*, 781 N.E.2d 672, 674, (Ind. 2003) (generally supporting the proposition that the openness of a constitutional question as well as determination of similar issues by other jurisdictions in a manner favorable to the moving party may be a consideration in granting injunctive relief); Ex. 1-3 to Plaintiffs' Reply in Support of the Motion for Preliminary Injunction.

ww. On balance, the weighing of these harms favors granting injunctive relief.

Paragraph (ss) tells us that it is the plaintiff who has the burden of proof: “**Plaintiffs must show** that their threatened injury if the injunction is denied outweighs the threatened harm to the Defendants if the injunction is granted.” If the balance of harms is hazy, the preliminary injunction must be denied. Has it been shown that the balance of harms clearly favors the plaintiff? No-- or at least nothing in the court’s opinion tells us that. Most of it is rehashes criterion (i), that the plaintiff has a reasonable likelihood of success. Balancing the harms, however, requires factoring in the size of the irreparable harms to the plaintiff and to the defendant from a wrongful denial or grant of the preliminary injunction.

If we knew the plaintiff’s likelihood of winning at trial and a dollar magnitude for the irreparable harms to each side, the way to balance the harms would be to look at the “expectation” of the harm to each side from not getting its way. This is most easily understood using a hypothetical example. Suppose the plaintiff has a 60% chance of winning on the merits, that the plaintiff’s loss from denial of the injunction is \$100, and the defendant’s loss from grant of the injunction is \$200. The expectation of the plaintiff’s loss from denial is then $(60\%)(\$100) = \40 , because if the plaintiff wins on the merits its legally cognizable harm is \$100 but if it loses on the merits its legally cognizable harm is \$0. The expectation of the defendant’s loss from grant of the preliminary injunction is $(40\%)(\$200) = \80 , because if the defendant wins on the merits its legally cognizable harm is \$200 but if it loses on the merits its legally cognizable harm is \$0. Since \$80 is bigger than \$40, the balance of harms would favor the defendant and the court would deny the preliminary injunction. See *Roland Machinery v. Dresser Industries*, 749 F. 2d 380 (7th Circ. 1984, Posner, J.).

This is the rational way to weigh the harms, but the difficulty arises in coming up with the numbers 60%, \$100, and \$200. The likelihood of success is difficult for the court to calculate, since the whole point of the legal process is to develop the reasoning and evidence the court needs to know which side should win, and the request for a preliminary injunction comes before discovery and trial. But the court must and can do its best; that is a problem that even arises with criterion (i). Coming up with the figures \$100 and \$200, the irreparable harm to each side, is even more difficult. Irreparable harm by its very nature tends to be nonmonetizable harm, very difficult to quantify. Yet if the court is to truly balance the harms, it must do so. It cannot simply use the 60% figure-- in our example, that would give the wrong answer, since the plaintiff's superior likelihood of success is only a little superior whereas its irreparable harm is much smaller than the defendant's. Whether it uses an actual number or not, the court must form some opinion of the relative harms.

If the court merely says, "The plaintiff's likelihood of success is greater than the defendant's" and then lists each of their irreparable harms without comparing the magnitudes, the court is in effect eliminating criterion (iii) and is deciding the case on the merits. This is most unjust, as well as contrary to precedent. But that is what the court below has done when it says in paragraph (ww), "On balance, the weighing of these harms favors granting injunctive relief." Paragraph (ww) should have been the longest and most complex paragraph of this section, but it is the shortest. It should have taken the ingredients provided in the previous paragraphs as inputs and provide an explanation for how to process them into a decision output, but instead it jumps to the decision without explanation.

What might the lower court have done? Or, rather, what might the plaintiffs have done in their brief to aid the court, since the burden of proof is on the plaintiffs? They might have told us the number of women who would be denied abortions in the time period before trial; the number of months of unwanted pregnancies; the effort required to get abortions in states where it was legal; the cost of suspending operations in Indiana abortion clinics; the emotional harm to the women. And, since it requires honest consideration of both sides' irreparable harm to make the case that the plaintiffs' is greater, the plaintiff should have discussed the number of babies killed; the emotional harm to relatives and to other citizens from their being killed; and the exact nature of the state's harm from the statute the citizens supported being enjoined. These are hard things to compare, but they must be compared: that is the essence of the court's decision on a preliminary injunction. This difficulty is one reason a preliminary injunction is called "an extraordinary remedy": it requires extraordinary wisdom on the part of the court compared to the relatively easy task of deciding on the merits after a trial has developed all the evidence.

But all we have here is "On balance, the weighing of these harms favors granting injunctive relief."

II. The Opinion Below Contains Insufficient Reasoning to Show that the Public Interest Will Be Disserved if the Preliminary Injunction Is Not Granted

I will give in full the lower court's evaluation of criterion (iv) as applied to this case. The trial said on p. 15 of its September 22, 2022 *Order Granting Plaintiffs' Motion for a Preliminary Injunction* (Cause No. 53C06-2208-PL- 001756) (boldfacing added):

xx. **Plaintiffs also carry the burden to show that public interest will be disserved if the relief is not granted.** *Leone* at 1248.

yy. **The public has an interest in Plaintiffs' constitutional rights** being upheld. See, e.g., [Carter](#), 854 N.E.2d at 881-83.

zz. Plaintiffs have also demonstrated that **the public has an interest in Hoosiers being able to make deeply private and personal decisions** without undue governmental intrusion.

aaa. In considering the public interests, the Court must consider the constitutional rights of Indiana women and girls, but the Court cannot and should not disregard the legitimate public interest served by protecting fetal life. The Court specifically acknowledges the significant public interest in both.

bbb. If injunctive relief is granted, the public will continue to be subject to the previous abortion regulation regime that was significantly

influenced by the United States Supreme Court jurisprudence that identified and expressly reaffirmed a privacy right that included abortion for nearly fifty years. Staying enforcement of S.B. 1 maintains that fifty-year-old scheme long enough for the Court to address the issue on the merits.

ccc. **Weighing the considerations, the Court concludes that the public interest will be disserved by if the relief is not granted.**

The double negative in Indiana caselaw is unfortunate: the plaintiff must show that “public interest will be disserved if the relief is not granted,” rather than that “the public interest will be served if the relief is granted.” Indeed, another possibility, which is perhaps closer to what courts are really thinking, is to require the plaintiff to show that “the public interest will not be disserved if the relief is granted,” which is to say, that he need not show that his relief serves public as well as private interests, just show that his relief will not violate the public interest.

All this makes one’s head whirl, but it is not important to the present case, though Indiana law would be well served if the Supreme Court were to clarify it. Rather, what is of first importance here is to determine what “the public interest” means and how it applies to this preliminary injunction.

What the trial court has done is simply repeat the considerations found in the first three criteria and say that there is a public interest in justice being done. That is not satisfactory. If the law is to take that approach, it might as well eliminate criterion (iv) altogether, because it “double-counts” what has already been discussed for the first three criteria. And that is what the 7th Circuit has concluded: that federal court of appeals has simply dropped criterion (iv) altogether, while at the

same time saying that if there are irreparable harms to other parties besides the plaintiff and defendant, those harms should be incorporated into the weighing of harms in criterion (iii).

Indiana law still has criterion (iv), though. Could it be useful? Perhaps. It is an escape hatch of sorts, for unusual cases where the balance of harms leads to one conclusion-- the granting of the preliminary injunction-- but some important public interest, an interest not incorporated into the benefits and harms of individuals, lead to the opposite conclusion-- denial of the preliminary injunction.

This is digression in a brief, and would be dictum in a decision, but I will suggest an example. Consider Shylock's pound of flesh in *The Merchant of Venice*. Antonio has agreed to pay Shylock a pound of his flesh if he fails to repay money Shylock has lent him. Antonio does fail to pay. The contract is valid, and Shylock eloquently explains why mere money is no good substitute for the pound of flesh-- irreparable harm. Antonio, of course, suffers irreparable harm if the court denies his request that the taking of the pound be preliminarily enjoined--if I may now depart from the play's text. But although death is a huge harm, Antonio's likelihood of success on the merits is so low that the balance of harms goes against him. Antonio clearly owes the money; the only question is whether Shylock can get specific performance. But here criterion (iv) comes to the rescue. The court can say that although the contract is valid, the court will not enforce it by the equity remedy of injunction, but only the "law" remedy of money damages. An injunction would offend the public interest in civilized behavior, and so the court will not grant that extraordinary remedy. Instead, Shylock must wait for trial and show what money equivalent would come closest, and though that, too, might show that Antonio had made a bad decision in agreeing to the contract, the court would allow Antonio to lose money as the result of his indiscretion.

III. The Plaintiff Has the Burden of Showing that Extraordinary Relief Should Be Granted, So the Preliminary Injunction Should Be Denied

Preliminary injunctions are an equitable remedy and an extraordinary remedy.² They allow more discretion to the trial court than the monetary remedies of the common law. When discretion is allowed, however, it must be controlled by explanation. A plaintiff who does not show that the four criteria for a preliminary injunction are met does not deserve to have his request granted. And a court that grants a preliminary injunction, but does not explain, does not deserve deference. Otherwise, equitable remedies escape the rule of law, as was said so pointedly by Selden:

“Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.”³

Under Indiana law, an appellate court reviews a trial court's grant or denial of a preliminary injunction under two standards. For questions of law, the review is de novo, as for all questions of law. For questions of fact, the review is for abuse of discretion. Such abuse can take the form either

²A preliminary injunction is “an extraordinary equitable remedy that should be granted in rare instances” only. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011).

³J. Selden, Table Talk; quoted in Evans, Michael; Jack, R Ian, eds. (1984), *Sources of English Legal and Constitutional History*, Sydney: Butterworths, pp. 223-224, ISBN 0409493821.

of gross mistakes of fact, or of providing the appellate court (and the public) with too little explanation to be able to determine why the trial court decided as it did and whether or not it made a mistake.⁴ As [*Heraeus Medical v. Zimmer*](#), 135 NE 3d 150 (Ind. Supreme Court 2019), says:

“Heraeus Medical and Kolbe appeal from the trial court's grant of a preliminary injunction, which we review for an abuse of discretion. *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008). An abuse of discretion can occur under various circumstances, including when the trial court misinterprets the law. See *Myers v. Myers*, 560 N.E.2d 39, 42 (Ind. 1990). To the extent our analysis depends on the trial court's interpretation of a purely legal question—here, whether a court, pursuant to a reformation clause, can add language to an unenforceable restrictive covenant in a noncompetition agreement—we afford that matter de novo review. Cf. *Harrison v. Thomas*, 761 N.E.2d 816, 818 (Ind. 2002) (noting that "construction of the terms of a written contract is a pure question of law for the court, reviewed de novo").”

As we have seen, in the present case, the opinion below fails to explain how it weighs the harms and how it determines whether issuance of a preliminary injunction would serve the public interest. It lays out some of the factors involved, but not how it puts them together and comes to a

⁴ [See, e.g., *In re Hill*, 775 F.2d 1037, 1040 \(9th Cir.1985\)](#): “There is an abuse of discretion when a judge's decision is based on an erroneous conclusion of law or when the record contains no evidence on which he rationally could have based that decision. [*Premium Service Corp. v. Sperry & Hutchinson Co.*](#), 511 F.2d 225, 229 (9th Cir. 1975).”

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conclusion. Thus, it seems the plaintiffs have not met their burden of proof, and the decision below should be overruled.

CONCLUSION

For the foregoing reasons, amicus Eric Rasmusen respectfully requests that this Court reverse the trial court's grant of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and the Statement of Interest, contains 4,098 words according to the word count function of the LibreOffice word-processing program used to prepare it, which is less than the limit of 4,200 words in Rule 44.

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 1, 2022, I filed the foregoing document via Efile.incourts.gov. I further certify that on November 1, 2022, the following persons were contemporaneously served via Efile.incourts.gov with the foregoing document.

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