IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-2366

K.C., *et al.*,

Plaintiffs/Appellees,

v.

INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, *et al.*

Defendants/Appellants

On Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
No. 1:23-cv-00595-JPH-KMB,
The Honorable James P. Hanlon, Judge

Appellees' Reply In Support of Motion for Panel Reconsidaration and Reconsideration En Banc As To Sua Sponte Stay of Preliminary Injunction

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INTRODUCTION

In the week since the Panel's February 27, 2024 Order, transgender adolescents, their parents, and their medical providers have been living a nightmare. Beginning the morning after the stay order, doctors like Plaintiff-Appellee Dr. Bast had to start the process of calling patients to inform them of the news, cancel appointments for the coming week, and effectively cut people off from treatment that had been improving their symptoms of gender dysphoria. *See* Bast Decl. ¶3, attached as Exhibit A. As Dr. Bast explained, these were some of the "most difficult conversations" she has ever had in her life. *Id*. at ¶4. Not only must she withhold medical treatment she knows is helping her patients, but also she cannot even tell parents where to go to continue to receive treatment lawfully for their children.

The Panel's March 1, 2024 Order effectively denied Plaintiffs-Appellees' request for panel reconsideration on the issuance of the stay. Appellees renew their request for en banc reconsideration of the stay here and emphasize, again, that, at a minimum, a delayed implementation of the stay is warranted.

I. The Panel's Sua Sponte Stay Order Should Be Rescinded.

After Appellees filed their February 28, 2024 Emergency Petition for Panel Rehearing and Rehearing En Banc, the Court issued a March 1, 2024 Order requesting briefing on whether a "grace period" from the sua sponte stay is warranted. Doc. No. 127. By issuing that briefing order on the narrow question of a "grace period", the Court effectively denied Appellees' request to vacate the stay. *See* Doc. No. 127, Dissent of Judge Jackson-Akiwumi (dissenting from the Order insofar

as it does not request briefing on whether a stay should issue). A vote from the en banc court is warranted upon a denial of reconsideration by the panel. *See*, *e.g.*, *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982) (noting circuit rules for rehearing). No such reference to en banc consideration was made in the Court's briefing order. *Contra id*. (noting specifically that "no member of the court in regular active service has voted to hear the matter en banc.").

In their Brief in Opposition, Appellants largely re-litigate the merits of the case and argue in favor of a stay for the first time here. For the reasons outlined in Appellees' February 28, 2024 Petition and Motion and the merits briefing in this matter, the Panel was wrong to grant a stay, particularly without a call for briefing from the parties, and Appellees renew their request for en banc consideration to vacate the stay here.[1]

II. Any Stay That Issues Must Be Subject to A Grace Period.

Among the many harms that flow from the Court's decision to sua sponte stay the district court's injunction is the lack of notice provided to patients and families.

[1] Appellants' citations to other cases where stays were entered are inapposite. As discussed in Appellees' Petition/Motion, in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), the Court had already issued an opinion on the merits, a petition for rehearing was pending, and the Appellants moved for a stay. In *Frank v. Walker*, 766 F.3d 755, 755-56 (7th Cir. 2014), Wisconsin had asked for stay and the motion was granted after the case was briefed and orally argued. In *Stone v Signode*, 777 F. App'x 170 (7th Cir. 2019), the Court vacated a stay rather than issued one, in an unpublished opinion with reference to the district court's underlying reasons. In *Nat'l Resources Defense Council, Inc. v. Winter*, 518 F.3d 704 (9th Cir. 2008), the Ninth Circuit concurrent with the stay issued an opinion on the merits and explaining the stay. In *In re Starnet, Inc.*, 355 F.3d 634 (7th Cir. 2004), the Court issued a stay upon party motion and with an opinion. In *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124 (D.C. Cir. 1978), the D.C. Circuit stayed injunctions pending resolution of the cert petition, after issuing an opinion on the merits and explaining its reasons.

At lunchtime on February 27, 2024, transgender adolescents in Indiana had access to their doctor-prescribed gender-affirming medical treatment for gender dysphoria. By bedtime that same day, that care became illegal in Indiana. Though the legislature anticipated a grace period for families to make plans in the event care was outlawed, *see* Ind. Code § 25-1-22-13(d), this Court's sua sponte order allowed for no such planning. When the Court of Appeals for the Sixth Circuit stayed Tennessee's injunction, allowing that state's law to go into effect, Chief Judge Sutton noted, "[a]s for harm to others, the Act's continuing care exception permits the challengers to continue their existing treatments until March 31, 2024. That feature of the law lessens the harm to those minors who wish to continue receiving treatment." *L. W. v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023) (staying district court injunction with eight months remaining in the statutory grace period).

For the first time, Appellants now suggest a stay is proper and oppose even the entry of the type of grace period the legislature mandated when enacting SEA 480. Appellants' novel and constrained reading of the law should not be credited. Now they argue that treatment can continue so long as it is "titrated down" because such interventions would no longer be for the purposes of "gender transition". *See* Op. Br. at 15-16. But such a reading cannot be reconciled with the plain text of the statute. "Gender transition hormone therapy" is defined as the provision of enumerated hormones "in an amount greater than would normally be produced endogenously in a healthy individual of that individual's age and sex." Ind. Code Ann. § 25-1-22-4. The prohibited treatment is based on the amount given, not exclusively based on the

purpose for which it is prescribed, and the State's new reading of the law is inconsistent with this plain text. If the "grace period" in the law's text was solely for the purpose of "avoid[ing] any doubts", Opp. Br. at 15, about the ability of physicians to "titrate down" treatment, then it would be superfluous. Moreover, the State's atextual interpretation hardly binds future members of the Indiana Medical Licensing Board, nor does it bind Indiana courts resolving claims brought under S.E.A. 480's private-enforcement provision, Ind. Code § 25-1-22-16. In other words, no provider in Indiana can rely on the State's novel interpretation.

Furthermore, titrating patients off of treatment is an option of last resort, as most patients who have already started care will do whatever it takes to continue care out of state. *See* Dist. Ct. Doc. No. 26-4 (Declaration of Nathaniel and Beth Clawson, whose 11 year-old transgender daughter received a puberty blocker a year ago) at ¶18 ("If she is condemned to having to suffer through male puberty and is denied the ability to be the girl that she truly is, it will be catastrophic."); Dist. Ct. Doc. No. 26-5 (Declaration of Lisa and Ryan Welch, whose 17 year-old transgender son started testosterone about two years ago) at ¶16 ("Before receiving testosterone, we watched our son struggle with gender dysphoria and its negative effects. It is clear that the receipt of testosterone has caused him to be much happier and is allowing him to live as he is, an adolescent boy. Without the testosterone he will revert to experiencing the profound negative effects of gender dysphoria."); Dist. Ct. Doc. No. 26-6 (Declaration of Emily Morris, whose almost 12 year-old transgender daughter has been on puberty blockers since 2021) at ¶17 ("I am afraid to think about what

might happen if the puberty blocker were stopped…I believe that this would also cause her to have irreversible depression and might cause her to think again about mutilating herself…"); Dist. Ct. Doc. No. 26-7 (Declaration of Maria Rivera, whose 16 year-old transgender son started testosterone a year ago) at ¶16 ("If he is not allowed to continue receiving the hormone therapy, I am sure that his gender dysphoria will come roaring back as he stops developing male characteristics and develop female ones. This would literally threaten his life.").

By cutting off hundreds of transgender adolescent patients from treatment with no warning, the Court's order has created chaos and harm that must be minimized. The stay has forced doctors like Dr. Bast into the impossible position of knowingly causing harm to their patients to comply with state law. The stay has forced parents to watch their children suffer and possibly uproot their lives without any advance planning. And most troublingly, the stay has left hundreds of vulnerable adolescents with no treatment and no accessible and safe means to access information from their doctors about what treatment options remain. The State has no answer except to say, the law permits you to slowly go off your medication. But does it? And even so, should this group of patients be given no choice but to travel out of state to find care elsewhere? And if they can even manage that, should they be forced to do so with no medical guidance or information? Should their parents not be able to pick up the phone and call their trusted doctors to ask for help? It is hard to think of a clearer suppression of speech. It is hard to think of a more concrete harm. At a minimum, a

grace period is warranted to give doctors, parents, and patients a chance to make a plan.

This Court's sua sponte stay order is not just a remarkable divergence from typical practice wherein a party applies for a stay in one or more courts before any court grants one, and the "moving party must give reasonable notice of the motion to all parties." Fed. R. App. P. 8(a)(1)(C), (a)(2)(A), (a)(2)(C). It is also an extraordinarily irregular decree in the severe and immediate harm it caused without warning. Indiana provided ninety days' notice before prohibiting care: SEA 480 was enacted April 5, 2023, went into effect on July 1, 2023,[2] and provided a six-month grace period through December 31, 2023.[3] This was consistent with other states' restrictions, which provided at least thirty days' notice (and typically ninety days or more), a six-month (or longer) grace period to wind down care, and/or a legacy provision allowing existing care to continue.[4] And the majority of those laws did not contain an "aiding

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[2] *Compare* Ind. Code Ann. § 25-1-22-13 (effective July 1, 2023) *with* IN LEGIS 10-2023 (2023), 2023 Ind. Legis. Serv. P.L. 10-2023 (S.E.A. 480) (April 5, 2023 enactment).

[3] *See* Ind. Code Ann. § 25-1-22-13(d).

[4] *Compare* Ala. Code § 26-26-4 *with* AL LEGIS 2022-289, 2022 Alabama Laws Act 2022-289 (S.B. 184) (30 days' notice); *and* Ariz. Rev. Stat. Ann. § 32-3230 *with* AZ LEGIS 104 (2022), 2022 Ariz. Legis. Serv. Ch. 104 (S.B. 1138) (one year's notice); *and* Ark. Code Ann. § 20-9-1502 *with* AR LEGIS 626 (2021), 2021 Arkansas Laws Act 626 (H.B. 1570) (over ninety days' notice); Fla. Admin. Code Ann. r. 64B8-9.019 (legacy provision); Fla. Admin. Code Ann. r. 64B15-14.014 (same); *compare* Ga. Code Ann. § 43-34-15(b)(4) (legacy provision) *with* GA LEGIS 4 (2023), 2023 Georgia Laws Act 4 (S.B. 140) (over ninety days' notice); *and* Idaho Code Ann. § 18-1506C *with* ID LEGIS 292 (2023), 2023 Idaho Laws Ch. 292 (H.B. 71) (over eight months' notice); *and* Iowa Code Ann. § 147.164 *with* IA LEGIS 9 (2023), 2023 Ia. Legis. Serv. Ch. 9 (S.F. 538) (over sixty days' notice); *and* Ky. Rev. Stat. Ann. § 311.372(6) (grace period) *with* KY LEGIS 132 (2023), 2023 Kentucky Laws Ch. 132 (SB 150) (over ninety days' notice); *and* La. Stat. Ann. § 40:1098.2(D) (yearlong grace period) *with* 2023 La. Sess. Law Serv. Act 466 (H.B. 648) (over five months' notice); *and* Mo. Ann. Stat. § 191.1720(4) (legacy

and abetting" provision that would prevent doctors from safely referring their patients to providers in states where care remained legal. Only this Court's stay order and the State of Mississippi deprived all minors of care overnight.[5]

CONCLUSION

The en banc court should reconsider the issuance of the stay and vacate the Panel's February 27, 2024 Order. In the interim, the Panel should immediately order a grace period from the stay to mitigate the escalating harms to Indiana families.

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clause) *with* MO LEGIS S.B. 49, 236 & 164 (2023), 2023 Mo. Legis. Serv. S.B. 49, 236 & 164 (VERNON'S) (West's No. 4) (over sixty days' notice); *and* Mont. Code Ann. § 50-4-1004 *with* MT LEGIS 306 (2023), 2023 Montana Laws Ch. 306 (S.B. 99) (over five months' notice); *and* Neb. Rev. Stat. Ann. § 71-7304 (legacy clause) *with* NE LEGIS 574 (2023), 2023 Nebraska Laws L.B. 574 (over four months' notice); N.C. Gen. Stat. Ann. § 90-21.152(b) (legacy clause); N.C. Cent. Code Ann. § 12.1-36.1-03 (legacy clause); Ohio Rev. Code Ann. § 3129.02(B) (legacy clause); Ohio Rev. OH LEGIS 16 (2024), 2024 Ohio Laws File 16 (Sub. H.B. 68) (ninety days' notice); Okla. Stat. Ann. tit. 63, § 2607.1(a)(2)(b)(7) (six-month grace period); *Poe v. Drummond*, No. 23-CV-177-JFH-SH, 2023 WL 6516449 (N.D. Okla. Oct. 5, 2023) (denying preliminary injunction with one month still remaining in Oklahoma's grace period); *compare* S.D. Codified Laws § 34-24-38 (six-month grace period) *with* SD LEGIS 127 (2023), 2023 South Dakota Laws Ch. 127 (HB 1080) (over four months' notice); *compare* Tenn. Code Ann. § 68-33-103(b) (eight-month grace period) *with L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 468 (6th Cir.) (noting Tennessee law's enactment four months before effective date) *and L.W. by & through Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023) (noting Tennessee law's "continuing care exception…lessens the harm to those minors who wish to continue receiving treatment); *and* Tex. Health & Safety Code Ann. § 161.703(b), (c) (grace period) *with* 2023 Tex. Sess. Law Serv. Ch. 335 (S.B. 14) (almost ninety days' notice); *and* Utah Code Ann. § 58-1-603 (provision for treatment of minors under certain conditions) *with* Utah Code Ann. § 58-1-603.1 (prohibiting care for minors who had not been diagnosed with gender dysphoria prior to January 28, 2023); *and* W. Va. Code Ann. § 30-3-20(c), (d) (January 1, 2024 effective date with provision allowing care under certain conditions) *with* WV LEGIS 233 (2023), 2023 West Virginia Laws Ch. 233 (H.B. 2007) (over ninety days' notice).

[5] *See* Miss. Code Ann. § 41-141-5 (law effective from February 28, 2023 enactment). And even Mississippi's aiding and abetting provision provided that it "may not be construed to impose liability on any speech protected by federal or state law." *Id.*

Dated: March 5, 2024

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Circuit Rule 32(c) because this document contains 2,414 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Supplemental Declaration of Catherine Bast, MD

Catherine Bast, being duly sworn, declares that:

1. I am a plaintiff in the above-captioned lawsuit and am a medical doctor at and a co-founder of Mosaic Health and Healing Arts, Inc., which is also a plaintiff.

2. I currently treat approximately 70-80 transgender patients under the age of 18.

3. Since the Court's order on Tuesday, February 27, 2024, I have been in the process of canceling appointments with patients who were scheduled to see me for treatment that is now prohibited under Indiana law. Beginning on Wednesday morning, my staff and I began to cancel about 30 appointments, beginning with those that were scheduled for last week.

4. The calls I made to patients were some of the most difficult conversations I have ever had in my life. Every parent that I spoke with was in tears. They expressed to me that their children were distraught, experiencing anxiety, and some had not slept since the news of the Court's order. One mother conveyed to me that her son's anxiety medication stopped working and there was no way to calm his anxiety in light of the decision making his medical treatment in Indiana illegal.

5. I felt that in every single phone call I was making, I was doing harm. As a doctor, I took an oath to do no harm but now I feel like I am abandoning my patients and taking them off their medication in ways that will lead to predictable harms and without any ability to provide them with continuity of care. Not only do I

believe that I am violating my ethical duties as a result of the Court's order, but I am certain that I am also violating federal law since the Affordable Care Act prohibits me from discriminating based on sex and requires that I at least refer patients to other providers when I myself cannot treat them.

6. In addition to the conversations that I had on the phone with families, I received about 8-10 messages through the online patient portal from other families. In these messages families asked specific questions about where they should go for care and asked about treating physicians in places like Michigan where gender-affirming medical treatment is not banned. These families were panicked but because of the "aid and abet" provision in the Indiana ban on treatment, all I could do was respond, "I am so sorry, but I cannot advise you about treatment."

7. Keeping critical medical information from patients goes against everything we learn as physicians. In medicine we work so hard to make information accessible and to ensure that there is continuity of care among providers.

8. In any other context, I would ensure that patients in this type of position would be connected with competent care out of state. For example, if I had a patient who was moving out of state and they had ongoing medical needs, I would work with them to identify and recommend providers out of state. I would explain the different options and help them figure out a plan that worked best for them. I would also ensure that they had a sufficient supply of medication to hold them over

during the period of time that care was being transferred. Once the patient had selected an out-of-state provider, I would then speak with that provider and send over the medical records. This type of exchange of information is critical for patient health.

9. I am terrified about what will happen to my dozens of adolescent patients with gender dysphoria who lost access to treatment overnight. No one should abruptly terminate hormone treatment and I fear that my patients will experience a range of mental health and physiological harms when they do not have access to their treatment. It is not safe to abruptly terminate, nor is there a protocol for abrupt termination of, hormone therapy. For each of my patients, I need to be able to either ensure that they have continuity of care elsewhere or advise them on how to titrate down on their current medication.

10. In addition to my patients receiving gender-affirming hormone therapy or puberty suppression by injection, I have about 15 patients with an implant for pubertal suppression. I need to ensure that these patients are able to connect with a provider out of state with the skill and experience to treat them. Because of the Court's order, I have not been able to do that.

11. I have close to 40 transgender adolescent patients who receive coverage for their medical treatment through Indiana Medicaid. These patients will not be able to receive care out of state through Medicaid as they are enrolled in Indiana's Medicaid program and not in the Medicaid program in any other state, and I am not aware of any out-of-state provider that accepts Indiana Medicaid. I

will therefore need to be able to advise these patients about titrating off of treatment and monitor their hormone levels during this period. Because of the Court's order, I cannot do that.

12. In addition to the very serious mental health harms that will result from cutting patients off from care, I am worried about the safety of many of my patients who have never lived or been known as any gender other than the one consistent with their gender identity. For these patients, the abrupt termination of treatment could lead to physical changes that not only will be extremely distressing but could also out them as transgender to the people in their lives who have no knowledge of their transgender status. This could lead to discrimination, harassment, and other threats to my patients' safety.

13. I am scared about the well-being of my patients. My heart breaks for them and for their parents. I am worried about what will happen if I cannot provide them with the appropriate advice, monitoring, and referrals. I have colleagues who have lost patients to suicide when this care has been cut off. I want to do everything in my power to treat the patients who I have cared for over many months and in some cases years.

14. In order to properly provide and oversee referrals for my patients or to titrate their medication down safely, I would need at least 90 days. I would work around the clock, filling in appointments wherever I could. I would do whatever it takes to protect the health and safety of transgender adolescents here in Indiana.

I swear under penalty of perjury that the foregoing is true and correct.

Date: 3/4/2024

CATHERINE BAST, MD