STATE OF INDIANA	)	MONROE COUNTY CIRCUIT COURT
	) SS:	
COUNTY OF MONROE	)	CAUSE NO. 53C06-2208-PL-001756

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC., et al.,	)
Plaintiffs,	)
v.	)
MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities, et al.	)
Defendants.	)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In August, the General Assembly enacted Senate Bill 1 (S.B. 1), which prohibits abortion except where a pregnancy seriously endangers a mother's health or life, a pregnancy is the result of rape or incest, or the unborn child has a lethal anomaly. This case concerns whether the judiciary should take the abortion issue away from Indiana voters and their elected representatives.

The plaintiffs (collectively, Planned Parenthood) urge the judiciary to recognize a novel, unwritten, historically unsupported right to abortion under Article 1, Section 1 of the Indiana Constitution. As the Indiana Supreme Court has repeatedly held, however, any constitutional right must be rooted in Indiana constitutional text and history. Neither supports a right to abortion. The constitutional text nowhere mentions abortion, and Indiana has prohibited or heavily regulated abortion by statute since 1835—before, during, and after the time when the 1851 Indiana Constitution was drafted, debated, and ratified.

Planned Parenthood also challenges S.B. 1's requirement that abortions allowed under the statute be performed at hospitals or ambulatory surgical centers—facilities that are available throughout the State and that Hoosiers go to for many medical needs. But the Indiana Constitution's Equal Privileges and Immunities Clause does not prohibit the General Assembly from determining that hospitals and surgical centers are best staffed and equipped to provide abortions when sought due to a serious medical emergency, rape, or other traumatic situation.

Planned Parenthood's fears that an exception to S.B. 1's prohibition on abortion is vague are equally unfounded. S.B. 1 is not vague about when abortions can be performed; Planned Parenthood simply misreads the statute. Regardless, Planned Parenthood lacks standing to bring its vagueness challenge, and the federal vagueness doctrine it invokes is inapplicable here.

The absence of any colorable constitutional claim is reason enough to deny Planned Parenthood's request for an injunction. Additionally, enjoining enforcement of S.B. 1 here would inflict irreparable harm to thousands of unborn children, women, and the public. The State has a "valid and compelling" interest in protecting unborn children—whom the Indiana Supreme Court 50 years ago described as, "at the very least, from the moment of conception . . . living being[s] and potential human life." *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972).

STATEMENT OF FACTS

I. Factual Background

Abortion is the intentional termination of an unborn human life after fertilization. Exhibit 1, Declaration of Tara Sander Lee, ¶ 1; Exhibit 2, Declaration of Farr Curlin, M.D., ¶¶ 16, 17; Exhibit 3, Declaration of Professor O. Carter Snead, ¶ 7. At fertilization, the single-celled human, or "zygote," bears a unique molecular composition distinct from its parental gametes, and then "directs *its own* development to more mature stages of human life," producing "increasingly complex tissues, structures and organs that work together." Ex. 1, Sander Lee Decl. ¶ 10; *see* Ex. 2, Curlin Decl. ¶¶ 16–17; Dr. Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 U. St. Thomas J.L. & Pub. Pol'y 44 (2013). That development happens rapidly.

The first sign of the unborn child's developing brain appears within three weeks of fertilization. Ex. 1, Sander Lee Decl. ¶¶ 12–13. In the third week after fertilization, the unborn child develops its own heartbeat. *Id.* ¶ 14. A respiratory system starts to form about a week later. *Id.* ¶ 15. "During the sixth week, the preborn baby starts moving, and the first sense develops—touch." *Id.* ¶ 17. More than 90% of body parts form by the end of the eighth week. *Id.* ¶ 19.

At nine weeks, an unborn child starts to exhibit "more complex behaviors, such as thumb-sucking, swallowing, and stretching." Ex. 1, Sander Lee Decl. ¶ 20. The unborn child's lips and nose mature into their adult shape by week eleven, and around that time, the child will start "practic[ing] breathing" and producing "complex facial expressions." *Id.* ¶ 22. By thirteen weeks, the unborn child can feel pain. *Id.* ¶ 24. Ability to hear certain sounds arrives a week later. *Id.* ¶ 25; *see id.* ¶ 29 (explaining that preborn babies will respond to music, reading, and singing).

By nineteen to twenty weeks, unborn children will respond "to taste, temperature, pain, pressure, movement and light." Ex. 1, Sander Lee Decl. ¶ 28. And during the eighth and ninth months of pregnancy, unborn children spend "almost 40% of the time" "practic[ing] breathing." *Id.* ¶ 31.

II. Statutory and Regulatory Background

Legal prohibition of abortion stretches back to common law. "At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022). "The 'eminent common-law authorities (Blackstone, Coke, Hale, and the like)' *all* describe[d] abortion after quickening," the first felt movement of a baby in the womb, "as criminal," and even pre-quickening abortions were regarded as unlawful such that they could support a homicide charge under a "proto-felony-murder rule." *Id.* at 2249–50 (citation omitted).

In early America, "the vast majority of the States"—Indiana among them—"enacted statutes criminalizing abortion at all stages of pregnancy." *Dobbs*, 142 S. Ct. at 2252. Indiana's first statute dates from 1835. That statute imposed criminal penalties on "every person" who administered "to any pregnant woman[] any medicine, drug, substance or thing whatever . . . with intent

thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman." 1835 Ind. Laws ch. XLVII, p. 66 § 3.

Amendments in 1852 and 1859 expanded the statute to prohibit a "druggist, apothecary, physician, or other person selling medicine" from selling any "medicine . . . known to be capable of producing abortion or miscarriage, with intent to produce abortion." 1859 Ind. Laws ch. LXXXVI, p. 469, § 2. And in 1881, the penalty for violating the law was raised "from a misdemeanor to a felony," and the legislature made "solicitation of an abortion by the pregnant woman" a crime. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 989 n.2 (Ind. 2005) (Dickson, J., concurring).

Only after the U.S. Supreme Court declared abortion a federal fundamental right in 1973, *see Roe v. Wade*, 410 U.S. 113, 93 (1973), did the General Assembly amend Indiana law to permit abortion in certain circumstances, *see* 1973 Ind. Acts, P.L. No. 322 (codified at Ind. Code § 35-1-58.5-1 to -8 (1973)); 1977 Ind. Acts, ch. 335, § 21. Although *Roe* compelled the State to liberalize abortion restrictions, the State persisted in its commitment to protect the unborn by (1) making unlawful abortions a Class C felony, *see* Ind. Code 35-1-58.5-4 (1973) (recodified at Ind. Code § 16-34-2-7), (2) imposing medical reporting requirements on abortion providers, *see* Ind. Code 35-1-58.5-5 (1973) (recodified at Ind. Code § 16-34-2-5), and (3) making experimentation on and transportation of aborted children a Class A misdemeanor, *see* Ind. Code 35-1-58.5-6 (1973) (recodified at Ind. Code § 16-34-2-6).

In 1992, Indiana gained additional authority to protect prenatal life and maternal health when the U.S. Supreme Court upheld Pennsylvania's parental consent, informed consent, and 24-hour waiting period requirements. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Following *Casey*, Indiana adopted its own informed consent and 18-hour waiting period

requirements, as well as new protocols for physicians performing abortions, definitions for medical emergency warranting an abortion, and criminal penalties for violating the abortion code. *See* 1995 Ind. P.L. 187-1995. It also enacted a host of new restrictions, including hospital admitting privileges, ultrasound requirements, and clinic licensing and inspection laws. *See* 2014 Ind. P.L. 98-2014. Later, the State would ban race-selective, sex-selective and disability-selective abortions (later overturned) and impose new protocols for the disposition of fetal remains, among other regulations promoting fetal life and maternal health. *See* 2016 Ind. P.L. 213-2016.

Some restrictions were ruled contrary to the federal abortion right recognized in *Roe and Casey*. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Indiana State Dep't of Health*, 265 F. Supp. 3d 859, 873 (S.D. Ind. 2017) (enjoining anti-discrimination, information dissemination, and fetal disposition provisions), *aff'd*, 888 F.3d 300 (7th Cir. 2018), *reh'g en banc granted in part and judgment vacated*, 727 F. App'x 208 (7th Cir. 2018), *opinion reinstated by evenly divided court*, 917 F.3d 532 (7th Cir. 2018), *rev'd in part sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (vacating injunction for fetal disposition provision, but leaving other provisions enjoined). When Indiana's informed-consent requirements were challenged under the Indiana Constitution, however, the Indiana Supreme Court declined to decide whether it provided a corresponding state right to abortion, deeming the requirements lawful regardless. *See Brizzi*, 837 N.E.2d at 978.

In June 2022, the U.S. Supreme Court held that the federal constitution did not confer a right to abortion, reversed *Roe* and *Casey*, and "returned to the people" of Indiana and "their elected representatives" the "authority to regulate abortion." *Dobbs*, 142 S. Ct. at 2279. Shortly thereafter, in August 2022, the General Assembly enacted S.B. 1, which, like Indiana's historical

restrictions on abortions, makes "abortion" a "criminal act" except when expressly authorized. Ind. Code § 16-34-2-1(a) (as amended by S.B. 1, Sec. 21).

Under S.B. 1, abortion is permitted in three circumstances only:

- *First*, as amended, Indiana Code § 16-34-2-1(a)(1) permits abortions "before the earlier of viability of the fetus or twenty (20) weeks postfertilization age of the fetus" where (i) "reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or (ii) "the fetus is diagnosed with a lethal fetal anomaly." A "serious health risk" is one "that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function," but "does not include psychological or emotional conditions." Ind. Code § 16-18-2-327.9. Only hospitals and ambulatory surgical centers may perform abortions under subsection (a)(1). Ind. Code § 16-34-2-1(a)(1)(B).
- *Second*, Indiana Code § 16-34-2-1(a)(3) permits abortions "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age and any time after" where "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Because subsection (a)(3) permits abortions later in the pregnancy than subsection (a)(1), it imposes some additional requirements. Those include that the abortion be "performed in a hospital" and be "performed in compliance with" Indiana Code § 16-34-2-3. Ind. Code § 16-34-2-1(a)(3)(C)–(D). Indiana Code § 16-34-2-3—which governs "abortions performed on or after the ear-

lier" of viability twenty (20) weeks postfertilization age—in turn requires the presence of a second physician who is prepared to provide care for any "child born alive as a result of the abortion." Ind. Code § 16-34-2-3(b); *see also id.* Ind. Code § 16-34-2-3(a), (c)–(d) (imposing additional requirements).

- *Third*, Indiana Code § 16-34-2-1(a)(2) permits abortions "during the first ten (10) weeks of postfertilization age" where the pregnancy arose from rape or incest. Only hospitals and ambulatory surgical centers may perform abortions under subsection (a)(2). Ind. Code § 16-34-2-1(a)(2)(C).

III. Procedural Background

On August 31, 2022, Planned Parenthood filed a complaint challenging S.B. 1's constitutionality and moved for a preliminary injunction. The complaint alleged that (1) S.B. 1 violates Article 1, Section 1 of the Indiana Constitution; (2) S.B. 1 violates Article 1, Section 23's Equal Privileges and Immunities Clause by requiring abortions to be performed at hospitals and ambulatory surgical centers rather than abortion clinics; and (3) S.B. 1 violates Article 1, Section 12's Due Course of Law Clause by failing to make clear whether abortions can be performed after the earlier of viability or 20 weeks postfertilization age. Compl. ¶¶ 58–66.

STANDARD OF REVIEW

A 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) (internal quotation marks omitted). "To obtain a preliminary injunction, the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the

nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction." *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008). None of those factors support an injunction here.

NO REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS

I. Article 1, Section 1 of the Indiana Constitution Does Not Confer a Right to Abortion

Planned Parenthood does not have a reasonable likelihood of success on its claim that S.B. 1 violates Article 1, Section 1 of the Indiana Constitution. That provision does not confer *any* judicially enforceable rights, let alone a right to abortion. The constitutional text nowhere mentions abortion as a protected right, and Indiana history demonstrates abortion was regarded as criminal—not a cherished core value. Without any textual or historical support, Planned Parenthood cannot overcome its "heavy burden" of showing S.B. 1 is unconstitutional. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997) (quoting *Person v. State*, 661 N.E.2d 587, 592 (Ind. Ct. App. 1996)).

A. Section 1 does not confer judicially enforceable rights

Interpretation of Section 1 must begin with the text. *See State v. Katz*, 179 N.E.3d 431, 443 (Ind. 2022). Section 1 provides in full:

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

Ind. Const. art. 1, § 1. That provision reflects the "natural rights philosophy that informs the Indiana Constitution." *Katz*, 179 N.E.3d at 447. As the court of appeals has observed, however, the Indiana Supreme Court has given "good" indications that Section 1 does not confer any "judicially enforceable" guarantees. *Solomon v. State*, 119 N.E.3d 173, 176 n.1 (Ind. Ct. App. 2019) (quoting *Morrison v. Sadler*, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (opinion of Barnes, J.)).

In *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003), the Indiana Supreme Court expressed skepticism that Section 1 is a self-executing guarantee rather than an unenforceable philosophical expression. It observed that "a number of our sister states" have found constitutional provisions "very similar" to Section 1 to be unenforceable. *Id.* at 990. "Most notably," the Supreme Court of Ohio has determined that Ohio's constitutional analogue was "not a self-executing provision . . . subject to judicial enforcement" but rather a "'statement of fundamental ideals.'" *Id.* (quoting *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000)). And multiple "[o]ther states" have reached similar conclusions. *Id.* at 991 (collecting citations). They have determined that "constitutional provisions similar in wording to Art. I, § 1, of the Indiana Constitution" do not contain language that "provide[s] courts with a standard that c[an] be routinely and uniformly applied." *Id.*

The difficulties *Doe* identified counsel against holding that Section 1 is judicially enforceable here. Section 1, like the similar "precatory words" found in the Declaration of Independence, reads as a declaration of "fundamental ideals" rather than a concrete, judicially enforceable textual guarantee. *Williams*, 728 N.E.2d at 354. Whereas *every* other provision in the Bill of Rights states that citizens "shall" have *specific* liberties, *see, e.g.*, Ind. Const. art. 1, § 2 ("All people shall be secured . . ."), § 3 ("No law shall . . ."), § 4 ("No preference shall be given, by law, . . ."), or "may" take *specific* actions, Ind. Const. art. 1, § 10, Section 1 lacks comparable language. It nowhere contains a mandatory prohibition on *specific* governmental actions or "provide[s] courts with a standard that c[an] be routinely and uniformly applied." *Doe*, 790 N.E.2d at 991. Attempting to enforce Section 1's capacious references to "life, liberty, and the pursuit of happiness" and "all power [being] inherent in the people" would place the judiciary essentially in a policymaking rule contrary to separation-of-powers principles.

Other difficulties with reading Section 1 as a self-executing provision abound. "Other more specific provisions" follow Section 1's precatory words, securing specifically enumerated rights. *Shields v. Gerhart*, 658 A.2d 924, 929 (Vt. 1995). Those other Bill of Rights provisions would be unnecessary if Section 1's broad guarantee of "liberty" for "all people" were capable of judicial enforcement. Ind. Const. art. 1, § 1. Moreover, if Section 1 were judicially enforceable, "all people" would have an "inalienable," judicially enforceable right to the "pursuit of happiness." *Id.* They would be able to "call the state to task for infringing the right to pursue happiness, which makes no sense within a traditional conception of ordered liberty." *Gerhart*, 658 A.2d at 929. "Happiness is such a broad concept that no court could ever adequately protect every individual's happiness without transgressing the happiness of another." *Williams*, 728 N.E.2d at 354.

Planned Parenthood cites a pair of old economic-rights cases in which the Indiana Supreme Court mentioned Section 1 in striking down liquor laws. Br. 14 (citing *Beebe v. State*, 6 Ind. 501 (1855), and *Herman v. State*, 8 Ind. 545 (1855)). Those cases, however, were later overruled. In *Schmitt v. F. W. Cook Brewing Co.*, 120 N.E. 19, 21 (Ind. 1918), the Indiana Supreme Court rejected *Bebee* and *Herman*, explaining that "[i]t cannot be determined by those cases on what principle the court was acting." It observed that the cases never identified any "particular provision of the Constitution" that "forbids the prohibition of the manufacture and sale of intoxicating liquor." *Id.* at 22. And it explained that "the judicial department cannot hold" a legislative act to be void that "violates no provision of the federal or state Constitution." *Id.* (quoting *Churchman v. Martin*, 54 Ind. 380, 383–84 (1876)).

As the court of appeals has recognized, the "modern validity" of the *Lochner*-like philosophy embraced by Planned Parenthood's economic-rights cases "has been called into question." *Boultinghouse v. State*, 120 N.E.3d 586, 590 (Ind. Ct. App. 2019); *see McIntosh v. Melroe Co.*,

729 N.E.2d 972, 975 (Ind. 2000) (describing *Lochner* and other property-rights cases as "now discredited"); *Solomon*, 119 N.E.3d at 176 n.3. Now, any "constitutional rights not grounded in a specific constitutional provision should not be readily discovered." *Sanchez v. State*, 749 N.E.2d 509, 516 (Ind. 2001); *see also Schmitt*, 120 N.E. at 22. The State "may subject persons and property to restraints and burdens, even those which impair 'natural rights.'" *Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993) (quoting *Wiesenberger v. State*, 175 N.E. 238, 240 (Ind. 1931)). Whatever the judicial philosophy might have been when *Beebe* and *Herman* were decided, this Court should not construe Section 1 to be a self-executing guarantee of whatever newfound rights Planned Parenthood allegedly finds in generic references to "liberty" and "happiness."

B. No text or history recognizes a right to abortion

To the extent that Section 1 is capable of judicial enforcement, it does not confer a right to abortion. Planned Parenthood concedes that determining whether abortion-on-demand is a "core value" protected by Section 1 requires looking "to the language of the text in the context of the history surrounding its drafting and ratification." Br. 14; *see Price*, 622 N.E.2d at 957 ("Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."). But Planned Parenthood does not point to any constitutional text referencing a general right to "privacy," much less "abortion."

In a footnote, Planned Parenthood cites assorted constitutional provisions—including Section 3's protections for religion, Section 21's protection from government takings, and Section 34's prohibition against quartering of soldiers—that supposedly reflect "an inalienable privacy interest." Br. 15 n.20. But invoking a sequence of explicit constitutional protections for other rights only underscores the lack of textual support for an abortion right—and the overall weakness of

Planned Parenthood's position. The Indiana Constitution would not need to prohibit uncompensated takings or quartering of soldiers explicitly if a broad, unwritten "inalienable privacy interest" already barred those actions.

Planned Parenthood does not cite any history that supposedly demonstrates the existence of a right to privacy or abortion either. It identifies no sources from the time of the Indiana Constitution's drafting and ratification that discuss a putative right to privacy or abortion, or any Indiana precedent from that era that recognizes such putative rights. Planned Parenthood's utter failure to identify any constitutional text or history recognizing abortion as a core value is enough to defeat its argument. *See Doe v. Town of Plainfield*, 893 N.E.2d 1124, 1131–32 (Ind. Ct. App. 2008).

Indiana's history, moreover, affirmatively demonstrates that no right to abortion existed. As early as 1835, Indiana had a statute making it a criminal offense to "willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever," or to "use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman." 1835 Ind. Laws ch. XLVII, p. 66 § 3. That prohibition was in effect when the 1851 Constitution was drafted and ratified. "The law underwent further changes in 1852 and 1859." *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 989 n.2 (Ind. 2005) (Dickson, J., concurring).

As amended, the law provided:

> Every person who shall willfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, any thing whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life; and any person as a druggist, apothecary, physician, or other person selling medicine . . . who shall sell any medicine . . . known to be capable of producing abortion or miscarriage, with intent to produce abortion . . . shall be deemed guilty of a misdemeanor.

1859 Ind. Laws ch. LXXXVI, p. 469, § 2. That prohibition remained operative until the U.S. Supreme Court recognized a (now-repudiated) federal right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). *See Brizzi*, 837 N.E.2d at 989 n.2 (Dickson, J., concurring).

During the 135-year period before *Roe* in which Indiana prohibited nearly all abortions by statute, Indiana courts never "even hinted" that Indiana's abortion ban infringed a putative right to abortion. *Brizzi*, 837 N.E.2d at 990 (Dickson, J., concurring). To the contrary, Indiana courts enforced abortion laws. *See, e.g.*, *Willey v. State*, 52 Ind. 421 (1876); *Adams v. State*, 48 Ind. 212 (1874); *Basset v. State*, 41 Ind. 303 (1872); *Carter v. State*, 2 Ind. 617 (1851). Indeed, as recently as 1972—the year before *Roe* was decided—the Indiana Supreme Court rejected the argument that Indiana's near-total abortion ban violated an unwritten "right to privacy which includes the woman's right to decide whether to bear an unquickened fetus." *Cheaney v. State*, 285 N.E.2d 265, 266–67 (Ind. 1972). The court explained that the common law of Indiana and other States was incompatible with the notion that the Ninth Amendment's reservation of rights included a fundamental right to abortion that could not be subject to state regulation. *See id.* at 266–70.

Nor did the drafters and ratifiers of Indiana's 1851 Constitution stand alone in rejecting the notion that ordered liberty includes a right to abortion. Even before Indiana enacted its first statutory prohibition on abortion in 1835, the common law regarded abortion as "criminal in at least some stages of pregnancy" and as "unlawful . . . at all stages." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022); *see id.* at 2248–51. "Indiana followed [common-law] precedent" deeming an "unborn child" to have an independent existence "without regard to the state of gestation." *Cheaney*, 285 N.E.2d at 267 (quotation marks omitted); *see id.* at 267–69.

An overwhelming number of other States, including States with constitutional provisions worded similarly to Section 1, also recognized that statutory bans on abortion were permissible.

Three-quarters of the States "enacted statutes making abortion a crime" at all stages of pregnancy by 1868, and with one exception, the remainder had enacted similar bans by 1910. *Dobbs*, 142 S. Ct. at 2252–53; *see id.* at 2285–2300. The constitutional text and historical record thus defy any contention that Indiana traditionally regarded abortion as a core value.

C. Generic dicta about liberty and out-of-state decisions cannot give rise to a novel abortion right

Eschewing Indiana's constitutional text and history, Planned Parenthood speculates that the Indiana Supreme Court *might* create a new right to abortion—despite the lack of textual or historical support—because three members once found it "unnecessary to determine whether there is any right to privacy or abortion." Br. 15 (quoting *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 978 (Ind. 2005)). But speculation about what the Indiana Supreme Court might do provides no warrant for disregarding its unequivocal holdings that constitutional questions must be "resolved by examining the language of the [constitutional] text in the context of the history surrounding its drafting and ratification, the purpose and structure of our Constitution, and case law interpreting the specific provisions." *Hoagland v. Franklin Twp. Cmty. Sch. Corp.*, 27 N.E.3d 737, 741 (Ind. 2015) (quoting *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484 (Ind. 2006)); *see Price*, 622 N.E.2d at 957. Nor do Planned Parenthood's other cases.

1. Late-twentieth century dicta is not evidence of an abortion right

Citing *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991), Planned Parenthood asserts that Section 1 "confers on Hoosiers the freedom to live their private lives as they see fit, without unnecessary government interference." Br. 14. But *Lawrance* is not even a constitutional decision. It is a statutory case concerning whether Indiana's Health Care Consent Act applies when "the family of a never-competent patient in a persistent vegetative state seeks to withdraw the patient's artificially provided nutrition and hydration." 579 N.E.2d at 37. *Lawrance* merely mentioned Section 1 in

passing, commenting that Indiana "common law has evolved in a legal culture governed by the Indiana Constitution." *Id.* at 39. "[T]hose who wrote the constitution," *Lawrance* stated, "believed that liberty included the opportunity to manage one's own life except in those areas yielded up to the body politic." *Id.* That dicta, however, provides no insight into which areas were "yielded up to the body politic" and which were not. Answering that question requires looking to constitutional "text and history," *Price*, 622 N.E.2d at 959 n.4 (discussing *Lawrance*), neither of which recognizes an inalienable right to abortion, *see* pp. 11–14, *supra*.

Lawrance, moreover, did not suggest even in dicta that Section 1 "gives Hoosiers 'complete sovereignty over their affairs.'" Br. 15 (quoting *Lawrance*, 579 N.E.2d at 39 n.3). In the cited footnote, *Lawrance* quoted a single delegate who remarked that Section 1 reflects "that *God* had given to all persons equally complete sovereignty over their affairs," including the "'right to walk abroad and look upon the brightness of the sun at noon-day.'" 579 N.E.2d at 39 n.3 (emphasis added). That "isolated statement from a single delegate" "hardly" constitutes proof that the natural rights God granted to all people included a right to an abortion—"let alone that [Section 1] recognizes such a right as a core value." *Town of Plainfield*, 893 N.E.2d at 1132. Planned Parenthood's argument also proves too much. If Section 1 guaranteed all people "complete sovereignty over their affairs," no law regulating human affairs could stand.

Whittington v. State, 669 N.E.2d 1363 (Ind. 1996), and *Price v. State*, 622 N.E.2d 954 (Ind. 1993), do not help Planned Parenthood either. Neither held that Section 1 confers any judicially enforceable rights, much less a right to abortion. Those cases instead looked to Section 1 to understand the "political philosophy" animating Section 9's protections for speech. *Whittington*, 669 N.E.2d at 1368; *see Price*, 622 N.E.2d at 958–59 & n.4. Neither case, moreover, says that courts may decide what constitutes a putative right by invoking abstract, philosophical conceptions of

personal liberty. *Price* said the opposite: When "[c]onfronted with § 1 claims," it stated, "we have examined *text* and *history* to determine whether a given interest is of such a quality that the founding generation would have considered it fundamental or 'natural.'" 622 N.E.2d at 959 n.4 (emphasis added); *see id.* at 957 ("Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."). In *Price*, the Indiana Supreme Court rejected the atextual, ahistorical approach that Planned Parenthood takes here.

2. Poorly reasoned out-of-state cases provide no warrant for disregarding Indiana's constitutional text and history

That leaves Planned Parenthood with a few out-of-state cases recognizing rights "to privacy," "to make one's own medical decisions," and "to an abortion" under *other States'* constitutions. Br. 16. But a handful of out-of-state decisions cannot overcome Indiana's own constitutional text and history. "[A]n interpretation of Indiana's Constitution" must ultimately be "conducted independently." *Hoagland*, 27 N.E.3d at 741. Any Indiana core value must be deeply rooted in the "text" of the "Indiana Constitution," its structure and purpose, and its history. *Katz*, 179 N.E.3d at 434; *see Hoagland*, 27 N.E.3d at 741; *Price*, 622 N.E.2d at 961. The Indiana Constitution is not "an elastic instrument of no particular rigidity, which stretches to meet the demands of the moment." *Finney v. Johnson*, 179 N.E.2d 718, 721 (Ind. 1962).

Out-of-state cases provide no persuasive reason to recognize a novel right to abortion in any event. Multiple state courts reject Planned Parenthood's position that constitutional provisions with similar language create judicially enforceable rights. *See, e.g., Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 n.23 (Iowa 2022); *Williams*, 728 N.E.2d at 352; *Shields*, 658 A.2d at 928–29; *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949). Still

more reject the argument that generic references to liberty in state constitutions protect an unwritten abortion right. *See, e.g.*, *Planned Parenthood of the Heartland*, 975 N.W.2d at 740–42; *Mahaffey v. Att'y Gen.*, 564 N.W.2d 104, 109–11 (Mich. Ct. App. 1997) (per curiam). Earlier this year, for example, the Iowa Supreme Court held that the Iowa Constitution's "silen[ce]" on abortion rights and Iowa's long, consistent history of prohibiting abortion precluded recognition of an unwritten abortion right. *Id.* at 739–40. Planned Parenthood addresses none of those decisions.

Instead, Planned Parenthood relies on *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019), which held that the Kansas Constitution's reference to "inalienable natural rights" included rights to "personal autonomy" and "bodily integrity," which in turn encompassed abortion. *Id.* at 480–86. That analysis, however, is deeply flawed. First, *Hodes* wrongly assumed that showing the law protects "personal autonomy" or "bodily integrity" in some contexts would establish a right to an abortion. Under binding Indiana precedent, a court cannot ask whether a generic principle is a natural right or otherwise protected; it must ask whether the specific right asserted was historically recognized as a core value in Indiana. *See Price*, 622 N.E.2d at 959–60.

Katz—a recent case about whether Section 9's free-speech guarantee protects the non-consensual distribution of intimate images (*e.g.*, revenge porn)—illustrates the point. There, the Indiana Supreme Court explained that courts must begin by asking whether the specific "type of expression at issue" constitutes a "core constitutional value." 179 N.E.3d at 448. That is because the general category of speech captures myriad types of expression—from revenge porn to political speech—that implicate far different values and concerns. *See id.* at 448–50. Katz thus had to establish that non-consensual expression involving "private, sexual activity"—not speech generally—was "a core constitutional value." *Id.*; *cf. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring a "careful description" of the putative right).

That same principle applies here. Planned Parenthood must show abortion is a core value, not merely that the law respects privacy, autonomy, or bodily integrity in some contexts. "Privacy" could encompass any nonpublic activity, and "bodily integrity" could encompass any medical procedure. But taking family pictures is not like making child pornography, and refusing unwanted cosmetic surgery is not like obtaining an abortion. As even abortion proponents have acknowledged, "[a]bortion is a unique act . . . fraught with consequences for others." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see Cheaney*, 285 N.E.2d at 269 ("the fundamental distinction" between contraceptives and abortions is "the difference between prevention and destruction"). "What sharply distinguishes the abortion right" from a right to refuse medical procedures and similar rights is that "[a]bortion destroys" what even abortion apologists call "potential life" and what Indiana, through S.B. 1, regards as an unborn child. *Dobbs*, 142 S. Ct. at 2258; *see Cheaney*, 285 N.E.2d at 270 (acknowledging a "State interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling"); Ex. 2, Curlin Decl. ¶¶ 23–26, 32–36 (explaining how abortion diverges from patient autonomy and integrity in medical ethics); Ex. 3, Snead Decl. ¶¶ 15–17 (explaining abortion differs from other actions). *Hodes*'s failure to distinguish privacy and bodily integrity from abortion is fatal to its analysis.

Second, *Hodes* provides no persuasive reason for disregarding Indiana's unbroken history of banning abortion before *Roe* and heavily regulating abortion after *Roe*. *Hodes* discounted Kansas's nineteenth-century prohibitions on abortions on the theory they did not "reflect[] the will of the people," accusing Kansas's nineteenth-century legislators and constitutional delegates of being "proslavery" and "gender bias[ed]." 440 P.3d at 486–89, 491. Whatever the validity of such reasoning in Kansas, Indiana courts cannot disregard legislative enactments on the theory they are

contrary to some ineffable will of the people or "spirit pervading the Constitution outside of the expressed limitations in it." *Schmitt*, 120 N.E. at 22. Indiana courts must presume a statute is constitutional, *Paul Stieler Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269, 1273 (Ind. 2014), and "ought to accord to the legislature as much purity of purpose as [they] would claim for [themselves]." *Brown v. Buzan*, 24 Ind. 194, 197 (1865).

Hodes also asserted that, in early America, abortion was "neither morally nor legally wrong . . . before quickening." 440 P.3d at 487. But that statement, based on a single historian's views, defies the historical record. *See Dobbs*, 142 S. Ct. at 2249–56; *see also Planned Parenthood of the Heartland*, 975 N.W.2d at 740 n.19 (observing *Hodes*'s own "quoted jurists and philosophers . . . would almost certainly not have considered abortion to be included in an individual's natural rights"); Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 U. Fla. J.L. & Pub. Pol'y 71, 80–91 (2021) (explaining *Hodes* lacked adversarial briefing on key points, ignored important authorities undermining its conclusion, and overlooked that several of its own cited authorities "condemned abortion"). It also does not explain why abortion cannot be prohibited *after* quickening. And *Hodes* fails to acknowledge that, as the Indiana Supreme Court has observed, quickening was "merely an arbitrary distinction" made without the benefit of modern medical knowledge "establish[ing] that some sort of independent life begins at conception." *Cheaney*, 285 N.E.2d at 266–69; *see* pp. 2–3, *supra*.

Third, in concluding that regulations of unwritten "natural rights" like abortion should be subject to strict scrutiny, *Hodes*, 440 P.3d at 495–96, *Hodes* selectively applied the natural-rights philosophy that it said the Kansas Constitution embraced. According to an article on which *Hodes* relied to hold that unwritten natural rights are judicially enforceable, courts historically did not view natural rights "as strong limitations on legislative powers" but "were content to allow the

legislature flexibility and discretion in regulating" those rights. Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1441 (2015). "In nearly every case," courts "defer[red] to the legislature to regulate those rights." *Id.* Consistently applying the natural-rights philosophy that *Hodes* supposedly embraced thus would require courts to give state legislatures considerable leeway to exercise their police powers to regulate or even to ban abortion altogether. *See id.; see also* Steven G. Calabresi, *On Originalism and Liberty*, Cato Sup. Ct. Rev., 2015-2016, at 17, 53 ("I do not think the Lockean clauses support *Roe v. Wade*").

Planned Parenthood's other out-of-state decisions are even less persuasive. *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000), engaged in no textual or historical analysis. It traced New Jersey's putative "long-standing" recognition of abortion rights to a dissent penned in 1967 and a generic "commitment to the protection of individual rights." *Id.* at 629. That haphazard analysis in no way resembles the rigorous textual and ratification-era historical analysis Indiana precedent demands. *Women of State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995), suffers from similar flaws. There, ignoring text and history, a divided court embraced a right to abortion based on a 1988 decision recognizing a "right to be free from intrusive medical treatment" and the majority's view that abortion is equally "intimate, personal, and profound." *Id.* at 27. Such *ipse dixit* cannot suffice under Indiana law, which requires the specific right asserted to be deeply rooted in Indiana's constitutional text and history.

* * *

Ultimately, Planned Parenthood asks the judiciary to create a new right to abortion without any textual or historical grounding. That is an invitation to policymaking. Decisions about whether competing "social values" warrant allowing, restricting, or prohibiting abortion are for the General

Assembly and fall "outside the ambit of the judiciary." *Cheaney*, 285 N.E.2d at 269. "Judges must enforce the Constitution as written and intended," not invent new rights. *Bd. of Trustees of Pub. Employees' Ret. Fund of Indiana v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984).

D. S.B. 1 is a permissible exercise of police power

In the absence of a core constitutional right to abortion, the General Assembly is entitled to exercise its police power to restrict or ban abortion—just as it has done since 1835. Abortion terminates the existence of what science shows to be a unique, independent, "living human being" with the capacity to think, feel, hear, move, and "direct[] *its own* development." Ex. 1, Sander Lee Decl. ¶ 10; *see id.* ¶¶ 11–32. Usually, around or shortly after the woman becomes aware of her pregnancy, an unborn child's brain will have begun to develop and the child will have a heartbeat. *Id.* ¶¶ 12–14. And an unborn child will start moving, practicing breathing, engaging in complex behaviors, feeling pain, hearing sounds, and much more—all within 14 weeks of fertilization. *Id.* ¶¶ 15–25. In short, unborn children have all the characteristics of a human being—many of them acquired in the earliest stages of pregnancy.

As the Indiana Supreme Court has recognized, the State has a "valid and compelling" interest in protecting "what is, at the very least, from the moment of conception a living being and potential human life," *Cheaney*, 285 N.E.2d at 270, which is to say, unborn children. Protecting unborn human beings is consistent with traditional views of ordered liberty, which allows restrictions on liberty to prevent harm to others, and the longstanding, majority view of medical ethicists that physicians should not intentionally kill. *See* Ex. 2, Curlin Decl. ¶¶ 13–37; Ex. 3, Snead Decl. ¶¶ 9–17. Planned Parenthood's argument (Br. 18–19) that S.B. 1 materially burdens a constitutional value presumes the existence of an abortion right that does not exist, and contrary

to the Indiana Supreme Court's decision in *Cheaney*, "pretend[s]" that the unborn have "no competing interest" that can justify abortion restrictions. Ex. 3, Snead Decl. ¶¶ 17; *see id.* ¶¶ 11–16; Ex. 2, Curlin Decl. ¶¶ 23–26.

Nor does every challenged provision of S.B. 1 impose a material burden on Planned Parenthood's putative abortion right. Planned Parenthood objects that S.B. 1 requires what it deems "health care"—including surgical interventions—to be provided at hospitals and ambulatory surgical centers because they are more expensive than clinics. Br. 19. By that logic, however, the Indiana Constitution would require the State to allow other medical procedures to be performed at clinics whenever clinics could perform the procedures more cheaply than hospitals or surgical centers. It cannot be a material burden to require that a medical procedure be performed in facilities the State deems best suited to handle it where they are available statewide.

II. S.B. 1 Does Not Violate Article 1, Section 23's Equal Privileges and Immunities Clause

Planned Parenthood's argument that S.B. 1 "violates Article 1, section 23's guarantee of equal privileges and immunities by discriminating against abortion providers," Br. 20, lacks merit. Article 1, Section 23 provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. Art. I, § 23. Under that clause, a law is valid where any "disparate treatment" is "reasonably related to inherent characteristics which distinguish the unequally treated classes," and any "preferential treatment" is "uniformly applicable and equally available to all persons similarly situated." *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales*, LLC, 79 N.E.3d 371, 382 (Ind. 2017) (quoting *Myers v. Crouse-Hinds Div. of Cooper Indus., Inc.*, 53 N.E.3d 1160, 1165 (Ind. 2016)). In applying this test, courts must "accord the legislature substantial deference when making classifications and require the plaintiff to 'negate every conceivable basis which might

have supported the classification.'" *KS&E Sports v. Runnels*, 72 N.E.3d 892, 906 (Ind. 2017) (quoting *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016)).

A. By requiring that abortions be performed in hospitals and surgical centers, S.B. 1 merely ceases preferential treatment for abortion clinics formerly required by federal law

In this context, "'inherent' does not refer only to immutable or intrinsic attributes, but to *any* characteristic sufficiently related to the subject matter of the relevant . . . classes." *Whistle Stop Inn*, 51 N.E.3d at 200 (emphasis added). And, critically, only "*individuals* are afforded equal protection guarantees, not activities." *Richardson's RV, Inc. v. Indiana Dep't of State Revenue*, 112 N.E.3d 192, 197 n.7 (Ind. 2018) (citation omitted) (rejecting the argument that subjecting out-of-state RV sales to inconsistent sales tax rates violated the Equal Privileges and Immunities Clause). Here, "abortion clinics" are not organic, irreducible entities, and S.B. 1 does not discriminate against abortion clinics like Planned Parenthood. It instead eliminates a preferred regulatory classification—the classification of abortion clinic—due to a change of circumstances. Besides, in regulating abortion, S.B. 1 targets a procedure, not the plaintiffs here. S.B. 1 allows the plaintiffs to continue to provide services other than abortion, or even seek licensure as ambulatory surgical centers that can perform abortions in the narrow circumstances permitted by S.B. 1.

Abortion clinics are distinct from hospitals and surgical centers in that they are the result of evolving federal abortion doctrines. After *Roe* first recognized a federal right to abortion in 1973, States could not require first trimester abortions to be performed at hospitals or surgical centers, which encourage abortion clinics to open. *See Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983). States gained greater regulatory authority over clinics two decades later when *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 876–77 (1992), modified *Roe*.

Even after *Casey*, however, States lacked the authority to require abortion clinics to meet the same requirements as hospitals and surgical centers. *See Whole Woman's Health v. Hellerstedt*,

136 S. Ct. 2292, 2314–18 (2016) (invalidating Texas law requiring clinics to meet surgical center standards). That forced Indiana and other States to create unique regulatory regimes for clinics to provide oversight without running afoul of federal law. *See, e.g.*, Ind. Code §§ 16-18-2-1.5 (defining abortion clinic), 16-21-2-2 (giving Indiana Department of Health duty to license and regulate abortion clinics), 16-21-2-2.5 (giving the Department of Health authority to adopt rules concerning abortion clinics), 16-21-2-2.6 (requiring annual inspection of abortion clinics), 16-21-2-10 (licensing requirement for abortion clinics), 16-21-2-11 (qualifications for license applicants), 16-21-2-14 (expiration of license); 410 Ind. Admin. Code art. 26 (regulations for abortion clinics), art. 26.5 (regulations for medication-only abortion clinics).

Now that the Supreme Court has held that the federal constitution no longer recognizes a right to abortion or restricts regulation of clinics, the original rationale for regulating abortion clinics differently from hospitals and surgical centers has vanished. States are now permitted to conclude—as the General Assembly did—that hospitals and surgical centers, some of which already provide abortions in some circumstances, are better positioned to provide abortions safely, especially under the traumatic situations where S.B. 1 permits abortions. *See* pp. 26–28, *infra*. And they are also permitted to conclude—as the General Assembly did—that anyone wishing to continue performing abortions should have to meet the same minimum standards as hospitals or surgical centers rather than continue to receive more favorable treatment after the original rationale for that favorable treatment has ceased to exist.

Nothing in S.B. 1, moreover, prevents plaintiffs from becoming licensed as ambulatory surgical centers and continuing to provide abortions as allowed by S.B. 1. Nor is there anything in S.B. 1 that requires them to shutter their facilities; Planned Parenthood, Whole Woman's Health, and Women's Med can remain open to provide non-abortion services. *See Health Care Services*,

Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, https://www.plannedparenthood.org/planned-parenthood-great-northwest-hawaii-alaska-indiana-kentuck/patients/health-care-services (offering birth control, STD testing, annual exams, pregnancy services, HIV services, cancer screenings, and gender-affirming hormone care); *Whole Woman's Health of South Bend*, Whole Woman's Health, https://www.wholewomanshealth.com/clinic/south-bend/ (offering contraceptive services); *Birth Control*, Women's Med, https://www.womensmed.com/birth-control/overview/ (offering birth control services).

Consequently, S.B. 1 does not target a class with inherent, immutable characteristics, but instead specifies where a procedure may be performed. That is not a suitable classification for an Article 1, Section 23 claim. Under Section 23, "*individuals* are afforded equal protection guarantees, not activities." *Richardson's RV*, 112 N.E.3d at 197 n.7 (quoting *RDI/Caesars Riverboat Casino, LLC v. Indiana Dep't of State Revenue*, 854 N.E.2d 957, 962 n.4 (Ind. Tax Ct. 2006)) (emphasis added).

Planned Parenthood cites no cases to the contrary. Instead, it relies heavily on *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003). That case, however, did not draw a distinction between abortion clinics and hospitals. It instead distinguished between (1) *women* who needed an abortion to save their lives or who were victims of rape or incest and (2) *women* who needed an abortion to prevent serious bodily impairment. *Id.* at 255–56. For the court, Justice Sullivan (joined by Boehm and Rucker, JJ.) opined that "[t]he medical, moral, social, and ethical concerns are the same" for both categories of women "or at least the differences too insubstantial to be sustained by the State's justification." *Id.* at 258. Here, however, S.B. 1 already contains a health exception, and substantial safety differences exist between abortion clinics and hospitals. So *Humphreys* provides no help to Planned Parenthood.

B. As legacies of an overturned federal doctrine rather than entities with independent benefits or status, abortion clinics are not similarly situated to hospitals and ambulatory surgical centers

Abortion clinics are not similarly situated to hospitals and ambulatory surgical centers. They relics of a legal framework created by *Roe* and *Casey* and therefore no longer necessary. They are also licensed and inspected differently than hospitals. And they are not as well situated as hospitals and ambulatory surgical centers to provide care for women seeking abortions.

First, again, unlike hospitals and surgical centers, abortion clinics owed their existence to *Roe* and *Casey* and the entire abortion-rights doctrine predating *Dobbs*. Now that the federal abortion-rights regime has been overturned, the State has no need to recognize abortion clinics as legal entities. This alone is sufficient to distinguish abortion clinics from hospitals and surgical centers (which exist for many reasons, offer many services, and serve many communities), and justify doing away with them.

Second, abortion clinics differ from hospitals and surgical centers in how they are licensed and inspected. For hospitals and surgical centers, the Centers for Medicare and Medicaid Services impose minimum inspection requirements. *See* Centers for Medicare & Medicaid Services, *Fiscal Year (FY) 2021 Mission & Priority document (MPD)—Action*, at 11, https://www.cms.gov/files/document/fy-2021-mpd-admin-info-20-03-all.pdf. Private accrediting organizations can conduct those inspections. So the Indiana Department of Health does not need to independently inspect hospitals accredited by private accrediting bodies, such as the Joint Commission, to ensure compliance with health and safety standards. *See* Ind. Code § 16-21-2-13(a)(2).

No similar accrediting organization for abortion clinics exists, so any licensing and inspection of abortion clinics—which the General Assembly formerly was required to tolerate under *Roe* and *Casey*—must be done by the Indiana Department of Health. Now that *Roe* and *Casey* no longer require states to tolerate abortions in minimally regulated clinics (or anywhere else), the State has

no reason to burden itself with a separate licensing and inspection regime. It can instead depend on accreditors like the Joint Commission to inspect and accredit hospitals and surgical centers.

Moreover, Indiana has a specific history of safety and ethical violations by abortion clinics. Former Indiana abortion provider Dr. Ulrich Klopfer lost both his abortion clinic and medical licenses for serious violations, including failing to exercise reasonable care with patients, to timely report abortions on two girls under age 14, to follow proper sedation practices, to keep a log of cleaning procedure rooms, and to dispose of expired medications. Niki Kelly, *State Suspends Medical License of Former South Bend Abortion Doctor*, South Bend Tribune (Aug. 26, 2016), https://www.southbendtribune.com/story/news/local/2016/08/26/state-suspends-medical-license-of-former-south-bend-abortion-doctor/116996978/. After Dr. Klopfer's death, the remains of thousands of unborn children were discovered both at his clinic and in his home. Crystal Hill, *Abortion Doctor Kept Fetal Remains in Moldy Boxes Amid Piles of Rubbish, Report Says*, Indianapolis Star (Dec. 31, 2019), https://www.indystar.com/story/news/2019/12/31/fetal-remains-found-ulrich-klopfers-property-remain-unidentified/2782218001/. Eliminating abortion clinics in favor of more closely regulated and independently accredited facilities will help prevent such outrageous violations in the future.

Third, ample evidence shows that abortions are safer for women when performed in a hospital or ambulatory surgical center. Exhibit 4, Declaration of Monique Chireau Wubbenhorst ¶ 69. One study, which included published data from 32 states over 8 years, found more than 1400 clinic health and safety violations. *Id.* ¶ 62. Similar violations have been found at abortion clinics in Indiana, including those that are plaintiffs in this case. *See id.* ¶ 64 (citing failure to check patients' vital signs at Planned Parenthood in Bloomington); *id.* ¶ 65 (citing failure to give patient oxygen and overdoses of Fentanyl at Planned Parenthood in Indianapolis); *id.* ¶ 66 (citing failure to have

patient sign consent forms at Planned Parenthood in Merrillville); *id.* ¶ 67 (citing failure to sanitize equipment at Women's Med Group).

Ambulatory surgical centers, on the other hand, "have demonstrated an exceptional ability to improve quality and customer service while simultaneously reducing costs." Ex. 4, Wubbenhorst Decl. ¶ 70. A surgical center must "establish a program for identifying and preventing infections, maintaining a sanitary environment, and reporting outcomes to appropriate authorities." *Id.* ¶ 73. They must also have "[a] registered nurse trained in the use of emergency equipment and in cardiopulmonary resuscitation" and "an effective means of transferring patients with a local hospital." *Id.* ¶ 75. With respect to medication abortion specifically, surgical centers could provide medication abortion "in a way that optimizes quality of care and safety" by providing greater continuity of care for patients who experience complications from medication abortion. *Id.* ¶ 78.

Those differences justify treating hospitals and surgical centers differently from abortion clinics.

III. S.B. 1 Does Not Violate the Indiana Constitution's Guarantee of Due Course of Law

Planned Parenthood's due-course-of-law challenge also lacks merit. All plaintiffs lack standing to bring the challenge because none would perform abortions affected by the alleged statutory ambiguity. Also, Indiana's Due Course of Law Clause does not incorporate federal prohibitions against vague criminal statutes that Planned Parenthood invokes. Finally, S.B. 1's challenged exception is not vague; Planned Parenthood simply misreads the statute.

A. The plaintiffs lack standing to bring their due-course-of-law challenge

Planned Parenthood does not dispute that the general prohibition on abortion is clear: As amended by Section 21 of S.B. 1, Indiana Code § 16-34-2-1(a) unambiguously states that "abor-

tion shall in all instances be a criminal act, except when performed under [three enumerated] circumstances." Planned Parenthood instead posits a conflict between the exceptions in Indiana Code § 16-34-2-1(a)(1) and (a)(3) (which Planned Parenthood cites as § 21(1) and § 21(3)), saying they provide "duplicative," "contradict[ory]" "time limits" for performing abortions. Br. 22–23. According to Planned Parenthood, it is unclear whether it would be legal to perform an abortion on a "pregnant patient facing a risk of death who is 23 weeks" or "24 weeks" pregnant. *Id.* at 23.

The plaintiffs, however, lack standing to challenge that putative defect. Standing requires a plaintiff to have suffered, or be in "imminent danger" of suffering, a "personal, direct" injury. *Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022); *see City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022). Here, however, none of the plaintiffs is in such danger because none performs abortions at 23 or 24 weeks. *See* Gibron Decl. ¶ 9 ("up to 13 weeks and 6 days LMP"); Haskell Decl. ¶ 5 (same); Hagstrom Miller Decl. ¶ 5 ("up to 10 weeks of pregnancy"); Caldwell Decl. ¶ 8 ("abortions performed pre-viability and before 21 weeks 6 days of the woman's last menstrual period"). Their alleged injuries are entirely hypothetical and cannot support this claim.

B. Indiana's Due Course of Law Clause does not incorporate federal criminal doctrines regarding vagueness

Planned Parenthood's argument fails on the merits as well. It argues that the Due Course of Law Clause incorporates the *federal* principle that a "*criminal* statute may be invalidated for vagueness" if it fails to give sufficient notice or authorizes arbitrary enforcement. Br. 22 (emphasis added) (quotation omitted). As the Indiana Supreme Court has repeatedly held, however, the Due Course of Law Clause "applies only in the civil context." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975–76 (Ind. 2000); *see, e.g.*, *Church v. State*, 189 N.E.3d 580, 593 (Ind. 2022); *Harris v. State*, 165 N.E.3d 91, 98 n.1 (Ind. 2021). That holding forecloses any argument that the clause incorporates federal criminal doctrines or provides a basis for invalidating state criminal statutes.

Planned Parenthood's cases do not warrant a different conclusion. *Pava v. State*, 142 N.E.3d 1071 (Ind. Ct. App. 2020), never considered binding precedent establishing that the Due Course of Law Clause applies only in the civil context. Neither did *State v. Downey*, 476 N.E.2d 121 (Ind. 1985). Indeed, as later decisions recognize, *Downey* is best understood as a federal due-process case. *See Armstrong v. State*, 22 N.E.3d 629, 637 (Ind. Ct. App. 2014); *Helton v. State*, 624 N.E.2d 499, 505–06 (Ind. Ct. App. 1993). *Downey* nowhere mentioned the Due Course of Law Clause, but instead expressed concerns that the challenged state statute violated "due process notice requirements," and applied a standard taken from *Platt v. State*, 341 N.E.2d 219 (Ind. Ct. App. 1976), another due-process case applying federal standards. *Downey*, 476 N.E.2d at 122–23; *see Platt*, 341 N.E.2d at 221 (citing *Sumpter v. State*, 306 N.E.2d 95, 100 (Ind. 1974)).

A void-for-vagueness challenge to a criminal statute is therefore a nonstarter under Article 1, Section 12 of the Indiana Constitution.

C. S.B. 1 is not unconstitutionally vague even under federal standards

Even if federal standards applied, S.B. 1 would not be unconstitutionally vague. Planned Parenthood's purported confusion over whether abortions can be performed at 23 or 24 weeks stems from a misreading of the statute. Everyone agrees that, under Indiana Code § 16-34-2-1(a)(1), abortions can be performed to save a pregnant woman's life, to prevent a serious health risk, or due to a lethal fetal anomaly if sought "*before* the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus." (emphasis added). According to Planned Parenthood, however, Indiana Code § 16-34-2-1(a)(3) induces confusion because it says abortions can be performed to save a pregnant woman's life or to prevent a serious health risk if sought "*before* 'the earlier of the viability or [22 weeks LMP] *and any time after*.'" Br. 6 (emphasis altered). But that is not what subsection (a)(3) says. It says "*at* the earlier of viability of the fetus or

twenty (20) weeks of postfertilization age of the fetus *and any time after*." Ind. Code § 16-34-2-1(a)(3)(A) (as amended by S.B. 1, Sec. 21) (emphasis added).

That resolves the putative ambiguity. Read correctly, Indiana Code § 16-34-2-1 1(a)(1) and (a)(3) do not set forth conflicting time limits regarding the *latest date* for abortions. They instead provide different requirements for abortions sought at different stages in the pregnancy. Subsection (a)(1) applies to abortions sought "*before* the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus." Ind. Code § 16-34-2-1(a)(1) (emphasis added). Subsection (a)(3) applies to abortions sought "*at* the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus *and any time after*." Ind. Code § 16-34-2-1(a)(3) (emphasis added). Put another way, abortions sought *before* viability or 20 weeks postfertilization age are governed by subsection (a)(1); abortions sought *at* or *after* viability or 20 weeks postfertilization age, whichever comes first, are governed by subsection (a)(3).

That distinction is precisely why subsections (a)(1) and (a)(3) contain different substantive requirements. Because subsection (a)(3) governs abortions performed at later stages of pregnancy, it permits abortions in fewer circumstances, *compare* Ind. Code § 16-34-2-1(a)(1)(A)(ii) (allowing for abortions for a "lethal fetal anomaly"), *with id.* § 16-34-2-1(a)(3)(A) (not allowing such abortions); and authorizes fewer facilities to perform abortions, *compare* Ind. Code § 16-34-2-1(a)(1)(B) (permitting abortions at a "hospital" or "ambulatory outpatient surgical center"), *with id.* § 16-34-2-1(a)(3)(C) (only permitting abortions at a "hospital"); and requires compliance with additional restrictions found in Indiana Code § 16-34-2-3, a provision that applies only to late-stage abortions, *compare* Ind. Code § 16-34-2-1(a)(3)(D) (requiring compliance), *with id.* § 16-34-2-1(a)(1) (not requiring compliance). Like subsection (a)(3), Indiana Code § 16-34-2-3 applies

to "abortions performed *on* or *after* the earlier of the time a fetus is viable or the time postfertilization age of the fetus is at least twenty (20) weeks." Ind. Code § 16-34-2-3(a) (emphasis added). There thus is no ambiguity about whether abortions can be performed at 23 or 24 weeks; they can be performed if they comply with Indiana Code § 16-34-2-1(a)(3).

NO IRREPARABLE HARM

Merits aside, Planned Parenthood bears "the burden of demonstrating an injury which [would be] certain and irreparable if the injunction is denied." *Wagler Excavating Corp. v. McKibben Const., Inc.*, 679 N.E.2d 155, 157 (Ind. Ct. App. 1997). Critically, to obtain an injunction, a plaintiff must demonstrate harm to itself—not third parties. *See e.g.*, *Barlow v. Sipes*, 744 N.E.2d 1, 7 (Ind. Ct. App. 2001) ("In order to obtain the preliminary injunction, Sipes Body was required to show irreparable injury to its business."); *Tilley v. Roberson*, 725 N.E.2d 150, 154 (Ind. Ct. App. 2000) ("Tilley had the burden of showing that *her* remedies at law were inadequate, thereby causing *her* to suffer irreparable harm." (emphasis added)). In addition, "[s]peculative injuries do not justify th[e] extraordinary remedy" of an injunction. *E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005); *see Indiana Pacers L. P. v. Leonard*, 436 N.E.2d 315, 318 (Ind. Ct. App. 1982). Planned Parenthood fails to meet its burden.

First, Planned Parenthood contends that an "unlawful" or "unconstitutional" action always inflicts irreparable harm "per se." Br. 24–25 (citations omitted). But that amounts to saying that plaintiffs need never establish irreparable harm independent of establishing unlawful or unconstitutional conduct. The Indiana Supreme Court has never endorsed Planned Parenthood's "per se" rule and has even disclaimed any such rule absent "clearly unlawful" challenged conduct that is "against the public interest." *Indiana Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158,

162 & n.3 (Ind. 2002). S.B. 1—which is consistent with abortion restrictions stretching back to 1835 and contravenes no express constitutional guarantee—falls well outside any per se rule.

Second, Planned Parenthood claims that "S.B. 1's Hospitalization Requirement will prohibit [it] from performing abortions in Indiana" and prevent "pregnant Hoosiers" from obtaining abortions. Br. 25–26. But that is third-party injury, which is insufficient to sustain an injunction. Women's Med and WWHA's assertion that they "will not be able to remain in operation in Indiana," Br. 25, does not change the analysis. The supporting declarations do not explain what facts support that prediction, and vague "apprehensions or fears . . . , unsustained by facts" cannot support an injunction. *Daugherty v. Allen*, 729 N.E.2d 228, 236 (Ind. Ct. App. 2000). Under S.B. 1, moreover, any abortion clinics can still perform abortions if they become licensed ambulatory surgical centers and can offer non-abortion services regardless. Any injury suffered from a failure to seek a "readily available license" would be "self-inflicted, and self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003).

Third, Dr. Caldwell argues that S.B. 1 contains "conflicting statutory language regarding the point in pregnancy when [its] Health or Life Exception applies . . . [rendering her] unsure when an abortion under that exception is permissible." Br. 25. That alleged harm is speculative. Dr. Caldwell presents no evidence she has been or will be asked to perform an abortion after the point at which Planned Parenthood argues S.B. 1 becomes unclear. *See* p. 20, *supra*. She presents no evidence that refusing to perform an abortion after that time will injure her. And her assertion that *other* "hospital physicians or hospital legal counsel *may* hesitate or entirely forego providing critical care for fear of the consequences" is a speculative, third-party impact and therefore legally insufficient. Caldwell Decl. ¶ 41 (emphasis added).

Fourth, All-Options asserts that S.B. 1 "prevents" it "from carrying out its mission to expand reproductive justice and destigmatize abortion in Indiana." Br. 25–26. What that means is not clear, especially since S.B. 1 will not prevent All-Options from carrying out any of its "three key programs," which involve offering "free peer counseling," "counseling from clergy and religious counselors," "referrals to social service providers, and resources such as free diapers, wipes, menstrual products, and condoms." Dockray Decl. ¶ 4. All-Options's unexplained, subjective belief that its mission will somehow be impaired does not constitute a concrete, irreparable harm.

BALANCE OF HARMS AND PUBLIC INTEREST FAVOR THE STATE

The balance of harms and public interest militate against an injunction as well. An injunction here would inflict irreparable harm on the "thousands" of unborn Hoosiers whose existence Planned Parenthood seeks to terminate if permitted. Br. 8; *see* Ex. 1, Sander Lee Decl. ¶ 8. As with ending any life, abortion is an *irreversible* procedure; once an unborn life has been intentionally taken, it cannot be restored. *See* Ex. 3, Snead Decl. ¶¶ 7, 11. The world that Planned Parenthood wishes to preserve is one in which "thousands of Hoosiers each year" will abort their pregnancies—tragically, often at disproportionately higher rates in Black and Hispanic communities. Br. 9–10; *see* Ex. 2, Curlin Decl. ¶¶ 38–39 (noting disparate impact on aborted children); Ex. 4, Wubbenhorst Decl. ¶ 54 ("'[w]omen of black and other races were 2.4 times as likely as white women to die of complications of abortion'").

Abortions, moreover, often inflict serious physical and psychological harm on pregnant women, particularly when performed at later stages of pregnancy. *See* Ex. 4, Wubbenhorst Decl. ¶¶ 45–55 (explaining risks to physical health from abortion); Priscilla K. Coleman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995–2009,* 199 British

J. of Psychiatry 180, 182–83 (2011) (finding that undergoing an abortion leads to "an 81% increased risk of mental health problems" and that the risk is "55% to 138% greater than the risk from an unintended pregnancy carried to term).

The state and public interest in preventing the irreparable harms that Planned Parenthood seeks to inflict is gripping. As the Indiana Supreme Court has observed, there is a "valid and compelling" interest in protecting human life. *Cheaney*, 285 N.E.2d at 270; *see* Ex. 2, Curlin Decl. ¶ 37 ("S.B. 1 aligns with centuries of medical tradition"); Ex. 3, Snead Decl. ¶¶ 12, 16–17 (explaining that history vindicates "weighing the interests of the unborn child against those of her mother, and crafting a regulatory framework accordingly"). Likewise, the State has a significant interest in protecting "the life and health of all its citizens" by appropriate regulation. *Eastman v. State*, 10 N.E. 97, 99 (Ind. 1887); *see* Ex. 2, Curlin Decl. ¶¶ 27–28 (explaining why "the weight of medical tradition has seen abortion as incompatible with good medicine"); Ex. 3, Snead Decl. ¶ 17.

It is no answer to say that some women who would otherwise abort their children will have to carry pregnancies to term or face greater financial costs. Br. 28. Should a pregnancy threaten a woman's life or pose a serious health risk, abortion remains an option. *See* Ind. Code § 16-34-2-1(a)(1), (3); Ex. 2, Curlin Decl. ¶¶ 29, 32. Any impacts of childbirth unrelated to medical risks do not outweigh the grave consequences of killing an unborn child, or the risks to women's health that accompany abortions, especially considering the public and private resources available to pregnant women to address various impacts of pregnancy. *See Pregnancy Centers Stand the Test of Time*, Charlotte Lozier Institute 16–19 (2020), https://lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020_FINAL.pdf (listing resources provided by private crisis pregnancy centers to pregnant mothers who chose not to abort their children); Brooke McAfee, *Maternal, infant health focus of top health official's visit*, News and Tribune (August 30,

2022), https://www.newsandtribune.com/news/maternal-infant-health-focus-of-top-health-officials-visit/article_40eb8950-28b0-11ed-b7fa-7f583e793c8f.html (discussing Indiana's "Pregnancy Promise Program," which offers public resources to expectant mothers).

At the very least, the legislature—not the judiciary—decides what "balance" to strike between "the rights of the unborn child" and "the rights of the mother." *Cheaney*, 285 N.E.2d at 269; *see Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 121 (Ind. Ct. App. 2004) ("The laws promulgated by the General Assembly reflect its determination of what is in public interest."). The Court should not alter the balance already struck.

CONCLUSION

The plaintiffs' motion for preliminary injunction should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on September 16, 2022, the foregoing document was served upon the following persons using the IEFS:

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