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Monroe Circuit Court 6
Monroe County, Indiana

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

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC.; WOMEN'S MED GROUP PROFESSIONAL CORPORATION; WHOLE WOMAN'S HEALTH ALLIANCE; and ALL-OPTIONS, INC. on behalf of themselves, their staff, physicians, and patients; and AMY CALDWELL, M.D. on her own behalf and on behalf of her patients,

Plaintiffs,

v.

MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities; and the HENDRICKS COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MARION COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, ST. JOSEPH COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, and the WARRICK COUNTY PROSECUTOR, in their official capacities;

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Constitutions

State Statutes & Rules

INTRODUCTION

Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky ("PPGNHAIK"), Women's Med Group Professional Corporation ("Women's Med"), Whole Woman's Health Alliance ("WWHA"), and Dr. Amy Caldwell, (collectively, the "Provider Plaintiffs") and All-Options, Inc. ("All-Options") (collectively, "Plaintiffs") seek a preliminary injunction to prevent Senate Bill 1 ("S.B. 1")—which effectuates a near-total ban on abortion in Indiana—from taking effect during the pendency of this litigation.

For the reasons explained below, Plaintiffs are likely to succeed on the merits of their claims that S.B. 1 violates the Indiana Constitution. And absent a preliminary injunction, Plaintiffs and their patients and clients face immediate, irreparable harm, including the loss of their constitutional rights, the threat of criminal prosecution, loss of their medical licenses, and dramatic, irreversible, and potentially fatal health consequences. These harms considerably outweigh any negligible harm that might be caused to Defendants if the injunction issues, and the public interest will be served by an injunction. This Court should accordingly grant Plaintiffs' motion.

STATEMENT OF FACTS

A. Abortion Is Safe, Common, and Essential Reproductive Healthcare

Procedural abortions (also known as surgical abortions) and medication abortions are common and safe. *See* Exhibit B to the Declaration of Amy Caldwell, M.D., M.S. filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Caldwell Decl."); Caldwell Decl. Ex. C at 10. About one in four American women will have an abortion by the time she reaches age 45, and about one in five pregnancies in 2020 ended in abortion. Caldwell Decl. Ex. D; Caldwell Decl. Ex. E. Legal abortion is one of the safest medical interventions in the United

States and is substantially safer than continuing a pregnancy through to childbirth. *See* Caldwell Decl. Ex. C at 74-75; Caldwell Decl. Ex. F at 215. The risk of death associated with childbirth is more than twelve times higher than that associated with abortion, and every pregnancy-related complication is more common among patients who choose to give birth than among those who choose to have an abortion. *See* Caldwell Decl. Ex. C at 74. Complications from both medication and procedural abortion are rare. *Id.* at 77; *see also* Caldwell Decl. Ex. J. When complications do occur, they can usually be managed in an outpatient setting, either at the time of the abortion or at a follow-up visit. Caldwell Decl. ¶ 17.

People decide to end a pregnancy for familial, medical, financial, personal, and other reasons. Caldwell Decl. ¶ 14. Some people decide that it is not the right time to have a child or to add to their families; some end a pregnancy because of a severe fetal anomaly; some choose not to carry a pregnancy to term because they have become pregnant as a result of rape or incest; some choose not to have biological children; and for some, continuing with a pregnancy could pose a significant risk to their health. Caldwell Decl. ¶¶ 17, 24-33. As most patients who seek abortion already have at least one child, families must consider how another child will impact their ability to care for the children they already have. Caldwell Decl. ¶¶ 14, 32-33; *see generally* Caldwell Decl. Ex. G at 183-89. People who are forced to bear a child against their will also face a host of economic and social harms, including job loss and the inability to exit abusive relationships. Caldwell Decl. ¶¶ 30, 32; Caldwell Decl. Ex. I.

B. Plaintiffs Provide Safe and Essential Reproductive Health Care, Including Abortion, or Support Services to Those Seeking Care, in Indiana

PPGNHAIK is a not-for-profit corporation incorporated in the State of Washington. Declaration of Rebecca Gibron filed in support of Plaintiffs' Motion for Preliminary Injunction

(hereafter "Gibron Decl.") ¶ 3. It is the largest provider of reproductive health services in Indiana, operating 11 health centers throughout the state. Gibron Decl. ¶ 7. PPGNHAIK provides healthcare and educational services, including pregnancy diagnosis and counseling; contraceptive care and provision; testing, treatment, and vaccination for sexually transmitted infections; annual medical examinations; HIV prevention and treatment services; cancer screenings; gender-affirming hormone care; and educational services relating to fertility and pregnancy. Gibron Decl. ¶ 8. In Indiana, PPGNHAIK also offers medication abortion up to 10 weeks after the pregnant patient's last menstrual period ("LMP") at its Lafayette health center, and medication abortion up to 10 weeks LMP and procedural abortion up to 13 weeks 6 days LMP at its Bloomington, Merrillville, and Georgetown Road health centers. Gibron Decl. ¶ 9.

Women's Med is a for-profit organization incorporated in Ohio. Declaration of William Mudd Martin Haskell, M.D. filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Haskell Decl.") ¶ 1. It operates a licensed abortion clinic in Indianapolis that provides both procedural abortions until 13 weeks 6 days LMP and medication abortions until 10 weeks LMP. Haskell Decl. ¶ 5. Women's Med also provides contraceptive services. *Id.*

WWHA is a not-for-profit organization incorporated in Texas. Declaration of Amy Hagstrom Miller filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Hagstrom Miller Decl.") ¶ 1. Its mission is to provide abortion care in underserved communities and destigmatize abortion. Hagstrom Miller Decl. ¶ 4. WWHA operates a licensed abortion clinic in South Bend, which provides medication abortions until 10 weeks LMP as well as contraceptive services. Hagstrom Miller Decl. ¶ 5.

Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in Indiana. Caldwell Decl. ¶ 1. She provides abortion care at IU Health and the Georgetown Road Health Center operated by PPGNHAIK. *Id.*

All-Options is a not-for-profit organization incorporated in Oregon. Declaration of Parker Dockray filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Dockray Decl.") ¶ 1. It provides unconditional, judgment-free support concerning pregnancy, parenting, adoption, and abortion. *Id.* All-Options operates a Pregnancy Resource Center in Bloomington that offers unbiased peer counseling, referrals to social service providers, and resources such as free diapers, wipes, menstrual products, and condoms. The Pregnancy Resource Center also operates the Hoosier Abortion Fund, which provides financial assistance to help pay for abortions for the countless Indiana residents who would otherwise be unable to afford that care. Dockray Decl. ¶¶ 1, 4.

C. Indiana's Existing Abortion Regulations

Abortion is currently legal in Indiana until the earlier of viability or 22 weeks LMP. Ind. Code § 16-34-2-1(a)(2). In a normally progressing pregnancy, viability typically will not occur before approximately 24 weeks LMP. Caldwell Decl. Ex. H. Although abortions are currently permitted at licensed abortion clinics, hospitals, and ambulatory outpatient surgical centers ("ASCs"), including those majority-owned by a licensed hospital, *see, e.g.*, Ind. Code §§ 16-18-2-1.5, 16-21-2-1, the vast majority occur in licensed abortion clinics.[1]

[1] *See* Indiana Dep't of Health, *2021 Terminated Pregnancy Report* (June 30, 2022) at 2, https://www.in.gov/health/vital-records/files/2021-ITOP-Report.pdf (hereinafter "2021 Terminated Pregnancy Report"); Indiana Dep't of Health, *2020 Terminated Pregnancy Report* (June 30, 2021) at 2, https://www.in.gov/health/vital-records/files/ANNUAL-TPR-CY2020.pdf; Indiana State Dep't of Health, *2019 Terminated Pregnancy Report* (June 30, 2020) at 2, https://www.in.gov/health/vital-records/files/2019-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, *2018 Terminated Pregnancy Report* (June 30, 2019) at 3, https://www.in.gov/health/vital-records/files/2018-Indiana-Terminated-Pregnancy-Report.pdf; Indiana

D. S.B. 1 Would Ban Abortion in Indiana

The General Assembly passed S.B. 1 on August 5, 2022.[2] Governor Holcomb signed the bill into law the same day.[3] Absent action from this Court, S.B. 1 will take effect on September 15, 2022 and will virtually eliminate abortion access in the state.

S.B. 1 will ban abortion by making performing an abortion a Level 5 felony, punishable by imprisonment of one to six years and a fine of up to $10,000. § 28(7)(A) (Ind. Code § 16-34-2-7(A)); Ind. Code § 35-50-2-6(B). S.B.1 contains only three extremely limited exceptions:

First, if a physician determines based on "professional, medical judgment" that an "abortion is necessary when reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman[4] or to save the pregnant woman's life" (the "Health or Life Exception"), Section 21(1)(A) provides that abortions are

State Dep't of Health, *2017 Terminated Pregnancy Report* (June 30, 2018) at Exec. Summ., https://www.in.gov/health/vital-records/files/2017-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, *2016 Terminated Pregnancy Report* (June 30, 2017) at Exec. Summ. https://www.in.gov/health/vital-records/files/2016-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, *2015 Terminated Pregnancy Report* (June 30, 2016) at Exec. Summ., https://www.in.gov/health/vital-records/files/2015-TP-Report.pdf.

[2] Actions for Senate Bill 1, Indiana General Assembly 2022 Special Session, http://iga.in.gov/legislative/2022ss1/bills/senate/1.

[3] *Id.*

[4] Although people of many gender identities, including transgender men and gender-diverse individuals, may become pregnant, seek abortions, and bear children, Plaintiffs at times use the terms "woman" and "women" because S.B. 1's total-abortion ban speaks only in terms of "women."

permitted before "the earlier of viability of the fetus"[5] or 22 weeks LMP.[6] Ind. Code §§ 16-34-2-1(1)(A)(i). Section 21(3)(A) provides if a physician determines based on "reasonable medical judgment" that an "abortion is necessary when 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" that abortions are permitted before "the earlier of the viability or [22 weeks LMP] and *any time after*." §§ 21(1)(A)(i), (3)(A).[7] Under Indiana law, "serious health risk" means

> in reasonable medical judgment, a condition exists 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. The term does not include psychological or emotional conditions. A medical condition may not be determined to exist based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in physical harm.

§ 6 (Ind. Code § 16-18-2-327.9). Before performing the abortion, the physician must certify in writing that the abortion is necessary to prevent any serious health risk to the pregnant patient or to save the patient's life. §§ 21(1)(E), (3)(E) (Ind. Code §§ 16-34-2-1(1)(E), (3)(E)). The certificate must include "[a]ll facts and reasons supporting the certification." *Id.*

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[5] Viability is not defined in S.B. 1. However, Indiana Code generally states, "'[v]iability', for purposes of IC 16-34, means the ability of a fetus to live outside the mother's womb." Ind. Code § 16-18-2-365; *see also Colautti v. Franklin*, 439 U.S. 379, 388 (1979) ("Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

[6] S.B. 1 refers to gestational age in terms of "postfertilization age." This brief refers to gestational age in terms of the number of weeks since the patient's last menstrual period ("LMP"), which is the accepted approach in the medical field. Measuring gestational age by LMP adds two weeks to the "postfertilization age" because fertilization typically occurs two weeks after a patient's last menstrual period.

[7] As discussed *infra* pp. 22-23, the time limitations in Section 21(3)(A) are inconsistent with Section 21(1)(A)(i), such that there is uncertainty as to when the Health or Life Exception is applicable. This renders S.B. 1 unconstitutionally vague.

Second, abortions are permitted up to 22 weeks LMP if a physician determines based on "professional, medical judgment" that "the fetus is diagnosed with a lethal fetal anomaly" (the "Lethal Fetal Anomaly Exception"). § 21(1)(A)(ii) (Ind. Code § 16-34-2-1(1)(A)(ii)). "[L]ethal fetal anomaly" means "a fetal condition diagnosed before birth that, if the pregnancy results in a live birth, will with reasonable certainty result in the death of the child not more than three (3) months after the child's birth." Ind. Code § 16-25-4.5-2. Before performing the abortion, the physician must certify in writing that the abortion is necessary because the fetus is diagnosed with a lethal fetal anomaly. § 21(1)(E) (Ind. Code § 16-34-2-1(1)(E)). As with the Health or Life Exception, the certificate must include "[a]ll facts and reasons supporting the certification." *Id.*

Third, abortions may be performed up to 12 weeks LMP if the pregnancy was a result of a rape or incest ("Rape or Incest Exception"). § 21(2)(A) (Ind Code. § 16-34-2-1(2)(A)). Before performing the abortion, the physician must certify in writing, after proper examination, that the abortion is being performed at the patient's request because the pregnancy is a result of rape or incest. § 21(2) (Ind. Code § 16-34-2-1(2)).

S.B. 1 also eliminates licensed abortion clinics—where the vast majority of abortions currently occur—and requires that any abortions performed under S.B. 1's narrow exceptions take place at a licensed hospital or ASC ("Hospitalization Requirement"). §§ 21(1)(B), (3)(C) (Ind. Code § 16-34-2-1(1)(B), 3(C)); § 21(2)(C) (Ind. Code § 16-34-2-1(2)(C)).

Under S.B. 1, a physician "*shall*" have their license to practice medicine revoked if the Attorney General proves by a preponderance of the evidence that the physician knowingly or intentionally performed an abortion either (1) "in all instances" outside of the three narrow exceptions, Ind. Code § 16-34-2-7(a) (citing Ind. Code § 16-34-2-1), (2) without obtaining

consent from the pregnant person or the legal guardian of the pregnant person, Ind. Code § 16-34-2-7(b) (citing Ind. Code §§ 16-34-2-1(a)(1)(D), 16-34-2-4), or (3) without waiting the 18 hours and providing the pregnant person orally and in writing information including, among other things, the risks posed by abortion, "[t]hat human physical life begins when a human ovum is fertilized by a human sperm," and that the fetus "can feel pain at or before" 22 weeks LMP, Ind. Code § 16-34-2-7(c) (citing Ind. Code § 16-34-2-1.1). § 41(b)(2) (Ind. Code § 22-22.5-8-6(b)(2)). For a physician's license to be revoked under this section, it must be shown by a preponderance of the evidence that the physician performed the abortion with the intent to avoid the requirements of those provisions. § 41(b)(2) (Ind. Code § 22-22.5-8-6(b)(2)).

E. S.B. 1 Will Make Abortion Inaccessible to Nearly All Hoosiers

S.B. 1 will require the thousands of Hoosiers who seek abortion care each year to disrupt their lives and attempt to travel out of state for care, significantly delaying their abortions and causing them to incur higher expenses. Gibron Decl. ¶¶ 6, 11, 14-17; Caldwell Decl. ¶¶ 20, 52-53; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12; Dockray Decl. ¶¶ 11-12. Hoosiers seeking abortions out of state will need to gather more money to cover higher travel costs for gas, flights, overnight lodging, and meals. Gibron Decl. ¶¶ 14-17; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12; Dockray Decl. ¶ 11. They will likely lose income from taking time off work and could put their employment at risk. Gibron Decl. ¶¶ 14-17; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12. The longer time away from home required for out-of-state travel will also make it harder to find childcare. Gibron Decl. ¶¶ 14-17; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12; Dockray Decl. ¶ 12. The logistical and financial challenges of obtaining an out-of-state abortion are becoming more significant as time passes and more states, including Indiana's neighbors, ban or severely restrict abortion. Gibron Decl. ¶¶ 14-15; Caldwell Decl. ¶ 53. Patients can find

themselves in a vicious cycle of delaying while gathering funds, only to find the procedure more expensive than anticipated, requiring further delay, or causing them to time out of care altogether. Gibron Decl. ¶ 15; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12; Dockray Decl. ¶ 12. Pregnant individuals who are not able to obtain abortions out of state will be forced to carry their pregnancies to term against their wishes. Gibron Decl. ¶ 17; Haskell Decl. ¶ 13; Hagstrom Miller Decl. ¶ 13; Dockray Decl. ¶ 13. Many will be forced to suffer a host of serious pregnancy-related symptoms and complications that do not rise to the level of threatening their "death or a serious risk of substantial and irreversible physical impairment of a major bodily function," § 6 (Ind. Code § 16-18-2-327.9). Gibron Decl. ¶ 17; Caldwell Decl. ¶¶ 24-29, 37-39; Haskell Decl. ¶ 14.

The barriers imposed by S.B. 1 are most burdensome to Hoosiers with lower incomes and patients of color. Gibron Decl. ¶ 16; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12. Statewide in 2020, 35% of patients receiving an abortion identified as Black or African American, and 9.9% identified as Hispanic or Latino.[8] Fewer than half of patients receiving an abortion identified as white.[9] In comparison, according to the 2020 Census, only 9.6% of Hoosiers identified as Black or African American alone and 8.2% identified as Hispanic or Latino.[10] Black women will suffer some of the gravest consequences of S.B. 1's enforcement. A 2020 report found that Black, non-Hispanic women experienced the highest rate of pregnancy-

[8] *2021 Terminated Pregnancy Report* at 12.

[9] *Id.*

[10] *Indiana: 2020 Census*, U.S. CENSUS BUR. (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/indiana-population-change-between-census-decade.html#:~:text=Population%20(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25).

associated deaths in Indiana.[11] Additionally, the infant mortality rate among Black, non-Hispanic children in Indiana is more than twice the infant mortality rate of non-Hispanic white babies.[12]

Even patients who theoretically qualify for S.B. 1's narrow Health or Life Exception may still be unable to obtain an abortion because of its contradictory language about when in a pregnancy a physician may perform an abortion. Section 21(a)(1) provides that the Health or Life Exception applies "before the earlier of viability of the fetus or twenty (20 weeks) of postfertilization age of the fetus," but Section 21(a)(3) provides that it applies "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age and *any time after*" (emphasis added). These two provisions leave unclear whether a physician could provide an abortion after 22 weeks LMP under the exception to save the life of or prevent a serious health risk to a patient. Physicians treating a gravely ill patient whose pregnancy is more than 22 weeks LMP will be forced to make excruciating decisions that pit their commitment to preserving the life, health, and well-being of their patients against their own freedom, and as a result, subject patients to agonizing uncertainty and grave harm. Caldwell Decl. ¶¶ 40-44.

Additionally, the arbitrary time limit of 12 weeks LMP will prevent many people impregnated through rape or incest from obtaining an abortion in Indiana. Caldwell Decl. ¶¶ 48-49. Some survivors, and especially minors, do not know they are pregnant until later in pregnancy and will struggle to gather the resources needed to obtain an abortion in a hospital—if

[11] Indiana Dep't of Health, *Indiana Infant Mortality & Birth Outcomes, 2020* (Mar. 2022), at 7 https://www.in.gov/health/mch/files/2020-Infant-Mortality-Morbidity.pdf.

[12] *Id.* at 8.

they are able to do so at all—before that gestational age. Caldwell Decl. ¶ 50; Dockray Decl. ¶ 9.

Of the 8,414 abortions performed in Indiana in 2021, 8,281 were performed at abortion clinics that will be prohibited from providing abortion care under S.B. 1.[13] This means over 98 percent of abortions in Indiana were performed in facilities that will no longer be able to serve abortion patients after September 15, 2022.[14] Less than two percent of abortions in the state were performed in hospitals that will continue to be able to provide abortions under S.B. 1.[15] The vast majority of those hospitals are located in and around Indianapolis.[16] From 2015 through 2021, only one abortion was performed at an ASC—hospital-owned or otherwise.[17] Hospitals often do not advertise or otherwise publicize the availability of abortions at hospitals, and there is no obvious number to call or person to reach out to inquire about this care. Caldwell Decl. ¶ 55. Given the stigma that surrounds abortion, even patients that know about the availability of abortion will understandably be wary to cold-call hospitals to inquire about this service. Caldwell Decl. ¶ 55. Moreover, abortion care in hospitals costs more than abortion care provided by clinics. The cost of an abortion at IU Health, a hospital, is roughly $5,000-$7,000, whereas the cost of abortion in an outpatient clinic can range from around $400 to $725. Caldwell Decl. ¶ 54; Haskell Decl. ¶ 5. This higher cost will make obtaining abortion care in a hospital setting impossible for many Hoosiers. Gibron Decl. ¶ 18; Caldwell Decl. ¶ 31.

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[13] *2021 Terminated Pregnancy Report* at 19-20.

[14] *Id.*

[15] *Id*.

[16] *2021 Terminated Pregnancy Report* at 20.

[17] *See id.* at 2; Indiana Dep't of Health, *2020 Terminated Pregnancy Report* at 2; Indiana Dep't of Health, *2019 Terminated Pregnancy Report* at 2; Indiana Dep't of Health, *2018 Terminated Pregnancy Report* at 3; Indiana Dep't of Health, *2017 Terminated Pregnancy Report* at Exec. Summ.; Indiana Dep't of Health, *2016 Terminated Pregnancy Report* at Exec. Summ.; Indiana Dep't of Health, *2015 Terminated Pregnancy Report* at Exec. Summ.

LEGAL STANDARD

A party seeking preliminary injunctive relief under Rule 65 of the Indiana Rules of Trial Procedure must demonstrate by a preponderance of the evidence that: (1) the remedy at law is inadequate and the plaintiff will suffer irreparable harm pending resolution of the action; (2) the plaintiff is reasonably likely to prevail on the merits; (3) the threatened injury to the plaintiff if an injunction is denied outweighs the threatened harm to the adverse party if the injunction is granted; and (4) the public interest will be disserved if injunctive relief is not granted. *See Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001); *City of Gary v. Mitchell*, 843 N.E.2d 929, 933 (Ind. Ct. App. 2006); *Norlund v. Faust*, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997); *see also* Ind. Code § 34-26-1-5 (statutory requirements for obtaining pre-judgment injunction). "[T]he purpose of a preliminary injunction is to maintain the status quo." *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 160 N.E.3d 1103, 1108 (Ind. Ct. App. 2020) (citing *AGS Cap. Corp. v. Prod. Action Int'l, LLC*, 884 N.E.2d 294, 314 (Ind. Ct. App. 2008)).

ARGUMENT

This Court should enter a preliminary injunction preventing S.B. 1 from going into effect during the course of this litigation because Plaintiffs have successfully demonstrated all four factors justifying injunctive relief. *First*, Plaintiffs have established a *prima facie* case for success on the merits, demonstrating that S.B. 1 violates Hoosiers' right to privacy, guarantee of equal privileges and immunities, and guarantee of due course of law under the Indiana Constitution. *Second*, Plaintiffs, their patients, and their clients will suffer immediate and irreparable harm if S.B. 1 goes into effect, including serious physiological and psychological consequences. *Third*, the injury to Plaintiffs and their patients and clients considerably outweighs any harm that might be caused to Defendants if the injunction issues. *Finally*, the

requested injunctive relief will serve the public interest, including people seeking, providing, and facilitating abortion care, throughout Indiana.

I. Plaintiffs Are Reasonably Likely to Succeed on the Merits

Plaintiffs are entitled to an injunction because they have "establish[ed] a *prima facie* case" demonstrating "a reasonable likelihood of success at trial." *See N. Elec. Co. v. Torma*, 819 N.E.2d 417, 431 (Ind. Ct. App. 2004) (citing *Davis v. Sponhauer*, 574 N.E.2d 292, 302 (Ind. Ct. App. 1991)). A plaintiff must establish its *prima facie* case through probative and substantial evidence, *Ind. High Sch. Athletic Ass'n, Inc. v. Martin*, 731 N.E.2d 1, 7 (Ind. Ct. App. 2000), meaning evidence that is "more than a scintilla and less than a preponderance," *Partlow v. Ind. Fam. & Soc. Servs. Admin.*, 717 N.E.2d 1212, 1217 (Ind. Ct. App. 1999).

The party seeking preliminary injunctive relief is not required to show they are "entitled to relief as a matter of law," nor are they required to "prove and plead a case which would entitle [them] to relief upon the merits." *Abercrombie & Fitch Stores*, 160 N.E.3d at 1109; *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 874 (Ind. Ct. App. 2016). Moreover, where—as here—there is a great danger of irreparable harm to plaintiffs or the public, plaintiffs need not go beyond the establishment of their *prima facie* case. *See Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 637 N.E.2d 1306, 1311 (Ind. Ct. App. 1994) (contrasting with heightened standard testing the probability of recovery on the merits when irreparable harm is reduced).

A. Plaintiffs Are Reasonably Likely to Succeed in Showing that S.B. 1 Violates the Right to Privacy Established by the Indiana Constitution

By forcing pregnancy and childbirth upon Hoosiers confronting unwanted, unintended, or dangerous pregnancies, S.B. 1 prohibits Plaintiffs' patients and clients from exercising their

fundamental right to privacy, a core value in Indiana which encompasses the right to abortion, in violation of the Indiana Constitution.

1. Article 1, Section 1 Confers a Right to Privacy

Article 1, section 1 of the Indiana Constitution provides 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." By protecting the inalienable right to liberty, Article 1, section 1 confers on Hoosiers the freedom to live their private lives as they see fit, without unnecessary government interference. *See, e.g.*, *Matter of Lawrance*, 579 N.E.2d 32, 39 & n.3 (Ind. 1991). This privacy right is a core value protected by the Constitution that is independently judicially enforceable and includes the right to abortion.[18]

The Supreme Court has stressed that in analyzing our Constitution a court must look to the language of the text in the context of the history surrounding its drafting and ratification. *See, e.g.*, *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001). From the earliest of times, our courts have noted that Article 1, section 1 encompasses certain inalienable rights reserved to Hoosiers. *See, e.g.*, *Beebe v. State*, 6 Ind. 501, 510-11 (1855), *overruled on other grounds by Schmitt v. F. W. Cook Brewing Co*., 120 N.E. 19, 21 (Ind. 1918); *Herman v. State*, 8 Ind. 545, 552-60 (1855), *overruled on other grounds by Schmitt*.[19]

[18] Because the United States Constitution does not include any provisions analogous to Article 1, section 1, the United States Constitution does not provide any guidance for interpreting the rights conferred by Article 1, section 1. Nevertheless, the Indiana Constitution "may demand more protection for citizens than its federal counterpart," such that Article 1, section 1 can and should be read to provide broad protection for Hoosiers' liberties, even absent a federal analog holding the same. *See, e.g.*, *Cosby v. State*, 738 N.E.2d 709, 711 (Ind. Ct. App. 2000); *see also State v. Katz*, 179 N.E.3d 431, 443 (Ind. 2022).

[19] Both *Herman* and *Beebe* held that a statute prohibiting the manufacturing and sale of alcohol was unconstitutional. *See Herman*, 8 Ind. at 566-67; *Beebe*, 6 Ind. at 521-22. *Schmitt* rejected these holdings and found that the regulation of alcohol was within the police power of the state. 120 N.E. at 22. Although *Schmitt* overruled the earlier holding of these cases, it does not alter the conclusions that Article 1, section 1 encompasses and protects inalienable rights.

This is because under the inalienable rights "philosophy that informs the Indiana Constitution … individuals possess 'inalienable' freedom to do as they will, but they have collectively delegated to government a quantum of that freedom in order to advance everyone's 'peace, safety, and well-being.'" *Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996) (citing Ind. Const. art. 1, § 1); s*ee also Price v. State*, 622 N.E.2d 954, 958-59 (Ind. 1993). The history surrounding the drafting of Article 1, section 1 further supports this interpretation. As the Supreme Court has explained, Article 1, section 1 "include[s] the opportunity to manage one's own life" and gives Hoosiers "complete sovereignty over their affairs." *Matter of Lawrance*, 579 N.E.2d at 39 & n.3.

The Supreme Court in *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 978 (Ind. 2005), left open whether Article 1, section 1 confers a right to privacy that protects the right to an abortion. *Id.* ("We find it unnecessary to determine whether there is any right to privacy or abortion provided or protected by Indiana's Constitution[.]"). The Indiana Supreme Court is likely to conclude, consistent with the holdings of other courts with similarly worded constitutional provisions and similar constitutional traditions, that the constitution protects the right to abortion as one of the inalienable rights encompassed by Article 1, section 1's inalienable right to liberty.[20]

[20] Multiple provisions of the Indiana Constitution reflect the understanding that Hoosiers have an inalienable privacy interest, including Ind. Const. art. 1, §§ 3 (free exercise of religion), 9 (free speech), 11 (protection against improper search or seizure), 21 (just compensation), and 34 (freedom from quartering), although the right to privacy is conferred by Article 1, section 1 alone. These provisions are comparable to constitutional guarantees that other states have also recognized as protective of privacy interests. *See, e.g.*, *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988).

Such a holding is supported by other state supreme courts' interpretations of their states' provisions analogous to Article 1, section 1.[21] *See, e.g.,* Kan. Const. Bill of Rts. § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness"); N.J. Const. Art. 1, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness"). In interpreting these analogous provisions, these sister courts have concluded that these provisions confer inherent and inalienable rights, which encompass the right to privacy, including the right to make one's own medical decisions and right to an abortion. *See, e.g., Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471 (Kan. 2019) (Kan. Const. Bill of Rts. § 1 creates the "right of personal autonomy," which includes the right for "a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy"); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000) (N.J. Const. Art. 1, § 1 incorporates a right to privacy including the right to choose to have an abortion); *Women of State by Doe v. Gomez*, 542 N.W.2d 17, 26-27 & n.10, 32 (Minn. 1995) ("the right of privacy under the Minnesota Constitution is rooted in Article I, Sections 1, 2 and 10" and protects the right to choose whether to obtain an abortion).

[21] The decisions of other state supreme courts are "persuasive" in Indiana courts' "interpretation[s] of … state constitutional provision[s]." *City of Indianapolis v. Wright*, 371 N.E.2d 1298, 1300 (Ind. 1978).

The reasoning in *Hodes & Nauser* is instructive.[22] Bill of Rights Section 1 of the Kansas Constitution provides, "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," Kan. Const. Bill of Rts. § 1, which parallels the breadth of rights bestowed by the Indiana Constitution. The Kansas Supreme Court concluded that "th[e] right to personal autonomy is firmly embedded within [its analogous Article 1, section 1 provision's] natural rights guarantee and its included concepts of liberty and the pursuit of happiness." *Hodes & Nauser,* 440 P.3d at 483. In reaching that conclusion, the Kansas Supreme Court explained that "[a]t the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy." *Id.* Further, the Kansas Supreme Court determined that the rights protected in Bill of Rights Section 1 are "broader" than those provided for in the United States Constitution, including because Section 1 uses the expansive term "inalienable natural rights." *Id.* at 470-73. It explained that the right to "personal autonomy" "includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life." *Id*. at 484. As the court specifically noted, these decisions "can include whether to continue a pregnancy." *Id.* at 471.

[22] The Indiana Supreme Court has an established practice of looking to the Kansas Supreme Court's jurisprudence regarding "similar" constitutional provisions to inform its own constitutional interpretation. *See Akers v. Handley*, 149 N.E.2d 692, 694 (1958) (citing Kansas Supreme Court's interpretation of "§ 6 of the Kansas Bill of Rights" because it "is similar to § 37 of Article 1 of our Constitution"); *Wright Bachman, Inc. v. Hodnett*, 133 N.E.2d 713, 719-20 (1956) (citing Kansas Supreme Court's constitutional analysis to conclude that statute did not violate Indiana Constitution); *S. Bend Pub. Transp. Corp. v. City of S. Bend*, 428 N.E.2d 217, 223, 226 (Ind. 1981) (citing Kansas Supreme Court analysis of Kansas constitutional "clauses similar to ours" to hold tax allocation financing statute was "constitutionally permissible").

2. S.B. 1 Materially Burdens the Core Constitutional Value of Privacy

Under the modern jurisprudence adopted by the Indiana Supreme Court to interpret the Indiana Constitution, the legislature "may qualify but not alienate" the core values contained in the Bill of Rights. *Price*, 622 N.E.2d at 960; *City Chapel*, 744 N.E.2d at 446-47. "A right is impermissibly alienated when the State materially burdens one of the core values which it embodies." *Price*, 622 N.E.2d at 960. A core value is materially burdened when "the right, as impaired, would no longer serve the purpose for which it was designed." *Id.* at 961 n.7.

The Supreme Court has recognized that the "material burden" analysis in the context of Article 1, section 1 is "indistinguishable" from the "undue burden" standard previously used by federal courts to analyze the constitutionality of restrictions on abortion.[23] *Brizzi*, 837 N.E.2d at 983-84. To determine whether a restriction on abortion is permissible under the Indiana Constitution, these tests "measure the extent to which the state regulation impinges upon the central principle that the constitution protects." *Id.* at 984. "A regulation would be unconstitutional, *i.e.*, it would impose a material burden, if it has the effect of 'the right, as impaired, … no longer serv[ing] the purpose for which it was designed[;]'" "in this case, no longer permitting a woman to make the ultimate decision to terminate her pregnancy." *Id.* (citing *Price*, 622 N.E.2d at 961 n.7).

S.B. 1 materially burdens the core constitutional value of privacy by preventing Hoosiers from deciding whether to continue with a pregnancy and bear a child. If S.B. 1 goes into effect,

[23] To be sure, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), held that there is no federal right to abortion and overturned *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). But this does not affect the analysis under the Indiana Constitution, which, as explained *supra* pp. 13-17, independently protects the right to abortion. The Indiana Supreme Court has been clear that Indiana courts must analyze laws targeting abortion rights by applying the material burden test and that this test is the equivalent of the undue burden test. *See Brizzi*, 837 N.E.2d at 984 (in the abortion context the "material burden test is the equivalent of *Casey*'s undue burden test").

it will prevent the right to privacy from serving the purpose for which it was designed—protecting Hoosiers from unwarranted, unnecessary, and overbearing governmental intrusion into their personal lives. Ind. Const. art. 1, § 1. S.B. 1's total ban on abortion severely limits Hoosiers' access to safe, common, and essential health care. *See supra* pp. 1-2, 8-11. S.B. 1's extremely narrow exceptions—all tailored to limited, specific, and dire circumstances—do nothing to alleviate this burden because they allow only a small fraction of Hoosiers the theoretical right to decide when and if to bear a child. Due to S.B. 1's ban, Hoosiers will be forced to travel across state lines for an abortion, which creates a material burden by unnecessarily delaying access to care which can have harmful consequences on Hoosiers' health, careers, families, and finances. *See supra* pp. 8-9; *see also Women of State*, 542 N.W.2d at 30 (funding restrictions can impact the fundament right to abortion access); *Planned Parenthood of Cent. N.J.*, 762 A.2d at 631-42 (considering resulting delay and financial burdens resulting from notification statute). S.B. 1 will also create a material burden by increasing expenses for abortion care that must now be provided at a licensed hospital or ASC. *See supra* pp. 10-11. Moreover, S.B. 1 will create a material burden on low-income Hoosiers and Hoosiers of color by further limiting their access to abortion care when these communities are already disproportionately prevented from receiving safe, accessible health care. *See supra* p. 9. In this way, once S.B. 1 goes into effect, Hoosiers' right to privacy–a right that protects abortion access–would no longer serve the purpose for which it was designed, thereby violating the rights granted by Article 1, section 1.

B. Plaintiffs Are Reasonably Likely to Succeed in Showing that S.B. 1 Violates the Guarantee of Equal Privileges and Immunities under Article 1, Section 23 of the Indiana Constitution

S.B. 1 also violates Article 1, section 23's guarantee of equal privileges and immunities by discriminating against abortion providers. The Equal Privileges and Immunities Clause 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." The Clause's broad language reflects an intentional decision to guarantee citizens more protection against government overreach than the federal Equal Protection Clause. *See Collins v. Day*, 644 N.E.2d 72, 81 (Ind. 1994) (explaining that the Indiana Equal Privileges and Immunities Clause is analyzed independently of federal precedent and stating that it should evolve "in future cases facing Indiana courts to assure and extend protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment").

Article 1, section 23 imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of people. "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes." *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 253 (Ind. 2003) (quoting *Collins*, 644 N.E.2d at 80). This means that legislation that treats citizens differently "must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics." *Collins*, 644 N.E.2d at 78-79. "Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.* at 80.

S.B. 1's Hospitalization Requirement discriminates on its face against abortion clinics by favoring hospitals and ASCs majority-owned by licensed hospitals, despite overwhelming evidence that abortion clinics have been vital to the safe and legal provision of abortion care services. S.B. 1 specifically targets abortion clinics, striking any mention of them, thereby prohibiting them from providing abortions. There are no inherent characteristics that distinguish hospitals and ASCs from abortion clinics that are reasonably related to the disparate treatment of abortion clinics under S.B. 1. Abortion at a clinic is as safe as at a hospital. Caldwell Decl. ¶¶ 16-17, 56. Of the 8,281 abortions provided at Indiana abortion clinics in 2021, not one resulted in death.[24] Less than one percent experienced complications.[25] Moreover, as mentioned above, abortion clinics are the primary entities providing this service. In 2021, only six hospitals in Indiana provided abortions. *Supra* p. 10. Of the 8,414 abortions performed in Indiana in 2021, 8,281 were performed at an abortion clinic that will lose its license to perform abortion care under S.B. 1. *See supra* p. 10. Less than two percent of abortions in the state were performed in hospitals that will continue to be able to provide abortions under S.B. 1. *See supra* p. 10. Additionally, no Indiana ASCs majority-owned by hospitals provided abortion care in 2021. *See supra* p. 10. As a result, any disparate treatment between hospitals, ASCs, and abortion clinics is "not justified." *Humphreys*, 796 N.E.2d at 259. Further, the preferential treatment under S.B. 1's Licensed Facilities Requirement favoring hospitals and ASCs is not "uniformly applicable and equally available to all persons similarly situated." *Collins*, 644 N.E.2d at 80. As discussed *supra* pp. 8-11, the higher logistic and cost barriers for obtaining abortion care in a hospital setting will prevent even patients who fall under S.B. 1's narrow

[24] *2021 Terminated Pregnancy Report* at 18.

[25] *Id.*

exceptions from accessing abortion in a hospital if S.B. 1 takes effect. *See also* Gibron Decl. ¶ 18; Caldwell Decl. ¶¶ 31, 54.

C. S.B. 1 Is Unconstitutionally Vague

S.B. 1 violates the Indiana Constitution's guarantee of due course of law because it is unconstitutionally vague. *See* Ind. Const. art. I, § 12 ("[F]or injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

While "[a] line of cases by [the Court of Appeals] holds that appellate analysis of a vagueness claim is the same under both the federal and state constitution … [t]he Indiana Supreme Court has not addressed this issue." *Pava v. State*, 142 N.E.3d 1071, 1075 n.2 (Ind. Ct. App. 2020) (collecting cases). Relying on federal constitutional principles of due process, "a statute is void for vagueness if its prohibitions are not clearly defined." *Id.* at 1075; *see also State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985) (statute is unconstitutionally vague where "persons of common intelligence are left to guess about the statute's meaning and would differ as to its application"). "A criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement." *Pava* at 1075-76.

S.B. 1 is unconstitutionally vague because its Health or Life Exception is unclear as to *when* in a pregnancy a physician may perform an abortion. Section 21(1)(A) provides "before the earlier of viability of the fetus or twenty (20 weeks) of postfertilization age of the fetus," but Section 21(3)(A) provides "earlier of viability of the fetus or twenty (20) weeks of postfertilization age and any time after." These two provisions provide two different time limits for when abortions are allowed under the Health or Life Exception. The "at any time after"

language is contradicted by the earlier time limits in the beginning of the sentence and in conflict with Section 21(1)(A). If the earlier time limits in Section 21(3)(A) govern, then it is duplicative of Section 21(1)(A). This inconsistency fails to provide notice of when abortions to save the life or health of the pregnant person are permitted, thereby inhibiting physicians from providing legal abortion services because of uncertainty as to whether S.B. 1 allows their conduct. *See McCormack v. Herzog*, 788 F.3d 1017, 1032 (9th Cir. 2015) (imprecise language operates "'to inhibit a physician's provision of legal … services because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being criminally punished.'" (cleaned up)). For example, if a physician is treating a pregnant patient facing a risk of death who is 23 weeks pregnant by LMP, S.B. 1's conflicting provisions do not provide clarity as to whether an abortion would be legal in that situation. Moreover, the vagueness of this exception will also result in arbitrary enforcement of S.B. 1. Law enforcement officials will need to decide which date restriction applies on a case-by-case basis, leading to inconsistent and conflicting results. Such an effect is impermissible. *See Pava*, 142 N.E.3d at 1075-76. And practically, limiting abortions necessary to save the life or health of a pregnant person to 22 weeks LMP as set forth in Section 21(a)(1) will lead to dangerous results: pregnant Hoosiers will be denied critical care if they encounter pregnancy complications at 24 weeks LMP, for example. A physician might be forced to allow a patient to die rather than providing a life-saving abortion.

For these reasons, this provision violates due course of law: "It is constitutionally impermissible to force a physician to guess at the meaning of this inherently vague term and risk" not only professional but criminal sanctions "if he or she guesses wrong." *Planned*

Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 137-38 (3d Cir. 2000); *see also Downey*, 476 N.E.2d at 123 (Ind. 1985).

II. Without an Injunction, Plaintiffs and Their Patients Will Suffer Irreparable Harm

Injunctive relief is warranted where a legal remedy is inadequate "because it provides incomplete relief or relief that is inefficient 'to the ends of justice and its prompt administration,'" including where monetary relief does not suffice to right the wrong. *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 912 (Ind. Ct. App. 2011) (quoting *Robert's Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 864 (Ind. Ct. App. 2002)).

"[W]here the action to be enjoined is unlawful"—including the infringement of constitutional rights—"the unlawful act constitutes *per se* 'irreparable harm' for purposes of the preliminary injunction analysis." *Gibson v. Ind. Dep't of Corr.*, 899 N.E.2d 40, 56 (Ind. Ct. App. 2008) (finding that "if [Plaintiffs] have a reasonable likelihood of success at trial with their constitutional challenges [], then it easily follows that the legal remedies are inadequate/irreparable harm occurs"); *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004).[26] Indiana courts have "tailor[ed] [their] analysis accordingly" where a party claims that the defendant's "actions are unlawful and/or unconstitutional," meaning that once the court has determined that a constitutional right is being infringed, it need not further consider the nature of the harms inflicted on plaintiffs or whether the balance of harms weighs in their favor. *Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 864 (Ind. Ct. App. 2006); *L.E. Servs., Inc. v. State Lottery Comm'n of Ind.*, 646 N.E.2d 334, 349 (Ind. Ct. App. 1995), *trans. denied.*

[26] *See also B&S of Fort Wayne, Inc. v. City of Fort Wayne*, 159 N.E.3d 67, 73 (Ind. Ct. App. 2020) (quoting *Union Twp. Sch. Corp. v. State ex rel. Joyce*, 706 N.E.2d 183, 192 (Ind. Ct. App. 1998)).

Because Plaintiffs seek to enjoin Defendants from enforcing S.B. 1 on the grounds that its violations of the Indiana Constitution are *per se* irreparable harm, Plaintiffs need not demonstrate that S.B. 1 will inflict irreparable harms on themselves and on people seeking abortions. *See Carter*, 854 N.E.2d at 864. The county prosecutor defendants are obligated to enforce state law in their respective counties, Ind. Code § 33-39-1-5, but doing so here would violate the Indiana Constitution. Similarly, the Indiana Medical Licensing Board is required by S.B. 1 to take action to strip the licenses of physicians who provide abortions in violation of S.B. 1, depriving Hoosiers of their Constitutional rights. Nonetheless, Plaintiffs and their patients are certain to suffer irreparable harms beyond violations of their constitutional rights if S.B. 1 takes effect on September 15 and virtually eliminates abortion access in Indiana.

S.B.1 will cause irreparable harm to each of the Plaintiffs. First, S.B.1's Hospitalization Requirement will prohibit Women's Med, PPGNHAIK, and WWHA from performing abortions in Indiana. Caldwell Decl. ¶ 20; Haskell Decl. ¶ 10; Hagstrom Miller Decl. ¶ 9; Gibron Decl. ¶¶ 5, 12. Indeed, Women's Med and WWHA will not be able to remain in operation in Indiana, even if abortion clinics were allowed to provide abortions to those falling within S.B. 1's exceptions. Haskell Decl. ¶¶ 9-10; Hagstrom Miller Decl. ¶¶ 8-9. Second, as a result of the conflicting statutory language regarding the point in pregnancy when the law's Health or Life Exception applies, physicians such as Dr. Caldwell will be unsure when an abortion under that exception is permissible and accordingly reluctant to perform abortions under it for fear of criminal prosecution or loss of a medical license. Caldwell Decl. ¶¶ 41-44. This may lead physicians to refrain from providing abortions that they would otherwise provide in accordance with their professional judgment and ethical obligations, which could endanger patients and damage the provider-patient relationship. Caldwell Decl. ¶ 40. Third, S.B. 1 will prevent All-

Options from carrying out its mission to expand reproductive justice and destigmatize abortion in Indiana. Dockray Decl. ¶¶ 9-13.

S.B. 1's enforcement would mean that many pregnant Hoosiers who do not fall into one of S.B. 1's narrow exceptions will be forced to carry a pregnancy to term and give birth against their will, inflicting physiological, psychological, and economic harm on already-vulnerable Hoosiers and their families. *See supra* pp. 2, 8-11, 18. Second, even for those who can gather the resources needed to access abortion care out of state, S.B. 1 will delay their care and increase its cost. *See supra* pp. 8-11, 18; *infra* p. 26. Third, although abortion is extremely safe and significantly safer than continuing pregnancy through childbirth, delaying abortion care unnecessarily increases medical risk. *See supra* p. 2; *infra* pp. 27-28. Moreover, as a result of an unnecessary delay, some patients are prevented from obtaining abortions because they are pushed past the relevant gestational age limits. *See supra* p. 10. These harms cannot be alleviated through the exceptions outlined in S.B. 1 and will instead be thrust upon nearly all pregnant Hoosiers who wish to access abortion care in violation of their rights.

There is no adequate remedy at law for any of these irreparable harms. For example, damages cannot provide complete relief to a patient forced to carry a dangerous or unwanted pregnancy to term, or to a patient who suffers severe health consequences as the result of a pregnancy but cannot find a provider to perform an abortion. Nor will money adequately compensate providers who are forced to choose between their ethical obligations to their patients and criminal punishment or loss of their medical license for performing an abortion.

III. The Balance of Harms Weighs in Favor of Granting an Injunction

The injury to Plaintiffs and their patients if S.B. 1 takes effect outweighs the potential harm that the injunction would inflict on Defendants.

Indiana courts analyze and balance the full scope of the harms threatened in order to "protect the property and rights of the parties." *Bowling v. Nicholson*, 51 N.E.3d 439, 445 (Ind. Ct. App. 2016); *see, e.g., Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 733 (Ind. 2008); *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 178-79 (Ind. Ct. App. 2008). If S.B. 1 takes effect, Hoosiers will suffer a host of irreparable harms. As explained in detail in Sections I.A.1-2 and II above, pregnant Hoosiers will lose the constitutional right to decide whether and when to carry a pregnancy to term, resulting in serious financial, personal, medical, and familial consequences. Even those few Hoosiers whose abortions would fall into an exception to S.B. 1's ban will have difficulty accessing abortion due to the required closure of clinics, such that the exceptions will become meaningless in practice. Caldwell Decl. ¶¶ 20-21, 51-56; Haskell Decl. ¶¶ 9-13; Hagstrom Miller Decl. ¶¶ 7-8, 10-13; Gibron Decl. ¶¶ 18-19. The Provider Plaintiffs will also be irreparably harmed by being forced to close their clinics. Gibron Decl. ¶¶ 5, 12; Haskell Decl. ¶ 10; Hagstrom Miller Decl. ¶ 9. Physicians such as Dr. Caldwell will be forced to choose between providing ethically and medically sound care for their patients and the loss of their license and criminal liability. Caldwell Decl. ¶¶ 40-44. All-Options will suffer harm to its mission and ability to serve its clients. Dockray Decl. ¶¶ 9-13. Moreover, disturbing the status quo would cause widespread harm to Hoosiers, with minimal—if any—benefit to the State. Additionally, the State has little interest in violating the Constitutionally protected rights of Hoosiers, as discussed *supra* pp. 13-18; *see Plaza Grp. Properties, LLC v. Spencer Cnty. Plan Comm'n*, 877 N.E.2d 877, 896 (Ind. Ct. App. 2007) ("[W]hen the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardships in his favor.").

Therefore, these harms outweigh any harm that might be caused to Defendants if the injunction issues.

IV. Injunctive Relief Is in the Public Interest

Plaintiffs have established that an injunction serves the public interest by showing that they are likely to succeed in their challenge to S.B. 1—a factor that is frequently dispositive of the question of whether an injunction serves the public interest. *See, e.g.*, *Carter*, 854 N.E.2d at 881–83 (reversing denial of preliminary injunction and holding the public interest would not be disserved by upholding plaintiffs' constitutional right to privacy in medical records).

The factual circumstances also establish that enjoining S.B. 1 is in the public interest. *See Bowling*, 51 N.E.3d at 445 ("Whether the public interest is disserved is a question of law for the court to determine from all the circumstances." (citing *Robert's Hair Designers*, 780 N.E.2d at 868-69)). S.B. 1 will interfere with Hoosiers' privacy and ability to make for themselves an important, deeply personal decision that will dramatically impact the course of their lives. It will force Hoosiers whose abortions do not fall under the very limited exceptions to travel farther, expend more resources, and wait longer for their needed abortions, which will result in their having later, riskier, and more expensive abortions. *See supra* pp. 2, 8-11. S.B. 1 will—without reasonable justification—treat abortion providers differently from other medical providers. *See supra* pp. 19-21. It will force Hoosiers who have become pregnant as a result of rape or incest and are not able to obtain an abortion before 12 weeks LMP—sometimes due to the very abuse that resulted in their pregnancies in the first place—to carry those pregnancies to term. *See supra* p. 10. It will force Hoosiers to suffer a host of serious pregnancy-related symptoms and complications that do not rise to the level of threatening their "death or a serious risk of substantial and irreversible physical impairment of a major bodily function." § 6 (Ind. Code §

16-18-2-327.9); *see supra* pp. 8-9. It will put doctors in the untenable position of making medical decisions based not on their training and experience but on their fear about violating the law. Caldwell Decl. ¶¶ 40-44. It will further chill doctors from providing life- or health-preserving abortions for fear that their judgment will later be second-guessed by prosecutors and they will lose their licenses or be criminally sanctioned. *Id.*

V. Waiver of Bond

Trial Rule 65(C) requires that a bond be posted before a preliminary injunction may go into effect. However, "[t]he fixing of the amount of the security bond is a discretionary function of the trial court," and where there is no evidence that the injunction will cause any monetary damages or injury, a bond need not be required. *Kennedy v. Kennedy*, 616 N.E.2d 39, 44 (Ind. Ct. App. 1993) (internal quotation marks and citation omitted); *see also Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1043 (Ind. Ct. App. 2002) (same). The defendants here face no monetary losses or injuries if the preliminary injunction is granted. No bond should therefore be imposed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to grant a preliminary injunction enjoining Defendants from enforcing S.B. 1 during the pendency of this litigation.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2022, I electronically filed the foregoing document using the Indiana E-filing system.

I also certify that on August 31, 2022, the foregoing document was served on the following persons by first-class U.S. postage, pre-paid.

Members of the Medical Licensing Board of Indiana
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A courtesy copy was also served, by e-mail, on:

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/s/ *Kenneth J. Falk*
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