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Monroe Circuit Court 6
Monroe County, Indiana

STATE OF INDIANA	)	MONROE COUNTY CIRCUIT COURT
	) SS:	
MONROE COUNTY	)	CAUSE NO. 5306-2208-PL-001756

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC.; WOMEN'S MED GROUP PROFESSIONAL CORP.; 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.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

S.B. 1 is a complete ban on abortion in Indiana. With S.B. 1 in effect, thousands of Hoosiers have lost access to safe, common, and essential health care. Without this access, the consequences to Hoosiers are catastrophic, and potentially fatal. S.B. 1's extremely narrow exceptions apply in only limited, specific, and dire circumstances, such that Hoosiers who fit in one of the exceptions are severely restricted with *when* and *where* they may access abortion care. As a result, Hoosiers are being forced to carry unwanted and dangerous pregnancies to term in violation of their rights under the Indiana Constitution. Defendants attempt to distract from this stark reality by including a host of misleading and irrelevant claims unrelated to the issues in this case. Properly understood, Plaintiffs bring this lawsuit to ensure Hoosiers' access to abortion through 22 weeks LMP—vital healthcare which is now unavailable in Indiana. It is critical that the court enter Plaintiffs' requested injunction to restore Hoosiers' access to vital health care.

ARGUMENT

Plaintiffs have demonstrated that injunctive relief is proper and warranted in this case. *See* Br. in Supp. of Mot. for Prelim. Inj. ("PI Brief" or "PI Br.") at 13-29. Plaintiffs more than exceed the threshold of reasonable likelihood of success on the merits of their claim, they and their patients and clients face irreparable harm absent an injunction, and the balance of harms and public interest favor an injunction. Nothing Defendants have argued undermines this conclusion.

I. S.B. 1 Violates the Right to Privacy Under Article 1, Section 1

1. Article 1, Section 1 is Subject to Judicial Enforcement

As much as Defendants try to brush off the substantive rights enshrined in Article 1, section 1 as merely "generic references to 'liberty' and 'happiness,'" they cannot ignore that Article 1, section 1 contains "certain inalienable rights" which are enforceable by the courts.

Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. ("Def. Br.") at 11. In *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 986 (Ind. 2005), the Indiana Supreme Court had the opportunity to hold that Article 1, section 1 does not confer judicially enforceable rights but did not do so despite an express request by the State. *Brizzi*, 837 N.E.2d at 978 ("The State further contends that Article I, Section 1, protects no judicially enforceable rights in general[.]"). This Court should certainly not interpret the Supreme Court's silence as a holding that the guarantees of Article 1, section 1 are not judicially enforceable because doing so contravenes the clear meaning of the *Brizzi* decision—that Article 1, section 1 confers judicially enforceable rights.

Defendants instead spend a great deal of time relying on pre-*Brizzi* cases such as *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003) and *Morrison v. Sadler*, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005). Defendants conveniently ignore that the *O'Connor* court, like *Brizzi*, expressly declined to decide whether Article 1, section 1 conferred judicially enforceable rights. *See O'Connor*, 790 N.E.2d at 991 ("We need not decide whether Art. I, § 1, presents any justiciable issues here[.]").[1]

Defendants further rely on *O'Connor* for the proposition that "sister state[]" courts have found that similar provisions of their state constitutions do not confer judicially enforceable rights. 790 N.E.2d at 990. Yet Defendants also argue that out-of-state cases provide no

[1] Defendants' reliance on *Solomon v. State*, 119 N.E.3d 173 (Ind. Ct. App. 2019)—notably post-*Brizzi*—is also misplaced. The court in *Solomon* similarly declined to address whether Article 1, section 1 provides judicially enforceable rights, because the defendant had not raised it below. *See id.* at 178 ("The parties did not present arguments or evidence regarding the extent to which [defendant's activity] was protected by Section 1."). Moreover, in doing so, the court evaluated defendant's claims as if they *were* justiciable, rather than dismissing the notion outright.

Further, the Indiana Supreme Court has invalidated statutes on the basis that Article 1, section 1 is judicially enforceable on several occasions. *See, e.g.*, *Dep't of Fin. Insts. v. Holt*, 108 N.E.2d 629 (Ind. 1952); *Kirtley v. State*, 84 N.E.2d 712 (Ind. 1949); *Dep't of Ins. v. Schoonover*, 72 N.E. 747, 750 (Ind. 1947); *State Bd. of Barber Exam'rs v. Cloud*, 44 N.E.2d 972 (Ind. 1942); *Street v. Varney Elec. Supply Co.*, 66 N.E. 895 (Ind. 1903); *Herman v. State*, 8 Ind. 545 (1855). Defendants do not contest these prior holdings to the extent they found that Article 1, section 1 confers judicially enforceable rights.

guidance to this Court. Def. Br. at 16-20. But Defendants cannot have it both ways. The reality is that Indiana is not unique among the states in finding that Article 1, section 1 creates substantive and enforceable rights; many states have found that their own constitutional analog to Article 1, section 1, standing alone, confers judicially enforceable rights. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471 (Kan. 2019); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000); *Petition of Kerry D.*, 737 A.2d 662, 665 (N.H. 1999); *Women of State by Doe v. Gomez*, 542 N.W.2d 17, 26-27 & n.10, 32 (Minn. 1995); *Denoncourt v. Com., State Ethics Comm'n*, 470 A.2d 945, 947-48, 950 (Pa. 1983); *Grissom v. Dade Cnty.*, 293 So. 2d 59, 62 (Fla. 1974); *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972); *Commonwealth v. Campbell*, 117 S.W. 383, 385 (Ky. Ct. App. 1909).

In short, the weight of authority supports the conclusion that Article 1, section 1 of the Indiana Constitution creates judicially enforceable rights.

2. The Indiana Constitution Confers a Right to Privacy

The key to analyzing Article 1, section 1, as with other provisions of Indiana's Constitution, is to examine the language of the text in light of the history surrounding the drafting and ratification of the constitution as well its purpose. *See City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443, 447 (Ind. 2001). Case law interpreting the provision must also be considered. *Id.* This context makes clear that the Indiana Constitution confers a right to privacy.

The history behind the drafting and ratification of the Indiana Constitution and the interests animating our foundational document make clear that protecting individual privacy was a value important to the framers. As noted by Professor Patrick Baude, our "state was founded, not for the common good, or the general welfare, or out of a sense of community. It was born in conflict, in individualism. It would seem to follow that the constitution's key values are not

civility, equality, tranquility, or order, but liberty, opportunity, vigor, and privacy." Patrick Baude, *Has the Indiana Constitution Found its Epic?*, 69 IND. L.J. 849, 853-54 (1994). Indeed, as our Supreme Court has recognized, "[t]he debates of our constitutional convention suggest that those who wrote the constitution believed that liberty included the opportunity to manage one's own life except in those areas yielded up to the body politic." *Matter of Lawrance*, 579 N.E.2d 32, 39 (1991) (referring to Article 1, section 1).[2]

As Plaintiffs have previously noted, case law from shortly after the enactment of the constitution emphasized that Article 1, section 1 encompasses natural rights, including "the right of personal liberty." *Beebe v. State*, 6 Ind. 501, 511 (1855) (*quoting* Chancellor Kent), *overruled on other grounds by Schmitt v. F.W. Cook Brewing Co.*, 120 N.E. 19, 21 (Ind. 1918).[3] The liberty in Article 1, section 1 "not only means freedom from servitude and restraint, but embraces the right of every one to be free in the use of their powers in the pursuit of happiness in such calling as they may choose subject only to the restraints necessary to secure the common welfare." *Kirtley v. State*, 84 N.E.2d 712, 714 (Ind. 1949). Although *Kirtley* concerned the right to pursue a vocation, "liberty" was construed as allowing the person to act free from state constraints absent cause to constrain that right. This is a privacy interest—the right to live life without undue interference by the State. Indeed, the Indiana Supreme Court has recognized that right to privacy "is a well-established doctrine, derived from natural law and guaranteed by both the Federal and State Constitutions." *Voelker v. Tyndall*, 75 N.E.2d 548, 549 (Ind. 1947).

[2] Defendants rely heavily on *Cheaney v. State*, 285 N.E.2d 265 (Ind. 1972). This case is more than 50 years old. The Supreme Court more recently addressed Hoosiers' right to abortion in *Brizzi*, 837 N.E.2d 973 (Ind. 2005), without citing to or relying on *Cheaney*, showing its irrelevance to the question at hand here.

[3] Defendants criticize Plaintiffs' reliance on *Beebe*, saying it was later overruled. However, as Plaintiffs have previously explained, while *Schmitt* overruled *Beebe*, it did not alter the conclusion that Article 1, section 1 encompasses and protects inalienable rights. PI Br. at 14 n.19.

Defendants' argument that following *Lawrance*'s logic would lead to the conclusion that "no law regulating human affairs could stand" (Def. Br. at 15) is patently false and does a disservice to the Indiana Supreme Court by dismissing out of hand its analysis of the substantive rights at issue. In *Lawrance*, the Supreme Court stressed that the privacy right to "manage one's own life" has influenced the "legal culture" in Indiana, which emphasizes the "commitment to patient self-determination." 579 N.E.2d at 39. This led to the Court recognizing the "substantive right of a patient or her representative to refuse life-sustaining medical treatment." *Id.* If the right to "manage one's own life" encompasses such rights as the ability to pursue a vocation or the ability to refuse life-sustaining treatment, it must also include the right of a woman to determine whether or not to remain pregnant and whether or not to parent. *Id.* This is an obvious and crucial aspect of "self-determination." *Id.*

The privacy interest that protects abortion rights has been recognized as enshrined in the constitutions of numerous other states. 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). A recent interpretation of Ohio's Due Course of Law provision confirmed abortion is a right protected by the Ohio Constitution. On September 14, 2022, the Hamilton County Court of Common Pleas enjoined enforcement of Ohio's ban on abortions after six weeks of pregnancy, explaining that it was "[n]o great stretch . . . to find that Ohio law recognizes a fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making." Exhibit 1, *Preterm-Cleveland v. Yost*, No. A220320, pg. 12 (Ohio C.P., Hamilton Cnty. Sept. 14, 2022) (order granting temporary restraining order). The Ohio court not only found the state's constitution to confer judicially

enforceable rights, but went further to recognize "a fundamental right to abortion under Ohio's Constitution." *Id.* at 15.

Plaintiffs have previously cited to *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471, 483 (Kan. 2019), where the Kansas Supreme Court concluded that "th[e] right to personal autonomy," which includes "whether to continue a pregnancy," "is firmly embedded" in its constitution. *See* PI Br. at 16-17. In reaching its conclusion, the *Hodes* court appropriately looked to the text of its Article 1, section 1 analog, and the history of the drafting of that section. *See Hodes*, 440 P.3d at 476. As Defendants recognize, Indiana courts are required to look at the same things in interpreting Indiana's Article 1, section 1. *See City Chapel*, 744 N.E.2d at 447; Def. Br. at 8, 11-14. Defendants' criticism of *Hodes* is misplaced so far as the argument is essentially that the Kansas Supreme Court got its own constitution wrong. Def. Br. at 17-20. This is not a valid criticism of a well-reasoned opinion that has not been called into question or overruled, and that was later affirmed by a ballot measure enshrining the right to abortion in the Kansas Constitution.[4]

The Kansas Supreme Court's analysis in *Hodes* also sheds light on the irrelevance of Indiana's historic criminal statutes related to abortion, which Defendants emphasize in their interpretation of Article 1, section 1. The Kansas Supreme Court found that the historical criminal statutes did not warrant deference, as the history "[did] not reflect the type of antiabortion sentiment the State wishes to ascribe to the genesis of [the state's] early abortion statutes," and did not allow the Court to infer "what a majority of the legislators—much less the people in the [Territory] or the new state—thought about abortion." *Hodes*, 440 P.3d at 489.

[4] On August 2, 2022, Kansas voters struck down a ballot referendum, and thereby maintained the legal precedent established in *Hodes & Nauser v. Schmidt* that the Kansas Bill of Rights provides a right to abortion. *Kansas Voters Reject Abortion Amendment*, KMBC 9 NEWS (Aug. 3, 2022, 10:26 PM), https://www.kmbc.com/article/kansas-voters-reject-abortion-amendment-aug-2-primary/40786569#.

The same can be said of Indiana's early criminal statutes relating to abortion. Just as the weight of state court authority supports a holding that Article 1, section 1 is judicially enforceable, Plaintiffs have identified state Supreme Courts, including New Jersey and Minnesota, that have recognized that their state constitutions confer a right to abortion. PI Br. at 16. And these states are not alone. *See, e.g.*, *Comm. to Defend Reprod. Rts. to Myers*, 625 P.2d 779, 784 (Cal. 1981) ("[U]nder article 1, section 1 of the California Constitution all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or not to bear a child."); *Doe v. Maher*, 515 A.2d 134, 150 (Conn. Super. Ct. 1986) ("It is absolutely clear that the right of privacy is implicit in Connecticut's ordered liberty[,]" and "the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice."); *Gainesville Women Care, LLC v. State*, 210 So.3d 1243, 1254 (Fla. 2017) ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 399 (Mass. 1981) ("The decision whether or not to beget or bear a child is at the very heart of th[e] cluster of constitutionally protected choices." (internal quotation and citation omitted)); *Armstrong v. State*, 989 P.2d 364, 376-77 (Mont. 1999) ("[A] woman's right to seek and obtain pre-viability abortion services" is a "form of personal autonomy" protected by Article II, section 10 of the Montana Constitution); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 12, 15 (Tenn. 2000), *superseded by amendment* Tenn. Const. art. I, § 36 (2014) ("[T]he provisions of our Tennessee Declaration of Rights from which the right to privacy emanates differ from the federal Bill of Rights in marked respects[,]" and "[t]he concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental.").

In contrast, Defendants have only identified two outlier states that have declined to hold that references to liberty in their state constitution protect a right to abortion. *See* Def. Br. at 17. Yet even these two states (Michigan and Iowa) are not what Defendants proclaim them to be. Indeed, a Michigan court recently held the state's 1931 felony abortion ban unconstitutional because it "would deprive pregnant women of their right to bodily integrity and autonomy, and the equal protection of the law." Exhibit 2, *Planned Parenthood of Mich. v. Att'y Gen. of Mich. and Mich. House of Representatives and Mich. Senate*, No. 22-000044-MM, pg. 34 (Mich. Ct. Cl. Sept. 7, 2022) (order and opinion granting preliminary injunction). Further, the Iowa Supreme Court in question did not actually hold that the right to abortion was not protected by the Iowa Constitution at all. Rather, in Iowa, the former federal undue burden test remains the governing standard. *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 746 (Iowa 2022), *reh'g denied* (July 5, 2022) ("this means that the *Casey* undue burden test we applied in *PPH I* remains the governing standard"). But in doing so, the Iowa Supreme Court re-affirmed that "[a]utonomy and dominion over one's body go to the very heart of what it means to be free." *Id*. at 746. The reality is many states that have similar provisions to Article 1, section 1 recognize a privacy interest that includes the right to abortion care.

That the founders in 1851 may not have specifically considered abortion when creating Article 1, section 1 is of no matter. As Justice Perkins noted in 1856,

> the framers of our constitution . . . designed the first section of it as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a state government to exert legislative power, specify them and exclude all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them. They did specially prohibit such as they had experienced. But naming such attempts did not exclude the prohibition of others by the general fundamental provision. Further, we may say that

> these restraints were intended to operate upon the legislative power, though we suppose that this will not be denied.

Madison & Indianapolis R.R. Co. v. Whiteneck, 8 Ind. 217, 227-28 (1856) (internal citation omitted). The history and text of Article 1, section 1, as well as the analogous approaches of Indiana's sister state courts undoubtedly favor finding a right to privacy in the Indiana Constitution.

3. S.B. 1's Total Ban Materially Burdens the Right to Abortion

As discussed above, Article 1, section 1 provides Hoosiers with a right to privacy including the right to abortion care—a core value. The General Assembly may not materially burden that core value. *See Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993); *City Chapel*, 744 N.E.2d at 446-47. However, S.B. 1 does just that.

S.B. 1 is a complete ban on abortion in Indiana, which imposes a material burden on Plaintiffs, their clients, and their patients. Under S.B. 1's extremely narrow exceptions, only a tiny fraction of Hoosiers can access vital healthcare. As a result, Hoosiers are being forced to carry unwanted and dangerous pregnancies to term with possibly fatal consequences. Caldwell Decl. ¶¶ 14, 22, 28, 29; Haskell Decl. ¶ 6. S.B. 1's Health or Life and Lethal Fetal Anomaly Exceptions do nothing to decrease the material burden. These exceptions apply to limited, specific, and dire circumstances. Even with these exceptions, Hoosiers are severely restricted with *when and where* they may access abortion care.

Defendants ignore the material burden analysis and focus on the General Assembly properly exercising its police powers. Def. Br. at 21-22. But the State's police powers have no relevance when a core value is at stake. Indeed, where a statute purports to infringe on the right to an abortion, the material burden analysis must be followed. *See Brizzi*, 837 N.E.2d at 984. Our Supreme Court has clearly stated that in the context of Article 1, section 1 the court must

consider whether the law "has the effect of" impairing the right to privacy such that it "no longer serv[es] the purpose for which it was designed." *Brizzi*, 837 N.E.2d at 983. This analysis does not "involve weighing nor is it influenced by the social utility of the state action at issue." *Id.* at 983 (quoting *City Chapel*, 744 N.E.2d at 447). Thus, the Court's analysis turns on the material burden of the right to privacy and does not require weighing the state's purported police power.

4. S.B. 1's Hospitalization Requirement Materially Burdens the Right to Abortion

The harms from the Hospitalization Requirement, challenged separately under Article 1, section 23, and discussed in detail below, also compound the material burden the total ban imposes on Plaintiffs, their clients, and their patient. For Defendants to argue otherwise ignores the data. Just last year, 8,414 abortions were provided in Indiana, but less than two percent were performed at the only six hospitals providing abortions.[5] To be clear, abortion clinics provided 8,281 abortions out of the total 8,414.[6] And last year ***no*** Indiana ASCs majority-owned by hospitals provided abortion care.[7] Simply put, abortion clinics have been the facilities providing abortions and where Hoosiers have gone to obtain this vital healthcare. Under S.B. 1's Hospitalization Requirement, thousands of Hoosiers will be forced to needlessly find their way to a hospital that provides abortions, the vast majority of which are located in or around Indianapolis, or an ASC majority-owned by a hospital, instead of going to a clinic closer to their community.[8] This will require Hoosiers to not only spend more on travel costs, but also exponentially more on the abortion care itself. Hoosiers who obtain abortion care in a hospital

[5] Ind. Dep't of Health, *2021 Terminated Pregnancy Report* (June 30, 2022) at 19-20, https://www.in.gov/health/vital-records/files/2021-ITOP-Report.pdf (hereinafter "2021 Terminated Pregnancy Report").

[6] *Id.*

[7] *Id.*

[8] *Id.* at 20.

pay out of pocket roughly 10 times more than those who obtain that care in a clinic. Caldwell Decl. ¶ 54; Haskell Decl. ¶ 5. These prohibitive costs make obtaining an abortion in a hospital setting impossible for many Hoosiers, such that they are no longer able to access vital healthcare or make the deeply personal decision whether to carry their pregnancy to term without government intrusion.

Moreover, the fact that the State may have deemed hospitals and ASCs as the "better" facilities to provide abortion care is irrelevant to the material burden analysis. Def. Br. at 24. The data refutes that abortion is safer when provided in a hospital or ASC. From 2006 through 2018, abortion clinics had zero medical errors while hospitals and ASCs had more than 1,400 errors.[9] Further, what is relevant here is that the Hospitalization Requirement destroys Hoosiers' access to vital healthcare. As a result, Hoosiers are forced to seek abortion care out of state, which will significantly delay their abortions and cause them to incur higher expenses. Gibron Decl. ¶¶ 6, 12, 14-17; Caldwell Decl. ¶¶ 20, 52-53; Haskell Decl. ¶ 12; Hagstrom Miller Decl. ¶ 12; Dockray Decl. ¶¶ 11-12. These Hoosiers are and will experience physical, psychological, and economic harms.

II. S.B. 1 Violates Article 1, Section 23

1. S.B. 1 Treats Similarly Situated Medical Providers Differently

Attempting to find an explanation for the blatantly disparate treatment afforded abortion clinics under S.B. 1, Defendants argue that S.B. 1 "does not target a class with inherent, immutable characteristics, but instead specifies where a procedure may be performed" and that "individuals are afforded equal protection guarantees, not activities." Def. Br. at 23, 25. They claim that "S.B. 1 targets a procedure, not the plaintiffs here." *Id*. at 23. This is not so. S.B. 1

[9] *See* Ind. Dep't of Health, *Indiana Medical Reporting System - Final Report for 2018* (Dec. 16, 2019) at 29, https://www.in.gov/health/files/2018-MERS-Report.pdf. *See also infra* at 15-16.

clearly specifies ***where*** abortion may be performed, not how the procedure is performed. Defendants admit as much. Yet Defendants cannot justify this disparate treatment as based on inherent differences between abortion clinics and hospitals/ASCs not reasonably related to S.B. 1's public health goals. PI Br. at 20-22. This directly targets Plaintiffs and violates the guarantees under the Equal Privileges and Immunities Clause. PI Br. at 20-22; *Collins v. Day*, 644 N.E.2d 72, 80-81 (Ind. 1994).

Defendants' purported authority is inapposite. In support of the proposition that the Equal Privileges and Immunities Clause confers a right to equal treatment amongst individuals and not activities, Defendants cite *Richardson's RV, Inc. v. Indiana Department of State Revenue*, 112 N.E.3d 192, 197 (Ind. 2018), which in turn cites a single tax law case, *RDI/Caesars Riverboat Casino, LLC v. Indiana Department of State Revenue*, 854 N.E.2d 957, 962 (Ind. Tax Court 2006). Together, these two cases discuss the Equal Privileges and Immunities Clause in *dicta*, for a grand total of five footnoted sentences—hardly a fulsome analysis. *See Richardson's RV*, 112 N.E.3d at 197 n.7; *Caesars Riverboat Casino*, 854 N.E.2d at 962 n.4. Setting aside the fragile support they offer, they simply have no bearing on this case. In both prior cases, the court found that taxing distinct activities at distinct rates was not a violation of the Equal Privileges and Immunities Clause because, essentially, different activities could be treated differently. *See Richardson's RV*, 112 N.E.3d at 197; *Caesars Riverboat Casino*, 854 N.E.2d at 964. Here, the proper comparison is not between two distinct activities, such as abortion care and other medical care; rather, the disparate treatment lies in which entities are permitted to perform that care. In other words, this is the prototypical Equal Privileges and Immunities claim. *See, e.g.*, *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277

(Ind. 2014) (finding Equal Privileges and Immunities violation where smoking ban ordinance applied to certain bars and clubs but exempted other similarly situated facilities).

Confusingly, Defendants support their argument that S.B. 1 regulates activities and not providers by describing the differences between abortion clinics and other medical providers for several pages. Def. Br. at 23-25. Defendants list several distinct characteristics of abortion clinics—from their original purpose to their regulatory regime—and in the next breath conclude that S.B. 1 does not target a class with inherent, immutable characteristics. *Id*. By Defendants' own terms, S.B. 1 struck abortion clinics because "[s]tates 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."[10] Def. Br. at 24. In other words, Defendants admit that the State concluded that distinctive characteristics justify treating abortion clinics differently than hospitals and ASCs. Thus, under *Collins*, the remaining question is whether this distinction is reasonably related to S.B. 1's public health goals. *See Collins*, 644 N.E.2d at 80; PI Br. at 20-22. As discussed *infra*, it is not.

2. S.B. 1 Is Not Reasonably Related to Inherent Characteristics Differentiating Abortion Clinics from Hospitals or ASCs

As a preliminary matter, Defendants have not articulated a purpose for the disparate treatment between abortion providers, which forestalls the analysis into whether "the classification is based upon substantial distinctions with reference to the subject matter." *Paul Stieler Enters.*, 2 N.E.3d at 1277 (citation omitted). This is likely because they cannot point to a

[10] Defendants' arguments that "[n]othing in S.B. 1, moreover, prevents plaintiffs from becoming licensed as ambulatory surgical centers" and that nothing "in S.B. 1 that requires them to shutter their facilities" are disingenuous. Def. Br. at 24. As Plaintiffs have explained, the only ASCs permitted to perform abortion services under S.B. 1 are those that are majority-owned by hospitals, a factor outside Plaintiffs' control. PI Br. at 7. Additionally, Plaintiffs have demonstrated that, even if S.B. 1 does not close clinics outright, the effect will be their forced closure. PI Br. at 27.

single statutory provision or piece of legislative history articulating a basis for striking all references of abortion clinics from the relevant statutes. However, presuming, as Defendants seem to do, that the General Assembly's intended purpose was ensuring the safety of abortion procedures, Defendants' arguments fall flat.

Rather than engage with Plaintiffs' arguments that abortion clinics are equally well-situated, if not better situated, to provide abortion care, Defendants try to paint abortion clinics as providers of unsafe and unregulated abortion services. Def. Br. at 27-28. In doing so, they rely on the Declaration of Monique Chireau Wubbenhorst ("Wubbenhorst Decl."), whose qualifications notably do not include any experience in performing abortion services.[11] Wubbenhorst Decl. ¶¶ 4-10. Her arguments center on the alleged importance of "facility requirements" in providing safe abortion services. Wubbenhorst Decl. ¶¶ 58-67. As Defendants admit, however, abortion clinics have long been subject to an extensive state regulatory regime, including yearly inspections. Def. Br. at 23-24. The purported inspection issues that Dr. Wubbenhorst relies upon in an attempt to undermine abortion clinic safety not only did not lead to the state suspending or rescinding any abortion clinic's license but also consist exclusively of routine, minor inspection issues irrelevant to patient health or safety when taken in context. *See, e.g.*, Wubbenhorst Decl. ¶ 65 (some staff did not have CPR certification); *id*. ¶ 66 (various paperwork issues).

The evidence is clear. Plaintiffs have more than demonstrated that, contrary to Dr. Wubbenhorst's unsupported and unscientific accusations, abortion care is safe nationwide,

[11] In recent proceedings addressing Kentucky's abortion ban, the Kentucky court concluded that Dr. Wubbenhorst was "unable to provide any evidence to support her criticism" of the abortion statistics and maternal mortality statistics she also seeks to undermine in this case. Exhibit 3, *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, No. 22-CI-003225 (Ky. Circuit Ct., Jefferson Cnty. July 22, 2022), at 4 (order granting temporary injunction).

including in Indiana. PI Br. at 1-4. In an attempt to supplement her lack of experience in abortion care, Dr. Wubbenhorst cherry-picks a few studies to argue abortion care is unsafe. *See generally* Wubbenhorst Decl. However, as Dr. Caldwell, an OB/GYN with fellowship training in and experience providing abortion care, explained, the most authoritative literature review of abortion safety, conducted by the National Academies of Sciences, unequivocally establishes the safety of abortions.[12] Caldwell Decl. ¶¶ 5-9, 16; Caldwell Decl. Ex. C. The risk of death from childbirth is more than 12 times higher than that from abortion. Caldwell Decl. ¶ 16. Abortion is also safer than other common, low-risk medical procedures such as colonoscopies (2.9 per 100,000) and adult tonsillectomies (2.9-6.3 per 100,00). *Id*. Complications from abortions are rare. *Id*. ¶ 17. Less than 1% of patients obtaining abortions experience a serious complication, and the risk of a patient experiencing a complication that requires hospitalization is even lower– approximately 0.3%. *Id.* The evidence is also clear that abortion is as safe, if not safer, in an abortion clinic as in a hospital or ASC. Indiana collects extensive data on abortion service provision, and all the data supports that abortion clinics (1) provide the bulk of Indiana's abortion services and (2) do so with few complications. PI Br. at 1-4, n.1. For example, the Indiana State Department of Health requires reporting of serious medical errors at abortion clinics, hospitals, and ambulatory surgical centers, and compiles a report with data on these errors. [13] The most recent report indicates that from 2006 to 2018, zero abortion clinics reported serious medical errors, while hospitals and ASCs reported a combined 1,410 serious medical

[12] Even Indiana admits that abortion is significantly safer than childbirth. According to a brochure it requires doctors to provide to patients considering abortion, in the United States in 2012 there was one maternal death for every 6,289 live births, compared to one maternal death for every 153,846 legally induced abortions. Indiana Dep't of Health, *Abortion Informed Consent Brochure* (June 29, 2020) at 10, https://www.in.gov/health/files/Abortion_Informed_Consent_Brochure.pdf.

[13] *See* Ind. Dep't of Health, *Indiana Medical Reporting System - Final Report for 2018* (Dec. 16, 2019) at 29, https://www.in.gov/health/files/2018-MERS-Report.pdf.

errors (an average of 108.5 errors per year).[14] On average hospitals had more than 100 errors a year and ASCs had more than 6 errors a year. If the General Assembly's purpose in treating abortion clinics differently than hospitals and ASCs truly is to help ensure safe abortions, S.B. 1 compromises rather than furthers that goal.

Defendants' argument that "the State has no need to recognize abortion clinics as legal entities" in the wake of *Dobbs* fares no better.[15] Def. Br. at 26. "*Collins* requires that, to comply with Indiana's Equal Privileges and Immunities Clause, the disparate treatment must be reasonably related to the inherent differences that distinguish the unequally-treated classes. It does not merely require that sound policy reasons exist to justify the special privilege or immunity." *Paul Stieler Enters.*, 2 N.E.3d at 1275. Any attempt to distinguish abortion clinics from similarly situated abortion providers must be based on reasonably related inherent differences between the two, not simply state preference.

Defendants provide no case law support for their argument that inherent characteristics reasonably related to abortion services exist to justify abortion clinics' disparate treatment. Plaintiffs have demonstrated that any inherent characteristics that do exist have no bearing on abortion clinics' ability to provide safe and effective abortion services. Although the legislature is entitled to deference, that deference is "not without limitations," and "it is within the province of this Court to determine whether the exercise of legislative discretion violates express provisions of the Indiana and Federal constitutions." *Id.* at 1277 (quoting *Collins*, 644 N.E.2d at 80). As such, this court should find that S.B. 1 violates Article 1, section 23's guarantees of

[14] *Id.*

[15] As a preliminary matter, Plaintiffs bring this suit under the Indiana Constitution, and *Dobbs*, as a case interpreting the federal constitution, has no bearing on that analysis. *See Collins*, 644 N.E.2d at 75 (holding "that Section 23 should be given independent interpretation and application" from the federal Equal Protection Clause). Moreover, even if *Dobbs* were persuasive here, it did not purport to strip (nor even discuss) the licenses of abortion clinics nationwide.

equal privileges and immunities by discriminating against abortion clinics based on inherent characteristics not reasonably related to safe provision of abortion services.

III. Plaintiffs' Argument That S.B. 1 is Unconstitutionally Vague

Defendants have provided an explanation for how to read Sections 21(a)(1) and (3) of S.B. 1. *See* Def. Br. at 30-32. Plaintiffs are satisfied that this interpretation remedies the previously vague statute and request that this Court memorialize this interpretation in its Order to provide clarity to providers.

IV. S.B. 1 Causes Irreparable Harm

Plaintiffs have successfully demonstrated that they, their patients, and their clients are suffering irreparable harm from S.B. 1. While S.B. 1's constitutional violations are *per se* irreparable harm, *see* PI Br. at 24-25, Plaintiffs have also identified throughout their Complaint, PI Brief, and supporting Declarations a host of irreparable harms they and their patients and clients are experiencing as a result of S.B. 1. *See, e.g.*, PI Br. at 1, 12, 24-26. And as discussed above, *see supra* at 9-11, S.B. 1's total ban and Hospitalization Requirement materially burden Hoosiers. Because Defendants cannot rebut the harms that will befall pregnant Hoosiers under S.B. 1, they instead attack the ability of Plaintiffs to bring claims on behalf of their patients, in contravention of well-established third-party standing doctrine. In Indiana, "[a] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete, redressable injury, that he has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his own interests." *Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 870 (Ind. Ct. App. 2006) (quoting *Osmulski v. Becze*, 638 N.E.2d 828, 833-34 (Ind. Ct. App. 1994)) (Planned Parenthood had standing to assert constitutional privacy issues of minor patients in injunctive action because, *inter alia*, clinic's interests were closely aligned with its patients' interests regarding abortion services); *In re Ind. Newspapers,*

Inc., 963 N.E.2d 534, 549 (Ind. Ct. App. 2012) (recognizing third-party standing outside the abortion context); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 977 (Ind. 2005) (allowing case to proceed on third-party standing in the abortion context). Moreover, third-party standing is widely accepted in federal courts in the abortion context. *See, e.g.*, *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998) ("The standing of the physician plaintiffs, and of Planned Parenthood as the owner of abortion clinics in Wisconsin, to maintain this suit is not open to question." (citing other cases)).[16] Courts "have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (citations omitted), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The *Dobbs* opinion has not altered the understanding of third-party standing. As has been the case in federal and state court for decades, Plaintiffs have standing to seek to redress the irreparable harm being done to their patients and clients.[17]

[16] With respect to the non-provider Plaintiff, All-Options, All-Options has been harmed by S.B. 1's complete abortion ban. Part of All-Options' mission is expanding reproductive justice by facilitating abortions in Indiana. Dockray Decl. ¶¶ 1, 9. But S.B. 1 is forcing the vast majority of Hoosiers to travel out of state for care. *Id.* ¶¶ 9-13. As a result, it is forcing All-Options to divert its resources away from carrying out its mission. *Id.* Further, All-Options has third-party standing on behalf of its clients for the same reasons the Provider Plaintiffs have third-party standing on behalf of their patients. *See id.* ¶¶ 1, 4-5. Regardless, because the Provider Plaintiffs clearly have standing to assert their claims on behalf of themselves and their patients, this Court need not separately determine whether All-Options has standing to do so on behalf of itself and its clients. *See, e.g.*, *City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58, 67 n.10 (Ind. Ct. App. 2010) ("Because we conclude that Greenwood has standing, we need not determine whether the other Appellants have standing."); *Penn-Harris-Madison Sch. Corp. v. Joy*, 768 N.E.2d 940, 944 n.4 (Ind. Ct. App. 2002) ("[T]he issue of the parents' standing does not change our review of the case, as other named plaintiffs have standing to prosecute this action. Thus, we need not address the standing issue.").

[17] Defendants suggest that Plaintiffs can address any harm by becoming a "licensed ambulatory surgical center[]." Def. Br. at 33. As an initial matter, this argument ignores the fact that S.B. 1 requires more than just the ASC be licensed, but rather requires the ASC be *majority-owned* by a licensed hospital to be able to provide abortion care. This would require that Provider Plaintiffs enter into contractual partnerships with licensed hospitals. At the preliminary injunction stage, plaintiffs are not required to jump through hoops to redress their harm. Thus, the fact that Provider Plaintiffs have not gone through significant hurdles to convert themselves into ASCs majority-owned by licensed hospitals does not alter the fact that the Hospitalization Requirement is causing an irreparable harm.

V. Balance of Harms

With S.B. 1 in effect, the harm to Plaintiffs, their clients, and their patients greatly outweighs harm, if any, to Defendants if the law is enjoined.

Defendants talk about "[t]he world that Planned Parenthood envisions," depicting the State as the great champion of women of color and their children. But Defendants ignore the reality of life in Indiana for children and pregnant Hoosiers, especially those that are already vulnerable. Indiana infant and maternal mortality rates are among the worst in the country, and the State has severely limited eligibility for public benefits intended to help vulnerable parents and children, including Temporary Assistance for Needy Families ("TANF"), which provides cash assistance, and the Supplemental Nutritional Assistance Program ("SNAP"). Dockray Decl. ¶ 13. Moreover, as recognized by the Indiana State Department of Health, "[c]onsiderable racial disparities in pregnancy-related mortality exist."[18] In 2012 the CDC reported that the pregnancy-related mortality rate for white women was 1 death per 8,475 births whereas the mortality rate for Black women was 1 death per 2,433 births.[19] The pregnancy-related mortality rate for Black women far exceeds those for white women.

The Defendants also claim that abortion can lead to psychological harm, citing a research article by Dr. Priscilla Coleman. Def. Br. at 34. This claim, repeatedly made by Dr. Coleman, has been thoroughly discredited. *See, e.g.*, Ex. B to Caldwell Decl. at 149-152, 161. Dr. Coleman's studies have been criticized as "lacking," *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 273 F. Supp. 3d 1013, 1036 (S.D. Ind. 2017), *aff'd*, 896 F.3d 809 (7th Cir. 2018), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 184

[18] Indiana Dep't of Health, *Abortion Informed Consent Brochure* (June 29, 2020) at 10, https://www.in.gov/health/files/Abortion_Informed_Consent_Brochure.pdf.

[19] *Id.*

(2020). Indeed, one of Dr. Coleman's studies concerning abortion and mental health was described by the Seventh Circuit as "controversial and much maligned." 896 F.3d at 826.

Moreover, as previously noted, *see* PI Br. at 27, the State has little interest in violating the Constitutionally protected rights of Hoosiers. *See Plaza Grp. Props., 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.").

CONCLUSION

For the foregoing reasons, Plaintiffs reiterate their request that this Court grant a preliminary injunction enjoining Defendants from enforcing S.B. 1 during the pendency of this litigation.

Respectfully submitted:

/s/ Kenneth J. Falk
Kenneth J. Falk, No. 6777-49

/s/ Gavin M. Rose
Gavin M. Rose, No. 26565-53

/s/ Stevie J. Pactor
Stevie J. Pactor, No. 35657-49

ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
T: 317/635-4059
F: 317/635-4105
kfalk@aclu-in.org
grose@aclu-in.org
spactor@aclu-in.org

/s/ Katherine V. Mackey
Katherine V. Mackey, No. 8502-95-TA

/s/ Allyson Slater
Allyson Slater, No. 8501-95-TA

WilmerHale
60 State Street
Boston, MA 02109
T: (617) 526-6000
katherine.mackey@wilmerhale.com
allyson.slater@wilmerhale.com

/s/ Juanluis Rodriguez
Juanluis Rodriguez, No. 8519-95-TA
Lawyering Project
41 Schermerhorn Street, #1056
Brooklyn, NY 11201
T: (646) 490-8633
prodriguez@lawyeringproject.org

/s/ Rupali Sharma
Rupali Sharma, No 6698-95-TA
Lawyering Project
113 Bonnybriar Road
South Portland, ME 04106
T: (908) 930-6645
rsharma@lawyeringproject.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, I caused the foregoing document to be electronically filed using the Indiana E-filing system. Service will be made on all counsel of record by operation of the Indiana E-filing system.

/s/ Stevie J. Pactor
Stevie J. Pactor
Attorney at law