

IN THE
INDIANA SUPREME COURT

No. 22S-PL-00338

MEMBERS OF THE MEDICAL	)	Indiana Court of Appeals
LICENSING BOARD OF	)	Cause No. 22A-PL-02260
INDIANA, in their official	)	
capacities, et al.,	)	Interlocutory Appeal from the
	)	Monroe County Circuit Court,
Appellants.	)	
	)	No. 53C06-2208-PL-001756,
PLANNED PARENTHOOD	)	
GREAT NORTHWEST HAWAII,	)	The Honorable Kelsey Hanlon,
ALASKA, INDIANA,	)	Special Judge.
KENTUCKY, INC. et al.,	)	
	)	
Appellees,	)	
	)	
	)	

BRIEF OF HISTORIANS AND STATE CONSTITUTIONAL LAW SCHOLARS
AS AMICI CURIAE IN SUPPORT OF APPELLEE

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STATEMENT OF THE INTEREST OF AMICI CURIAE¹

Amici are historians and scholars of state constitutional interpretation who have an ongoing interest in ensuring Indiana's approach to constitutional interpretation is independent of the federal constitution, respectful of the purposes of the Indiana Constitution, and informed by accurate analysis of historical facts. The *amici* are: Wendy Gamber, Byrnes Professor, Department of History, Indiana University; Michael Grossberg, Sally M. Reahard Professor of History and Professor of Law, Department of History Maurer School of Law, Indiana University; Hendrik Hartog, Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Emeritus, Department of History, Princeton NJ; James Madison, Emeritus Professor, Department of History, Indiana University; Anita Morgan, Senior Lecturer, Department of History at IUPUI, Indianapolis; Elizabeth Osborn, Ph.D, Indiana University; Leslie J. Reagan, Ph.D., Professor of History, University of Illinois, Urbana-Champaign; Nicholas L. Syrett, Associate Dean, College of Liberal Arts and Sciences, Professor of Women, Gender and Sexuality Studies, University of Kansas; and Robert F. Williams, Distinguished Professor of Law, Rutgers School of Law.

SUMMARY OF THE ARGUMENT

Indiana is not a “lockstep” state; rather, consistent with our Constitution's separate legal status and function, our constitutional tradition is to evaluate the

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

Indiana Constitution’s protections for Hoosiers independent of the United States Constitution and its interpretations. This approach is consistent with this Court’s duty as a court of last resort, with full and unreviewable authority to interpret our state’s Constitution. The State’s argument in favor of Indiana’s statute criminalizing abortion mimics the one accepted by the United States Supreme Court in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). As in *Dobbs*, the State argues that this Court’s understanding of Indiana’s Constitution should be dictated by “particularized history.” Appellant’s Br. at 43, *passim*. By this, the State means that specific practices in place at the time the Constitution was adopted should be taken to be enshrined in the meaning of the Constitution itself. To do otherwise, the State argues, violates principles of separation of powers and leaves this Court unrestrained and Indiana’s citizens subject to unprincipled judicial activism.

The State advances an interpretive gloss to our Constitution that would encumber Indiana’s citizens in perpetuity with a legal regime that predates the enfranchisement of women on issues that affect them intimately and directly and which burdened, without their representation, their control of their bodies, their reproductive autonomy, and their right to medical care. No theory of governmental or judicial legitimacy native to this country can countenance such a result, as this Court has demonstrated time and again in its reading of our Constitution’s guarantees and protections. This Court’s traditional interpretive tools, which focus

on the text, spirit, structure, and intent of our Indiana Constitution, accord with its core obligation to protect fundamental rights against legislative intrusion.

The State's reading of the history of abortion is similarly unpersuasive. To the extent the historical status of abortion is constitutionally relevant, the State has that history exactly backwards. Historical research demonstrates that Indiana followed the common-law tradition, leaving abortion as a private and unregulated matter before "quickening" (generally between four and five months); that abortion was a common and well-known practice; and that the state statutes in the nineteenth century were concerned with protecting women from harm, particularly by poisoning; did not prohibit abortion *per se*; and were most likely not enforced before quickening because of the need to prove intent. At this point in history, however, concern for women's health counsels against support for S.B. 1's criminalization of abortion, and in favor of women's rights to liberty, autonomy, and the exercise of conscience under Ind. Cons. art. 1 §§ 1 & 3.

ARGUMENT

I. The Court Should Not Adopt a Method of Constitutional Interpretation that Violates Fundamental Tenets of Democratic Government Enshrined in Indiana's Constitution

A. Indiana's Constitution Enshrines The Political Imperative of Consent of the Governed

"There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."

West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 641 (1943). Our Court has forcefully noted Indiana’s constitutional commitment to this principle:

[T]he very opening lines of our constitution . . . declared, as a sort of beacon light to its interpretation, ‘that all power is inherent in the people, and all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well being.’ These are words of warning that the people are the only source of power, [and] it should be recognized that the authority of the governed is essential.

State ex rel. Geake v. Fox, 158 Ind. 126, 63 N.E. 19, 21-22 (1902); *see also* WILLIAM P. McLAUCHLAN, *THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE* 3 (1996) (noting that the 1816 Constitution “made the people of the state the political sovereigns.”)

The political theory of popular sovereignty is conveyed through every founding document of our country and our state, and reiterated in moments of crisis: “Governments,” the Declaration of Independence states, “deriv[e] their just Powers from the Consent of the Governed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The United States Constitution begins: “We the People of the United States.” U.S. CONST. pmbl. The Gettysburg Address saw the great threat of the Civil War in its terms: we fight, said Lincoln, so that “government of the people, by the people, for the people shall not perish from the earth.” President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863). If there is a single idea that created our Nation (and that our Nation commended to the world), it is this one: The people are sovereign.

A near century before the American Republic's constitutional founding, John Locke developed the theory of popular sovereignty to create a tight bond of accountability from their representatives to the people: "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supreme Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them." JOHN LOCKE, TWO TREATISES OF GOVERNMENT at 385 (P. Laslett ed. 1964).

"A dependence on the people is, no doubt, the primary control on the government," wrote James Madison, The Federalist No. 51, at 322 (Clinton Rossiter ed., 1961), and it is this dependence that constrains legislators from enacting laws that unreasonably burden voters. In our state, as in our country, power must be subject to the oversight of the enfranchised.

B. Indiana Women Were Not Enfranchised During the Period Encompassing the Adoption of the Indiana Constitution, and Did Not Consent to Nineteenth Century Laws That Burdened Their Liberty Interests or Exercise of Control Over Their Bodies

"[T]he . . . power is in the people over the Government, and not in the Government over the people," argued Madison. 4 ANNALS OF CONG. 934 (1794). But which people? Our country, and our state, took centuries to realize the promise of this profound political theory. At the time of our state's founding, women were not members of the enfranchised polity and could not consent to laws that burdened them. Women during the antebellum period, in fact, "ha[d] no political existence," SARAH GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN 74 (1838). As our founding political theory would predict and as a direct

result of their disenfranchisement, which continued in Indiana until the passage of the federal Constitution's 19th Amendment in 1920, women suffered under profound legal disabilities.

Under the common law, for instance, the doctrine of coverture effaced a woman's legal personhood and placed her under her husband's control and protection. As a result, "a wife could not use legal avenues, such as suits or contracts, own assets, or execute legal documents without her husband's collaboration [C]overture pervaded the economic realm as well. Upon marriage a woman's assets became her husband's property and so did her labor and future earnings." NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11-12 (2000); ELIZABETH R. OSBORN, *THE INFLUENCE AND CULTURE OF GENDER ON THE CREATION OF LAW IN ANTEBELLUM INDIANA, OHIO, AND KENTUCKY* 110 (2004) (noting husbands were legally free to dispose of their wives' property); *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462, 463 (1896) ("At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of the husband. The husband, by virtue of the marriage, was entitled to all the personal property and choses in action of his wife, which, when reduced to possession, became his absolute property, and was also entitled to the exclusive possession, use, and control of her real estate during their joint lives.") (citations omitted).

Thus, during both 1816 and 1851, husbands were "the one full citizen in the household." Cott, *supra*, at 12. And "the public officials, the authoritative legal

voices, were all male. Judges, legislators, juries, treatise writers, all of them.”

HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 11 (2000).

During this period, when the laws burdened women, they lacked effective recourse, either political or legal, to object. Nevertheless, object they did. In calling for an Indiana woman’s rights convention in 1851, one reformer stated that “since women of our land are being oppressed and degraded by laws and customs of our country, and are in little better condition than chattel slaves,” women needed to organize to lobby for rights in the upcoming constitutional convention. ANITA MORGAN, *WE MUST BE FEARLESS: THE WOMAN SUFFRAGE MOVEMENT IN INDIANA* 15 (2020). At its first meeting in Dublin, Indiana in 1851, the Indiana Women’s Rights Association demanded, among other things, “[t]hat as the qualification for citizenship in this country is based on capacity and morality, and as the sexes in their mental condition are equal . . . , wom[e]n should enjoy the same rights of citizenship as m[e]n.” *Id.* at 21.

The delegates to the 1851 constitutional convention debated (and defeated) the inclusion of expanded women’s property rights; suffrage was barely discussed. Osborn, *supra*, at 200-22. That discussion reflected the antique gender views of separate, and legally enforced, spheres for men and women. *Id.* It would be another sixty-nine years until Indiana’s women gained the vote.

**C. The State’s Interpretive Theory Is Politically and Judicially
Illegitimate and in Conflict with the Wishes of Many Who Debated the
1851 Constitution**

The State avoids grappling with the serious constitutional question in this case by arguing that laws aimed directly at women and enacted when women were

disenfranchised should be resurrected and given determinative legal effect to deny women their fundamental right to bodily integrity and medical care in the twenty-first century. There is no political theory native to our country or our state under which this approach is legitimate. Indeed, it was exactly this argument that led the United States Supreme Court to its most shameful error in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that the 14th Amendment should not be interpreted to abolish racial segregation:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id. at 544. The Plessy Court buttressed its argument that those who passed the 14th Amendment did not intend to affect segregation by pointing to “particularized history” in exactly the way the state argues here: laws passed by the Congress creating segregated schools, and other practices, such as the “[l]aws forbidding the intermarriage of the two races.” *Id.* at 545-46. And it could have pointed to more: Many articles claim that the galleries before which the 39th Congress debated the 14th Amendment were segregated. *See, e.g.*, Richard Primus, *Segregation in the*

Galleries: A Reconsideration, 18 MICHIGAN L. REV. ONLINE (Jan. 2020),

<https://michiganlawreview.org/segregation-in-the-galleries/>.

There is no stopping point for this approach, which substitutes assumed social practice from an era when both women and people of color were legally disabled and disenfranchised for principled analysis of the language and purpose of the actual Constitution.

**D. The State’s Proposed Interpretive Methodology Unduly Narrows
Indiana’s Approach to Constitutional Interpretation**

Mimicking the argument in *Dobbs, supra*, the State stakes its position on two propositions: first, our Constitution “nowhere declares a right to abortion,” that is, the specific practice is not named in the text of the Constitution; and second, that the specific practice of abortion was beyond the contemplation of Indiana’s constitutional framers. From this it concludes that women’s bodily autonomy and medical care cannot be within our Constitution’s protections for liberty and conscience. Our distinctive constitutional methodology does not limit this Court’s inquiry into the meaning of Article 1 §1 or §3 in the ways the State suggests.

Indiana is not a “lockstep” state. This Court’s position, consistent with our Constitution’s separate legal status and function, is that it must evaluate the Indiana Constitution’s protections for Hoosiers independent of the interpretations of the United States Constitution. This approach accords with this Court’s duty as a court of last resort, with full and unreviewable authority to interpret our state’s Constitution. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 193-232 (2009); Loretta H. Rush & Marie Forney Miller, *Cultivating State*

Constitutional Law to Form a More Perfect Union—Indiana's Story, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377 (2019) (state and federal constitutions serve complementary purposes that require separate interpretation); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 579-80 (1989) (discussing cases where this Court “charted its own course” independent of federal constitutional interpretations).

This Court considers text, history, structure, and the purpose, and intent of the Constitution’s provisions, and does not give any one of these determinative effect. *See generally Price v. State*, 622 N.E.2d 922 (Ind. 1993). To begin with history, the men who adopted Art. 1 §1 understood it as a broad protection of liberty from government overreach. This Court has noted before in discussing the right of “[e]very human being of adult years and sound mind . . . to determine what shall be done with [her] own body,” that Indiana’s understanding of that issue “has evolved in a legal culture governed by the Indiana Constitution, which begins by declaring that the liberty of our citizens is inalienable. Ind. Const. art. 1 § 1. The 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.” *In re Lawrance*, 579 N.E.2d 32, 38-39 (Ind. 1991). The *Lawrance* Court cited the constitutional debates: “Delegate Thomas Smith declared that article I, section 1, constituted a recognition that God had given to all persons equally complete sovereignty over their affairs, including the simplest such as the pursuit of happiness and ‘the right to walk abroad and look upon the

brightness of the sun at noon-day[.]” *Id.* at 39 n.3 (quoting 1 DEBATES IN INDIANA CONVENTION 968 (1850)). Delegate John B. Howe claimed further “that when people create governments, they do not create restrictions on their natural rights but merely delegate a portion of them to government for so long as they deem it expedient.” *Id.* Even in the face of arguments that it should be removed because it was inconsistent with the inequality of African Americans, the framers kept Art. 1, §1 because, as one of them put it, this language had:

become the watchword of liberty throughout the world It has not yet fulfilled its destiny, nor will it until universal liberty prevails upon the earth. And shall we now discard this principle which our fathers proclaimed defiantly in the face of the most powerful nation on the globe . . . ? I trust not, sir. Let us give to this principle the first place in our bill of rights.

1 DEBATES, *supra*, at 957 (Mr. Dunn).

These men expected the Constitution to facilitate progress, including progress on the rights of both people of color and women. Limiting analysis of Art. 1, § 1 in the manner the State advocates would directly contradict the intent of many who voted for the provision’s inclusion.

Second, contrary to the State’s view that it is inoperable, Art. 1, §1 was fiercely debated at the 1850 convention precisely because many delegates believed not only that the section presupposed and enshrined enforceable rights but also that those rights would some day be understood to include women and people of color. *See id.* at 952-64, 966-74. There was no suggestion that it would have no effect. For instance, many delegates arguing against its inclusion believed it would void a separate article restricting the rights of African Americans within the state. *Id.*

Section 1 opponents made a similar argument in reference to women's rights.

Nonetheless, the section was ultimately approved, with one of the delegates in favor declaring that "I believe in the doctrine of human progress The future, bright and beautiful, is looming up in the distance And mankind, in one great brotherhood, will rally around the spurned and condemned idea of the equality of man." *Id.* at 964. This hope for the future was expressed elsewhere in the debates. In remarking on the changes occurring in other states regarding women's property rights, for instance, Mr. Read of Monroe County stated "I rejoice in the progress of just sentiments which . . . has taken place all over the United States It is one of those principles of justice and humanity, which is triumphing over long established custom, and is finding a lodgment in our laws, as well as in our hearts and judgments." 2 DEBATES, *supra*, at 1188.

Structurally, Art. 1, § 1 is not a preamble, but the first operative section of the Constitution. Judicial review of statutes for constitutionality was well-known at the time of the convention and well-established in our state. *State v. Mead*, 4 Blackf. 309 (Ind. 1837); *Rubottom v. McClure*, 4 Blackf. 505 (Ind. 1838) (both holding legislation unconstitutional). And the early Indiana Court gave operative effect to this section in *Herman v. State*, 8 Ind. 545, 558-59 (1855) (recognizing Art. 1, § 1's liberty protected the humble "right . . . of selecting what [one] might eat and drink, in short his beverages, so far as he may be capable of producing them.").

Third, neither the men who debated Indiana's 1851 Constitution nor the men who interpreted it in its earliest days invoked the kind of blind fealty to the

particularized practices of the day that the State advocates, or thought that every factual setting to which the Indiana Bill of Rights and its broad concept of liberty would be applicable needed to be specified in the text. Indeed, they wrote the Bill of Rights against a broad understanding of natural rights that preexisted the Indiana Constitution and were presupposed and enshrined by it. *See, e.g.*, Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 335 (2021) (“Founding-Era Americans . . . assumed that written constitutional provisions worked in concert with and bled seamlessly into a broader field of non-positive fundamental law derived from several sources. Plenty constitutional content was constituted by text; but plenty was not. It was, therefore, not possible to reconstruct a constitution’s full content solely from what had been written. To think otherwise at the Founding was to misunderstand how constitutionalism worked.”) For the State, the Indiana Constitution’s seamless blending of natural and positivist understanding is a problem the State proposes to solve by counseling this Court to simply ignore Art. 1, §1. Appellant’s Br. at 37. As this Court has previously noted, however,

this Court determined that it would not root Indiana constitutional jurisprudence in the shifting sands of philosophical inquiry . . . [and has been] inclined toward the view that “fundamental rights are those which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms[,] [n]onetheless, in determining the scope of our Bill of Rights’ provisions, we are not at liberty to discard the fact that the drafters of those provisions conceived of their handiwork in natural law terms. Confronted with §1 claims, for example, we have examined text and history to determine whether a given interest is of such a quality that the founding generation would have considered it fundamental or “natural.”

Price v. State, 622 N.E.2d 954, 959 n. 4 (1993) (quoting *In re Lawrance*, 579 N.E.2d at 39) (additional citations omitted).

Fourth, our judiciary has likewise from its earliest decisions understood Indiana's Constitution to encompass not only the specific language of its provisions but also their "spirit and intent." *Wilkins v. Malone*, 14 Ind. 125, 126 (1860) (finding Art. 1, § 14's prohibition on compelled testimony in a criminal suit extended to incriminating testimony in a civil case: "Literally, this provision extends to criminal prosecutions only, and not to civil actions; but we think its spirit and intent go much farther . . ."); *Webb v. Baird*, 6 Ind. 11, 15 (1854) (finding Indiana's constitution held an implicit right to counsel in a criminal case for paupers: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty shall be debarred of counsel because he was too poor to employ such aid."); *State ex rel. Geake v. Fox*, 63 N.E. 19, 21 (Ind. 1902) ("When the validity of legislation is brought in question, it is not necessary to show that it falls appropriately within some express, written prohibition contained in the Constitution. The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as written words, and such restraints may be found either in the language employed or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the provision as part of the organic law.") (citation and internal quotation marks omitted).

A mere forty years after the Constitution’s adoption, this Court held that a woman’s right to the choice of vocation was protected under Art. 1, § 1, and that “[t]he fact that the framers of the constitution . . . did not anticipate a condition of society when women might desire to enter the profession of law for a livelihood, can not prevail as against their right to do so[.]” *In re Leach*, 134 Ind. 665, 669-70 (1893). Rather than restrict themselves to a view of women’s rights defeated in the constitutional convention, the unanimous majority in *Leach* acknowledged that “[a]ll progress in social matters is gradual. We pass, almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it.” *Id.* at 670 (quoting *In re Mary Hall*, 50 Conn. 131 (1882)).

Finally, understanding Art. 1, § 1’s liberty interest to encompass a right to bodily and reproductive autonomy and to choose appropriate medical care—the most intimate sorts of decisions into which the state can intrude—is supported by Art. 1, § 3’s prohibition of laws that interfere with “rights of conscience,” the right most central to personal autonomy. There can be no doubt that central premises of S.B. 1 are not shared by thousands of Hoosier women, who do not hold the unquestionably religious beliefs expressed by this law about the fetus. This Court has held since the nineteenth century that the freedom to choose religious beliefs, or no religious beliefs at all, is protected by the Indiana Constitution. *Smith v. Pedigo*, 145 Ind. 361, 33 N.E. 777 (Ind. 1893).

II. Through Most of the Nineteenth Century, Abortion in Indiana Was A Private Matter Not Regulated Before “Quickening,” Not Prohibited Per Se, And Only Regulated To Protect Women’s Lives

No less an authority than Justice Holmes counseled that the meaning of historical facts is as contested and disputable as the language of constitutions. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Resort to history does not avoid the uncertainties inherent in the task of interpretation; it simply moves them to a different location, one that requires care and humility. The nineteenth century practices around abortion the State believes are obvious and straightforward were not; rather, the State superimposes current debates on a past that did not contain them. This frail reading of history should not control the Court’s understanding of our current constitution.

The State would have this Court follow a “particularized history” that it misdescribes, but no wonder: It spins its account of abortion’s history during a period that began more than two centuries ago without citing a single historian—and this despite the existence of multiple well-researched histories of the common-law and statutory history of abortion in the relevant period. *See, e.g.*, JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 155-95 (1985); Brief Amicus Curiae of the American Historical Association in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (describing the evolution of abortion in the early days of the Republic through the adoption of the U.S. Constitution’s 14th Amendment). The State presents no evidence that Indiana’s regulation of abortion followed an arc different from most of its contemporaries during the period from before 1816’s first

constitution, and through its 1851 Constitution, and the materials that it cites from Indiana do not support its claims that “the Constitution’s framers regarded abortion as a criminal act that destroys innocent human life.” App. Br. at 26. Rather, like other states, Indiana largely left abortion unregulated before the fourth or fifth month of pregnancy. Its eventual nineteenth century statutes regulated methods of abortion but did not prohibit abortion *per se*.

A. At the time of the 1816 Constitution, Indiana Followed the Common Law, Leaving Termination of Pregnancy Unregulated Through Quickening

We agree with the State that Indiana received the common law through its reception statute in 1807. Appellant’s Br. at 45. As the State comes close to admitting, *id.* at 44-45, the common law expressed no interest in regulating the termination of pregnancies before “quickening,” that is, the point at which a woman could feel movement of a fetus. *Cheaney v. State*, 259 Ind. 138, 144, 285 N.E.2d 265, 268 (Ind. 1972) specifically so noted: “[U]nder the common law, abortion could be a crime only after the unborn child had quickened.” (citations omitted).

Quickening was the first perception of fetal movement by the pregnant woman herself. Quickening generally occurred near the mid-point of gestation, late in the fourth or early in the fifth month, though it could and still does vary a good deal from one woman to another. The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened.

Mohr, *supra*, at .3. Only the pregnant woman could definitively determine whether terminating a pregnancy at a given time was permissible or prohibited, because only she could detect whether this “stirring” had occurred. *See* ALFRED

SWAINE TAYLOR ET AL., A MANUAL OF MEDICAL JURISPRUDENCE 421 (6th ed. 1866)

(“No evidence but that of the female can satisfactorily establish the fact of quickening.”). A woman’s perception and recognition of movement signified in the common law that the fetus had an existence separate from hers. For the lawyers and judges announcing and applying this principle, “[i]t [was] not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period.” *State v. Cooper*, 22 N.J.L. 52, 55 (N.J. 1849) (recognizing that at common law, an attempt to procure an abortion before quickening was not a crime: “So far as my researches have gone, I have found no precedent, no authority, nor even a dictum (prior to Lord Ellenborough’s act, 43 Geo. 3, c. 58,) which recognizes the mere procuring of an abortion as a crime known to the law.”). That is because, “[i]n contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life.” *Id.* at 54. Accordingly, under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move. Importantly, of course, only the woman could make this determination. As medical textbooks from this period made clear, “pregnancy was impossible to diagnose with complete accuracy during the early months of gestation.” Mohr, *supra*, at 14 (citing textbooks and medical journals). “The use of quickening to distinguish criminal from legal abortion meant that under the law a woman had complete dominion over her womb until the first fetal movements, generally in the fourth or fifth month of pregnancy.” Grossberg, *supra*, at 160.

Evidence that abortion was a common practice can be inferred from declining fertility rates during America's nineteenth century, when "white female fertility . . . declined in each decade of the century, falling from 7.04 in 1800 to 3.56 a hundred years later." Grossberg, *supra*, at 156. This decline was the result of "the quiet determination of American mothers and fathers to reduce the number of children they reared." *Id.* In fact, Indiana's Robert Dale Owen, one of the chief proponents of Art. 1, § 1 in the 1851 debates (and a future Indiana Congressman), was a proponent of birth control and the author of *MORAL PHYSIOLOGY: A BRIEF AND PLAIN TREATISE ON THE POPULATION QUESTION* (1830), which advocated for birth control as a "means of restructuring sexual relations on more humane and equitable lines." Grossberg, *supra*, at 157. Early in the nineteenth century,

[a]bortion began to vie with contraception as a method of family limitation. . . . It had two main appeals: its effectiveness at a time when contraceptive techniques were neither reliable nor always obtainable; and its availability as a way for wives to unilaterally terminate a pregnancy. . . The middle classes embraced abortion in the late 1830's and 1840's, 'when the modern child-centered family in which the woman was the moral guide and guardian was establishing itself.

Id. at 159.

Abortion was also readily available. "Abortionists and sellers of abortifacients and contraceptive methods had been advertising extensively, if subtly, for decades, their main clients being married women." Cott, *supra*, at 126. This was also true in Indiana: advertisements for products to "unstop menses" were common in Indiana newspapers throughout the relevant period. *See, e.g.*, *DAILY STATE SENTINEL* (Indianapolis, Marion County), Jan. 5, 1856 (advertising "Sir James Clarke's

celebrated female pills remove all obstructions and restore the monthly period” (later marketed as Job Moses Sir J. Clarke’s Female Pills and Sir J Clarke’s Pills for Periodic Irregularities, these pills were, despite their stated purpose, a well-known abortifacient.); DAILY WABASH EXPRESS (Indiana, Terre Haute, Vigo Country) Nov. 11, 1867 (“Dr. Velpau's French Pills keep the complexion clear and regulate the entire female system;” Velpeau was widely known in France for his 1829 publication on obstetrics. Abortion pills that were advertised in America in the period from 1864-1868 were said to be his invention or discovery.); GREENCASTLE BANNER (Indiana, Putnam County) June 27, 1872 (“Dr. Pierce’s favorite prescription is guaranteed to work for many chronic diseases incident to women;” Dr. Pierce’s Favorite Prescription was a common abortifacient); Indianapolis News, Marion County, Oct. 15, 1885 (“Pennyroyal Pills indispensable to the ladies;” Since antiquity, Pennyroyal was known as an effective abortifacient. When consumed as a beverage, this plant promoted menstruation and expulsion of the placenta and fetus.); DAILY STATE SENTINEL (Indianapolis, Marion County), Sept. 1854 (“Daggett & Co. Renovating pills can be used in all cases where purgative medicine is needed and curbs female diseases;” “Renovating pills” marketed towards women was a common term for abortifacients).

Thus, all evidence suggests that abortion was common; that the common law left it unregulated before quickening (about the midpoint of pregnancy); and that methods to obtain abortions were widely advertised.

B. In 1835, Indiana Criminalized Dangerous Abortion Practices as Part of its Criminal Code on Poisoning in Order To Protect Women’s Health,

**But There Is No Evidence That the Statute Applied Before Quickening,
That It Represented Concern for the Fetus, or That It Banished Abortion
Per Se**

Legislators in the United States began to make some methods of abortion illegal as part of the general process of criminal codification of the criminal law in the 1820's, Grossberg, *supra*, at 161, and most, like Indiana's, "were inserted into American criminal codebooks between 1821 and 1841." Mohr, *supra*, at 20. Indiana's 1835 statute made it a misdemeanor to "wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or . . . use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman." 1835 Ind. Laws ch. XLVII, § 3.

These early laws had several things in common with Indiana's. First, they were primarily concerned with attempted murder by poisoning. "Indeed, [they] might best be characterized as a poison control measure." Mohr, *supra*, at 21. Indiana's 1835 statute is embedded in the poisoning section of the code, which included administering poison with the intent to kill (§1), mingling poison with food, drink, or medicine with intent to kill (§2) and medicine administered to a pregnant woman with intent to produce miscarriage (§3). The statute makes an explicit exception for administering medicine to "preserve the life of such woman." 1835 Ind. Laws, *supra*.

Second, as with Indiana's statute, most early statutes "did not proscribe abortion per se; rather, [they] declared illegal [certain methods] of abortion because [those methods were] considered prohibitively unsafe" Mohr, *supra*, at 22.

There is only one reported Indiana prosecution under the 1835 statute, and it concerned murder by poisoning. *Carter v. State*, 2 Ind. 617 (1851).

The 1835 statute's language is functionally identical to contemporaneous statutes in other states that were acknowledged by courts—even at the time they were in force—as primarily intended to protect the health of women, not prevent abortions. *See, e.g., State v. Murphy*, 27 N.J.L. 112, 114 (1858) (“The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts”); *Dougherty v. People*, 1 Colo. 514, 523 (1872) (noting that “[i]n the attempts made at abortion, the health of the mother is more frequently ruined than the life of the child is destroyed”); *Commonwealth v. Morrison*, 82 Mass. 224, 225 (1860) (stating that “it may well be that the legislature has thought fit to punish [the provider of an abortifacient] for thus tampering with a woman's health and life”); *People v. Phelps*, 15 N.Y.S. 440, 441-42 (N.Y. Gen. Term 1891) (holding that New York's statute was designed to punish “even the offense of giving medicine with such intent to one not pregnant,” because “of the injurious effect of such medicine on a woman, whether pregnant or not”).

Third, notwithstanding their language, there is no evidence that these statutes changed judges' views with respect to the legal status of the fetus, and “quickenings continued to play a significant role in abortion litigation, especially in the question of intent.” Grossberg, *supra*, at 165 (discussing cases). Without a

woman's testimony or a post-mortem it remained impossible to determine pregnancy until about the midterm:

[I]n practice, indictments could not be brought under these laws before quickening because intent had to be proved and the only way that intent could be proved was to demonstrate that the person who administered the poison could have known beyond any doubt that the woman was pregnant. Thus, the omission of explicit reference to quickening in . . . early laws probably reflected the fact that the quickening distinction was taken completely for granted, rather than any effort to eliminate it.

Mohr, *supra*, at 26.

Indiana's 1835 statute, then, did not prohibit abortion in all cases, more than likely did not apply at all before quickening, and was a misdemeanor. It certainly did not express, as the State paints it, the view that "abortion destroys innocent human life," unless the State is speaking of the pregnant woman's life. Appellant's Br. at 26. Thus, to the extent those who adopted either our 1816 Constitution or its 1851 version had views about abortion, available evidence suggests that before quickening, they viewed abortion as a private matter.

C. While Indiana's Statutes During the Period from 1835-1881 Were Concerned with Preserving the Woman's Life, Indiana's Current Ban on Abortion Endangers Women's Health and Deprives Them of Their Liberty in Service of a Religious Concept

Given the severe risks that accompanied abortion in the 19th century, states may have been justified in curtailing women's liberty to preserve their lives. *See Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993) ("[s]tate powers were . . . intended to perform an ameliorative function.") The California Supreme Court so concluded when it struck down its state's abortion statute, stating that "in the light of the then existing medical and surgical science [in 1850], the great and direct interference

with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous.” *People v. Belous*, 71 Cal. 2d 954, 964-65 (1969).

The period during which abortion was clearly criminalized, beginning in the late nineteenth century and continuing through *Roe v. Wade*, 410 U.S. 113 (1973) was also a dangerous one for women, who continued to obtain abortions illegally, often exposing them to criminal extortion or lethal malpractice. See generally LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (2022) (describing the process by which abortion was criminalized and its results); Grossberg, *supra*, at 170-175 (describing “high tide of antiabortion legislation” from 1860-1880). Indiana’s 1881 statute, adopted during this period, unambiguously made procuring an abortion illegal. Eugene Quay, *Justifiable Abortion---Medical and Legal Foundations*, 49 GEO. L. J. 395, 468 (1961); Ind. Laws ch. XXXVII §22 (procuring an abortion); §23 (criminalizing women soliciting abortion). The reported prosecutions under that statute all involved women’s deaths. *Montgomery v. State*, 80 Ind. 338 (1881) (abortion resulting in death of woman); *Traylor v. State*, 101 Ind. 65 (1885) (abortion resulting in death of a pregnant woman); *Hensley v. State*, 107 Ind. 587 (1886) (abortion resulting in miscarriage and woman’s death); *Rhodes v. State*, 128 Ind. 189 (1891) (abortion resulting in woman’s death and miscarriage); *Holland v. State*, 131 Ind. 568 (1892)

(abortion resulting in woman's death); *Hauk v. State*, 148 Ind. 238 (1897) (criminal abortion resulting in woman's death).

As the *Belous* court acknowledged, modern medical science is such that concerns for women's health that may have motivated legislators during Indiana's founding period are no longer valid justifications for the type of "great and direct interference" with constitutional guarantees of liberty and privacy that S.B. 1 represents. Abortion today is a common medical procedure. In 2017, over 860,000 abortions were performed in this country, including 7,710 in Indiana. GUTTMACHER INSTITUTE: STATE FACTS ABOUT ABORTION.² Approximately one quarter of American women have an abortion before the age of 45. Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 AM. J. PUB. HEALTH 1904, 1908 (2017). The overwhelming weight of medical evidence demonstrates the safety of modern abortion. *See, e.g.*, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, MEDICINE, THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES 10 (2018) ("The clinical evidence clearly shows that legal abortions in the United States - whether by medication, aspiration, D&E or induction - are safe and effective. Serious complications are rare.").

S.B. 1 threatens to plunge Hoosier women back into the peril from which they emerged in 1973. Our Indiana Constitution, which is more solicitous of both liberty and conscience than our country's, must be interposed between the State and that fate.

² <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-in.pdf>

CONCLUSION

The Trial Court's grant of a preliminary injunction should be sustained.

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.

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CERTIFICATE OF FILING AND SERVICE

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