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IN THE

Supreme Court of Indiana

No. 22S-PL-00338

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC., et al., *Appellees-Plaintiffs*,	)	Interlocutory Appeal from Monroe County Circuit Court
v.	)	Trial Cause No. 53C06-2208-PL-001756,
MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities, et al., *Appellants-Defendants.*	)	The Honorable Kelsey Hanlon, Special Judge.

BRIEF OF APPELLEES-PLAINTIFFS PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC., WOMEN'S MED GROUP PROFESSIONAL CORPORATION, WHOLE WOMAN'S HEALTH ALLIANCE, ALL-OPTIONS, INC., AND DR. AMY CALDWELL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

DOCKETED CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF SUPREME COURT JURISDICTION

1. Plaintiffs concur with the State's Statement of Supreme Court Jurisdiction. State Br. 12.

COUNTER-STATEMENT OF THE ISSUES

2. Whether Plaintiffs have standing to challenge S.B. 1, which would ban nearly all abortions in the state, and which threatens to injure Plaintiffs through prison sentences and loss of licensure and also to injure their patients and clients, who face serious obstacles to challenging S.B. 1 on their own behalf, but would be deprived of necessary medical care if it took effect.

3. Whether the trial court correctly recognized, consistent with this Court's longstanding jurisprudence, that Article 1, Section 1 is judicially enforceable.

4. Whether the trial court correctly found that there is a reasonable likelihood that Article 1, Section 1 protects the right to abortion, and that S.B. 1 materially burdens that right by banning nearly all abortions in the state.

5. Whether the trial court abused its discretion in concluding that the balance of the harms and the public interest weighed in favor of a preliminary injunction that permits Hoosiers to decide whether to continue a pregnancy consistent with Indiana's pre-existing restrictions on abortion care.

STATEMENT OF THE CASE

On August 31, 2022, Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.; Women's Med Group Professional Corporation; Whole Woman's Health Alliance; All-Options, Inc.; and Amy Caldwell, M.D. ("Plaintiffs") filed suit in Monroe Circuit Court against members of the Medical Licensing Board of Indiana and several county prosecutors (collectively "the State") challenging the constitutionality of Senate Bill 1 ("S.B. 1"), a near-total ban on abortion, under Article 1, Sections 1, 12, and 23 of the Indiana Constitution.

App. II, 43-64.[1] Plaintiffs simultaneously moved for a preliminary injunction barring its enforcement. App. II, 65-66.

The State filed its opposition and supporting declarations on September 16. Plaintiffs filed a reply on September 19, the same day the trial court heard argument on the motion. After considering the parties' filings, record evidence, argument, the text of the Indiana Constitution, and relevant case law, the trial court issued a detailed and thorough order granting a preliminary injunction and enjoining Defendants from enforcing S.B. 1 during the pendency of the litigation.

The State appealed the preliminary injunction to the Court of Appeals, moved for a stay of the preliminary injunction pending appeal, and sought to transfer the appeal to this Court under Indiana Rule of Appellate Procedure 56(A). On October 12, this Court granted the motion to transfer and denied the motion to stay.

STATEMENT OF FACTS

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

The long-standing status quo in Indiana is that Hoosiers have been legally permitted to obtain safe abortions at licensed abortion clinics, hospitals, and ambulatory outpatient surgical centers ("ASCs"). *See, e.g.*, Ind. Code §§ 16-18-2-1.5,[2] 16-21-2-1, 16-34-2-1(a)(1). On August 5, 2022, the General Assembly passed, and Governor Holcomb signed, S.B. 1, which briefly took effect on September 15, virtually eliminating abortion access in the state.[3] The trial court's preliminary injunction—supported by this Court's denial of the State's stay motion—is the only

[1] Citations herein to "App." refer to the State's Appendix. Citations to "Pl.App." refer to Plaintiffs' Appendix.

[2] S.B. 1 repealed or amended the following Indiana Code provisions on September 15, 2022 that were subsequently temporarily enjoined by the trial court's September 22, 2022 Order: Ind. Code §§ 16-18-2-1.5, 16-21-2-1, 16-34-2-1, 16-34-2-7(a), 16-18-2-327.9, 25-22.5-8-6(b)(2).

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

thing ensuring Hoosiers have continued access to the abortion care they have relied on for 50 years.

If this Court vacates the preliminary injunction, S.B. 1 would ban abortion in Indiana by making performing an abortion a Level 5 felony, punishable by imprisonment for one to six years and a fine of up to $10,000. § 28 (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 or to save the pregnant woman's life" ("Health or Life Exception"), Section 21 provides that abortions are permitted before "the earlier of viability of the fetus"[4] or 22 weeks LMP.[5] Ind. Code § 16-34-2-1(a)(1)(A)(i). Section 21 also provides that 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 viability … or [22 weeks LMP] and any time after." § 21 (Ind. Code § 16-34-2-1(a)(1)(A)(i), (3)(A)).[6] "[S]erious health risk" means that:

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[4] S.B. 1 does not define "viability," but Indiana Code generally states, "'[v]iability' … means the ability of a fetus to live outside the mother's womb." Ind. Code § 16-18-2-365.

[5] 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 first day of the patient's last menstrual period ("LMP"), the accepted approach to dating pregnancy in the medical field. Measuring gestational age by LMP adds two weeks to the "postfertilization age" because fertilization typically occurs around two weeks LMP.

[6] Before the trial court, the parties agreed that "subsection (a)(1) applies to abortions sought '*before* the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus,'" whereas "subsection (a)(3) applies to abortions sought '*at* the earlier of viability of

> 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 a serious health risk to the patient or to save the patient's life. § 21 (Ind. Code § 16-34-2-1(a)(1)(E), (3)(E)).

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" ("Lethal Fetal Anomaly Exception"). § 21 (Ind. Code § 16-34-2-1(a)(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 (Ind. Code § 16-34-2-1(a)(1)(E)).

Third, abortions are permitted up to 12 weeks LMP if the pregnancy was a result of rape or incest ("Rape or Incest Exception"). § 21 (Ind. Code § 16-34-2-1(a)(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 (Ind. Code § 16-34-2-1(a)(2)).

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the fetus or twenty (20) weeks of postfertilization age of the fetus *and any time after*.'" *See* App. II, 177; *see also* App. III, 88.

S.B. 1 would also eliminate licensed abortion clinics in the state—where the vast majority of abortions currently occur—and require that any abortions performed under its narrow exceptions take place at a licensed hospital or an ASC majority-owned by a hospital ("Hospitalization Requirement"). § 21 (Ind. Code § 16-34-2-1(a)(1)(B), (2)(C), (3)(C)).

In addition to the felony-level criminal penalties for a violation of S.B. 1, a physician "shall" have her 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 "in all instances" outside of S.B. 1's three narrow exceptions. § 41 (Ind. Code § 25-22.5-8-6(b)(2)). The Attorney General must also show by a preponderance of the evidence that the physician performed the abortion with the intent to avoid the requirements of those provisions. *Id.*

B. Plaintiffs Provide Safe and Essential Reproductive Health Care and Support Services in Indiana

PPGNHAIK is a not-for-profit corporation incorporated in Washington State. App. II, 109. It is the largest provider of comprehensive reproductive health services in Indiana, operating 11 licensed health centers throughout the state. App. II, 110. It offers medication abortion up to 10 weeks LMP at its Lafayette health center, and medication abortion up to 10 weeks LMP and procedural (sometimes referenced as surgical) abortion up to 13 weeks 6 days LMP at its Bloomington, Merrillville, and Georgetown Road (Indianapolis) health centers. App. II, 110-111.

Women's Med is a for-profit organization incorporated in Ohio. App. II, 115. It operates a licensed abortion clinic in Indianapolis that provides procedural abortions until 13 weeks 6 days LMP, medication abortions until 10 weeks LMP, and contraceptive services. App. II, 116.

WWHA is a not-for-profit organization incorporated in Texas, with a mission to provide abortion care in underserved communities. App. II, 119-120. WWHA operates a licensed abortion clinic in South Bend, which provides medication abortions until 10 weeks LMP as well as contraceptive services. App. II, 120.

Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in Indiana. App. II, 123. She provides abortion care at IU Health and PPGNHAIK's Georgetown Road Health Center. *Id.*

All-Options is a not-for-profit organization incorporated in Oregon. App. II, 140. 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. App. II, 140-141. The Pregnancy Resource Center also operates the Hoosier Abortion Fund, which provides financial assistance to Indiana residents who would otherwise be unable to afford abortion care. App. II, 141.

C. Abortion Is Safe, Common, and Essential Reproductive Healthcare, the Denial of Which Will Subject Hoosiers to Serious Harms

Legal abortion is one of the safest medical interventions in the United States and is substantially safer than continuing a pregnancy to childbirth. Pl.App. II, 118-119; Pl.App. III, 36. 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 give birth than among those who have abortions. Pl.App. II, 118. Complications from both medication and procedural abortion are rare. App. II, 30 (¶ o). 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. App. II, 127. Since Indiana began reporting data on maternal mortality,

not one reported maternal death has resulted from abortion; only 49 patients—0.6%—experienced one or more complications because of abortions in Indiana last year. Pl.App. III, 92, 118, 141, 165. The vast majority of abortions in Indiana (over 98.4% in 2021) occur in licensed abortion clinics. Pl.App. III, 91, 118, 141, 165, 193, 227; Pl.App. IV, 25.

Procedural abortion and medication abortion are common medical procedures. App. II, 30 (¶ o). About one in four American women will have an abortion by the time they reach age 45, and about one in five pregnancies in the United States in 2020 ended in abortion. Pl.App. III, 28, 32. In Indiana, 8,414 abortions were performed in 2021. Pl.App. III, 76. The preliminary injunction currently in place maintains pre-S.B. 1 law, which permits Hoosiers to obtain abortions until the earlier of viability or 22 weeks LMP.[7] Ind. Code § 16-34-2-1(a)(2).

People decide to end pregnancies for a variety of reasons. App. II, 126. Some decide that it is not the right time to have a child or to add to their families; some end pregnancies because of a severe fetal anomaly; some because they have become pregnant as a result of rape or incest; some choose not to have biological children; and, for some, continuing with pregnancies could pose significant health risks. App. II, 32 (¶ x), 127-131. 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 their existing children. App. II, 126, 131; *see generally* Pl.App. III, 42-48.

[7] Under existing state law, a patient seeking an abortion in the second trimester (or after roughly 13 weeks 6 days LMP) must obtain that abortion at a hospital or ASC. *See* Ind. Code § 16-34-2-1(a)(1) (allowing abortions by physicians in the first trimester, regardless of where it is performed); Ind. Code § 16-34-2-1(a)(2)(B) (limiting abortions after the first trimester to those performed in a hospital or ASC).

D. S.B. 1 Would Deprive Nearly All Hoosiers of Abortion Care and Severely Injure Plaintiffs

If permitted to take effect, S.B. 1 would deny abortions to the vast majority of Hoosiers who seek them. People forced to bear children against their will face a host of economic and social harms, including job loss and the inability to exit abusive relationships. App. II, 130-131; Pl.App. III, 57-63. S.B. 1 would require thousands of Hoosiers 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. App. II, 110-113, 117-118, 121-122, 127, 136, 142-143. Hoosiers seeking out-of-state abortions would need to gather more money to cover higher travel costs. App. II, 111-113, 117-118, 121-122, 142-143. Many would lose income from taking time off work and would risk their employment. App. II, 111-113, 117-118, 121-122. The longer time away from home required for out-of-state travel would also make it harder to find childcare. App. II, 111-113, 117-118, 121-122, 143. The logistical and financial challenges of obtaining an out-of-state abortion will only worsen if more states, including Indiana's neighbors, ban or severely restrict abortion. App. II, 111-112, 136. These barriers to obtaining out-of-state care will prevent some patients from accessing abortion, meaning pregnant Hoosiers will be forced to carry their pregnancies to term against their wishes or self-manage their abortions with the attendant legal risks. App. II, 112-113, 118, 122, 143. Even patients who qualify for the Rape or Incest Exception may be prevented from accessing care because survivors, especially minors, may not know they are pregnant until later in pregnancy and will struggle to gather the resources needed to obtain an abortion in a hospital or a hospital-owned ASC—if they are able to do so at all—before the statutorily indicated gestational age. App. II, 135, 142; *see infra* pp. 19.

Patients can find themselves in a vicious cycle of delay while gathering funds and making arrangements, only to find the procedure more expensive at a later gestational age, requiring

further delay, or causing them to time out of care altogether. App. II, 110-113, 117-118, 121-122, 127, 135-136, 142-143. Although abortion is very safe, and significantly safer than continuing a pregnancy and giving birth, delaying abortion care unnecessarily increases medical risk. App. II, 112-113, 118, 121-122, 128-130. Many would suffer serious pregnancy-related symptoms and complications that do not threaten 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). App. II, 113, 118, 128-133.

The barriers imposed by S.B. 1 are most burdensome to Hoosiers with low incomes and to Hoosiers of color. App. II, 112, 117-118, 121-122. Black or African American Hoosiers make up only 9.6% of Indiana's population but obtained 35% of the abortions performed in Indiana in 2020, meaning that they were approximately four times more likely than other demographic groups to obtain abortions. Pl.App. III, 86.[8] Black women would suffer some of the gravest consequences of S.B. 1's enforcement. In 2020, Black, non-Hispanic women experienced the highest rate of pregnancy-associated deaths in Indiana. Pl.App. IV, 59. Additionally, the infant mortality rate among Black, non-Hispanic children in Indiana is more than twice the infant mortality rate of non-Hispanic white children. Pl.App. IV, 100. Hispanic or Latino Hoosiers were also disproportionately likely to obtain abortions, comprising 8.2% of Indiana's population and obtaining 9.9% of abortions. Pl.App. III, 86.[9]

S.B. 1's Hospitalization Requirement exacerbates the harm caused by S.B. 1 by eliminating licensed abortion clinics. Of the 8,414 abortions performed in Indiana in 2021, 8,281

[8] *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).

[9] *Id.*

were performed at these clinics. App. II, 31-32 (¶ v). This means that over 98% of abortions in Indiana were performed in facilities that would no longer be able to serve abortion patients if the preliminary injunction were vacated. Pl.App. III, 93-94. Less than two percent of abortions in the state were performed in hospitals that could provide abortions under S.B. 1. App. II, 31-32 (¶ v). The vast majority of those hospitals are located in and around Indianapolis. Pl.App. III, 94. From 2015 through 2021, only one abortion was performed at an ASC, hospital-owned or otherwise. Pl.App. III, 91, 118, 141, 165, 193, 227; Pl.App. IV, 25; App. II, 30-32 (¶¶ n, v). In short, the Hospitalization Requirement would eliminate the vast majority of locations offering legal abortion in Indiana.

Other barriers make obtaining hospital-based care difficult or impossible. Hospitals often do not advertise their provision of abortions, and there is no evident resource to contact that handles such inquiries. App. II, 136. Given the stigma that surrounds abortion, even Hoosiers who know that some hospitals provide abortions will be wary of cold-calling hospitals to confirm which do. *Id.* Moreover, abortion care in hospitals costs approximately ten times more than abortion care provided by clinics. App. II, 32 (¶ w), 113, 116, 130-131, 136. The cost of abortion in a clinic ranges from around $400 to $725, whereas the cost of an abortion at IU Health, a hospital, is roughly $5,000-$7,000, which is prohibitive for many Hoosiers. *Id.*

S.B. 1 would also inflict severe injuries on Plaintiffs by destroying their livelihoods and frustrating their missions. PPGNHAIK would be hindered from fulfilling its mission of providing comprehensive reproductive health care services to its patients and would lose income. App. II, 111. Providers like Dr. Caldwell would be forced to choose between their ethical obligations to their patients and criminal punishment or loss of their medical license and would be drastically restricted in their ability to provide abortion care. App. II, 133-134. WWHA and

Women's Med would be forced to lay off their staff and relinquish their spaces. App. II, 117, 121. All-Options could not carry out its mission to expand reproductive justice and destigmatize abortions in Indiana and would expend additional funds to pay for Hoosiers seeking abortions to travel to other states. App. II, 142-143.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in preliminarily enjoining S.B. 1, an extreme abortion ban that upends Indiana's long-standing status quo and threatens Hoosiers' health, safety, privacy, and bodily autonomy. After extensive briefing and oral argument, the trial court thoroughly considered this Court's precedent, the factual record, and the preliminary injunction factors. It then issued a detailed opinion concluding that Plaintiffs are reasonably likely to prevail on the merits and would suffer irreparable harm should S.B. 1 take effect during the pendency of the litigation, and that both the balance of the harms and the public interest favor an injunction. Contrary to the State's arguments, that decision was correct and not an abuse of discretion.[10]

First, Plaintiffs have standing to bring this challenge. S.B. 1 would directly and grievously injure them, subjecting Plaintiffs to prison sentences and professional sanction for providing medical care in accordance with their ethical duties. Plaintiffs also have the right—long acknowledged by this Court and state and federal courts across the country—to challenge S.B. 1 on behalf of their patients and clients, on whom the ban would inflict serious injury, and

[10] For the purposes of this appeal Plaintiffs do not challenge the trial court's conclusion that they are unlikely to succeed on their Article 1, Section 23 claim. For avoidance of doubt, Plaintiffs may advance that claim in the trial court proceedings to a final judgment. *See State v. Economic Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011); *Kuntz v. EVI, LLC*, 999 N.E.2d 425, 433 (Ind. Ct. App. 2013).

who face preclusive obstacles to challenging it themselves. Additionally, Plaintiffs have standing under this Court's public standing doctrine.

Second, Plaintiffs are reasonably likely to prevail on the merits because S.B. 1 materially burdens Article 1, Section 1's judicially enforceable guarantee of liberty, which encompasses the right to determine whether to terminate a pregnancy. This Court's precedents acknowledge the judicial enforceability of Article 1, Section 1's liberty guarantees and the substantive privacy, self-determination, and bodily autonomy rights that it protects. As many state supreme courts have held in interpreting analogous constitutional provisions, those rights encompass the ability to terminate a pregnancy.

The trial court did not hold—and Plaintiffs do not assert—that Hoosiers have an unfettered right to abortion or that the State has no valid interest in regulating abortion. Whatever the limits of the State's authority in this respect, S.B. 1 goes too far by banning abortion in nearly all circumstances, no matter how early in pregnancy, thereby materially burdening the core constitutional rights of privacy and bodily autonomy. By allowing abortion only in the most extreme cases and requiring that those abortions occur in expensive hospitals long distances from many Hoosiers, S.B. 1 impermissibly conditions Hoosiers' right to bodily autonomy "upon first experiencing extreme sexual violence or significant loss of physical health or death." App. II, 37. As the trial court correctly determined—in line with over a century of Indiana precedents—S.B. 1 goes too far by making abortion almost completely illegal in Indiana.

Finally, the trial court properly concluded that Plaintiffs would suffer irreparable injury without a preliminary injunction, and that both the balance of the harms and the public interest favor a preliminary injunction. The trial court's conclusions, based on its evaluation of the facts before it, are due substantial deference by this Court. Those facts establish that without the

preliminary injunction, Hoosiers would be forced to carry unwanted and dangerous pregnancies to term.

For these reasons, this Court should hold that the trial court did not abuse its discretion by granting the preliminary injunction to preserve the status quo while the litigation progresses.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of a trial court's grant of a preliminary injunction is "limited to whether there was a clear abuse of discretion." *State v. Economic Freedom Fund*, 959 N.E.2d 794, 799-800 (Ind. 2011); *see also Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003) ("The grant or denial of a preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion."). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances or if the trial court misinterprets the law." *Indiana High Sch. Athletic Ass'n, Inc. v. Martin*, 731 N.E.2d 1, 5 (Ind. Ct. App. 2000); *see also Economic Freedom Fund*, 959 N.E.2d at 799-800.

II. PLAINTIFFS HAVE STANDING

Plaintiffs have standing to pursue this action.[11] First, S.B. 1 directly harms Plaintiffs. Second, Plaintiffs have third-party standing to sue on behalf of their patients and clients, notwithstanding the State's argument that federal prudential considerations counsel otherwise. This Court has never limited third-party standing due to such prudential considerations, and the

[11] It is sufficient for a single Plaintiff to have standing. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Board of Comm'rs in Cnty. of Allen v. Northeast Indiana Bldg. Trades Council*, 954 N.E.2d 937, 943 (Ind. Ct. App. 2011), *trans. denied*. Therefore, this Court's standing analysis must end if it concludes that a single Plaintiff has standing.

United States Supreme Court has consistently recognized that abortion providers have third-party standing. Third, Plaintiffs have standing under this Court's public standing doctrine as they seek to protect a constitutional right.

A. Plaintiffs Have Standing under Indiana Law Because S.B. 1 Directly Injures Plaintiffs

This Court's standing analysis has consistently focused on whether the plaintiff is injured by the action she challenges. *See, e.g.*, *Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022) ("a sufficient injury"); *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1256 (Ind. 2020) ("a substantial present interest in the relief sought") (cleaned up); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973) (direct threat of personal harm where "[t]he physician is the one against whom these criminal statutes directly operate"); *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 794-795 (7th Cir. 2013) (Posner, J.) ("doctors … *have first-party standing* to challenge laws limiting abortion when … penalties for violations of the laws are visited on the doctors") (emphasis added). S.B. 1 meets this standard by inflicting on Plaintiffs the "actual injury" necessary for standing.

Contrary to the State's assertion (at 27-29) that Plaintiffs have not alleged a "personal, direct injury from a violation of their own rights," Plaintiffs are directly harmed by S.B. 1. First, and most obviously, they are subject to the statute's significant criminal penalties and professional sanctions. *See supra* pp. 12; *see also* Ind. Code § 16-18-2-274(a) (defining the term "person" to include "a corporation"). As parties directly regulated by the law and at immediate risk of discipline by violating it, they have standing to challenge it. *See Taylor v. Fall Creek Reg'l Waste Dist.*, 700 N.E.2d 1179, 1183 (Ind. Ct. App. 1998).

Plaintiffs are also injured by complying with the S.B. 1. Some Plaintiffs would suffer the loss of their livelihoods and frustration of their missions and life's work, App. II, 111,

142. Others would be forced to shutter their health clinics, lay off their entire staffs, and relinquish the spaces in which they operate, App. II, 117, 121.

B. Plaintiffs Have Third-Party Standing to Advocate for the Interests of Their Patients and Clients

Vindicating patients' rights has long been sufficient to give medical providers standing; this Court has never adopted the prudential limitations the State seeks. Indeed, these federal prudential constraints are at odds with this Court's well-established public standing doctrine, which, discussed *infra* pp. 28-29, allows a plaintiff, upon "a showing of harm," to seek to vindicate certain public rights. *See, e.g.*, *Horner v. Curry*, 125 N.E.3d 584, 595 (Ind. 2019). And even were the Court to adopt the State's proposed prudential limitations—in contravention of clearly established Indiana law—Plaintiffs nonetheless meet them. Indiana courts consider federal justiciability doctrines "instructive," *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001), but this Court has consistently interpreted the Indiana Constitution as *more permissive* than its federal counterpart in providing access to the courts. *See, e.g.*, *E.F. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 188 N.E.3d 464, 466-467 (Ind. 2022) (allowing since-moot cases to proceed under the "public interest exception to the mootness" doctrine that has no corollary in federal court); *Horner*, 125 N.E.3d at 592-594 (discussing Indiana's "public standing doctrine," which relaxes Article III's case-or-controversy requirement). Accordingly, because Plaintiffs would have standing to bring third-party claims in federal court, they certainly may do so in Indiana state courts.

Indiana courts—including this Court—have repeatedly entertained challenges brought by abortion providers on behalf of their patients. *See Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 982 (Ind. 2005) (resolving merits of clinic's action challenging certain restrictions on patients' abortion rights); *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853, 870 (Ind.

Ct. App. 2006) (right of abortion provider to raise privacy rights of its patients). In doing so, Indiana courts have acknowledged that abortion providers have third-party standing to assert the rights of their patients.

A considerable body of Indiana case law reflects this reality. As the State acknowledges, State Br. 29-30, on at least three separate occasions the Indiana Court of Appeals has approved third-party standing, most notably in *Planned Parenthood v. Carter*, where the court permitted abortion providers to raise privacy rights on behalf of their patients because of the "closely aligned privacy interests of [Planned Parenthood of Indiana] and its patients." 854 N.E.2d at 870; *see also In re Indiana Newspapers Inc.*, 963 N.E.2d 534, 549 (Ind. Ct. App. 2012) (right of newspaper to raise First Amendment rights of anonymous commenter); *Osmulski v. Becze*, 638 N.E.2d 828, 833-834 (Ind. Ct. App. 1994) (right of civil litigant to raise equal-protection rights of potential jury pool). In at least two different contexts, this Court has assumed the existence of third-party standing by resolving the merits of claims where a litigant's standing was potentially premised on that doctrine. In *Brizzi*, this Court resolved the merits of a clinic's action challenging, like here, certain restrictions on patients' abortion rights. 837 N.E.2d at 981-982, 987-988. This Court also frequently applies *Powers v. Ohio*, 499 U.S. 400, 410-411 (1991)—which acknowledges "the right of litigants [under appropriate circumstances] to bring actions on behalf of third parties"—to evaluate claims asserting the improper exercise of peremptory challenges. *See, e.g.*, *Ashabraner v. Bowers*, 753 N.E.2d 662, 666-667 (Ind. 2001); *Wright v. State*, 690 N.E.2d 1098, 1104-1105 (Ind. 1997).

The U.S. Supreme Court has also long permitted "physician[s] to assert the rights of women patients as against governmental interference with the abortion decision," *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality). It reaffirmed this third-party standing doctrine in

June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020), and that holding remains unaffected by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), which implicitly recognized third-party standing by deciding a case predicated on it. Federal courts, which traditionally are more exacting in their Article III-based standing analysis, ensure proper separation of powers by granting third-party standing only where the plaintiff has a close relationship "to the person whose right he seeks to assert," and "some genuine obstacle" renders difficult that person's assertion of her own rights. *See Singleton*, 428 U.S. at 112-116. Plaintiffs satisfy both requirements for third-party standing under federal law.

First, the relationship between an abortion provider and her patient is "such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 115. Even outside the abortion context, the relationship between a doctor and her patient is "rooted in the imperative need for confidence and trust," *Trammel v. United States*, 445 U.S. 40, 51 (1980), and has been described by this Court as "special and particularly important," *Harris v. Raymond*, 715 N.E.2d 388, 394 (Ind. 1999), and by Indiana's Court of Appeals as "intensely personal," *Birt v. St. Mary Mercy Hosp. of Gary, Inc.*, 175 Ind. App. 32, 370 N.E.2d 379, 383 (1977). The privacy of that relationship is heightened in the abortion context, where patients consult physicians for assistance with inherently intimate decisions. *See Singleton*, 428 U.S. at 117. The State ignores the unique relationship between doctor and patient, which Indiana courts have repeatedly acknowledged and protected. *See infra* pp. 36-37.

Second, "genuine obstacle[s]" render difficult patients' assertion of their own right to abortion. *See Singleton*, 428 U.S. at 112-116. In many cases, patients "desire to protect the very privacy of [their] decision[s] [to terminate pregnancies] from the publicity of a court suit" due to societal stigma, and the intimate nature of medical and reproductive decision-making will

prevent them from suing on their own behalf. *Id.* at 117. Abortion providers and their patients are regular targets of threatening and violent behavior, Pl.App. IV, 156-158, and there have been significant recent increases in "intimidation tactics, vandalism, and other activities aimed at disrupting services, harassing providers, and blocking patients' access to abortion care," Pl.App. IV, 160. These circumstances undoubtedly serve as a "genuine obstacle" to patients' assertion of their own abortion rights.

The Supreme Court has also recognized that pregnant patients may be unable to challenge abortion restrictions on their own behalf because of "the imminent mootness" of any such suit. *Singleton*, 428 U.S. at 117-118. From the moment a woman learns of her pregnancy, she has a matter of weeks to reach a sometimes difficult decision regarding whether to remain pregnant. If she desires to terminate her pregnancy in contravention of an abortion restriction, she must determine her legal options, recruit an attorney, file a lawsuit, obtain a favorable decision, secure an appointment with a provider, and have the procedure performed—all while navigating childcare responsibilities, employment, and whatever other obligations exist in her life. It is highly unlikely that pregnant patients would be able to invalidate an abortion restriction applicable to them through litigation in time to personally benefit from any favorable decision they obtain. For example, if a pregnant woman seeking an abortion had brought this action on August 31, 2022, the day the case was filed, she would have obtained an abortion by now as permitted by the preliminary injunction. Alternatively, had the trial court denied the preliminary injunction, she would either be far past the time when she could obtain an abortion within the state by the time a decision is entered in this case, or—facing the difficulty of such timing—would have already traveled out of state for care. Either way, the State would undoubtedly argue that her claim was moot. The State argues that third-party standing is improper because a patient

seeking an abortion can sue to vindicate her own rights, State Br. 33-34, but *Singleton* requires that such an individual face "a genuine obstacle," not an absolute bar. Such obstacles exist for the reasons explained above.

For all these reasons, Plaintiffs have third-party standing to sue on behalf of their patients[12] and clients.[13]

C. Plaintiffs Have Public Standing

The State also ignores this Court's public standing doctrine, which "recognize[s] certain situations in which public… rights are at issue and hold[s] that the usual standards for establishing standing need not be met." *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985). The public standing doctrine "has been recognized in Indiana case law for more than one hundred and fifty years." *State ex rel. Cittadine v. Indiana Dep't of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003). "In addition to cases involving the enforcement of a public right or duty, the principles embodied in the public standing doctrine have also frequently been applied in cases challenging the constitutionality of governmental action, statutes, or ordinances." *Id.* at 981. *Cittadine* cites

[12] The State asserts that Plaintiffs' interests conflict with their patients' insofar as S.B. 1 requires that abortions be performed in a hospital or ASC rather than a clinic. State Br. 33. This argument is inapplicable to Dr. Caldwell, who performs abortions both in a hospital and in a clinical setting. App. II, 125. More importantly, it ignores the record evidence that abortion "is one of the safest medical procedures in the United States and is substantially safer for a patient than childbirth." App. II, 126. It further ignores the trial court's finding, unchallenged by the State, that S.B. 1's "requirement that [patients] obtain care in a hospital or ASC creates a significant burden on obtaining care" and "increases the financial burden of care for both victims of sexual violence and critically ill pregnant women—care that thousands of women safely received each year in a clinic setting prior to S.B. 1's hospitalization requirement." App. II, 32 (¶ w).

[13] All-Options has third-party standing to assert the abortion right of its clients. It has a close relationship with its clients because it provides them financial support to obtain abortions in Indiana consistent with its mission. App. II, 141. Thus, All-Options "is fully, or very nearly, as effective a proponent of the right as [its clients]." *Singleton*, 428 U.S. at 115. All-Options' clients face the same obstacles to suing on their own behalf as other Hoosiers seeking abortions.

dozens of instances in which this doctrine was relied upon to permit a challenge—constitutional or otherwise—to governmental activities, *id.* at 981-982 (collecting cases), and observed that public standing "is not unique to Indiana," *id.* at 982.[14]

Under the public standing doctrine, "when a case involves enforcement of a public … right the plaintiff need not have a special interest in the matter nor be a public official." *Cittadine*, 790 N.E.2d at 980 (cleaned up). Plaintiffs' claims in this case clearly meet this requirement. As this Court recognized in accepting jurisdiction over this appeal, this case presents issues of undeniable public import. Order Granting Emergency Pet. to Transfer, *Members of the Licensing Board of Indiana v. Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Inc.*, No. 22S-PL-00338 (Ind. Oct. 12, 2022); *see* Ind. R. App. P. 56(A).

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE REASONABLY LIKELY TO SUCCEED IN SHOWING THAT S.B. 1 VIOLATES THE LIBERTY RIGHTS ESTABLISHED BY THE INDIANA CONSTITUTION

A. Article 1, Section 1 Is Judicially Enforceable

Article 1, Section 1 of the Indiana Constitution establishes "certain inalienable rights" that are enforceable by the courts. This Court has a long history of striking down laws as violative of Article 1, Section 1. *See, e.g.*, *Beebe v. State*, 6 Ind. 501, 511 (1855) (invalidating statute regulating manufacture and sale of alcohol), *overruled on other grounds by Schmitt v.*

[14] This Court recently referred to the public standing doctrine as "unsettled." *City of Gary v. Nicholson*, 190 N.E.3d 349, 352 (Ind. 2022). Given that public standing has been commonplace in this state's constitutional case law for the better part of two centuries, *Nicholson* is best understood to refer to the *contours* of the doctrine, not its *existence*, as unsettled. *See Horner*, 125 N.E.3d at 595 n.14 (opinion does not "'eliminate' the public-standing doctrine"). The only limitation imposed by *Nicholson*, easily met here, is that a plaintiff relying on the doctrine must have suffered "some type of injury." 190 N.E.3d at 352.

F.W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19, 21 (1918);[15] *Herman v. State*, 8 Ind. 545, 552-560 (1855) (same), *overruled on other grounds by Schmitt*, 120 N.E. at 21; *Department of Ins. v. Schoonover*, 225 Ind. 187, 72 N.E.2d 747, 750 (1947) (invalidating insurance statute); *Department of Fin. Institutions v. Holt*, 231 Ind. 293, 108 N.E.2d 629, 631, 632-633 (1952) (affirming that statute limiting amounts which purchasers of retail installment sales contracts could pay retail dealers violated Article 1, Section 1); *see also Street v. Varney Elec. Supply Co.*, 160 Ind. 338, 66 N.E. 895, 896 (1903) (invalidating minimum wage legislation under, *inter alia*, Article 1, Sections 1 and 23); *State Bd. of Barber Examiners v. Cloud*, 220 Ind. 552, 556, 44 N.E.2d 972, 974, 980-981 (1942) (invalidating statute fixing prices and hours for barbers under Article 1, Sections 1 and 23); *Kirtley v. State*, 227 Ind. 175, 84 N.E.2d 712, 713-714 (1949) (invalidating statutory prohibition on scalping tickets under Article 1, Sections 1 and 21). And it has previously rejected the State's invitation to hold that Article 1, Section 1 does not confer judicially enforceable rights. *Brizzi*, 837 N.E.2d at 978.

This Court's repeated judicial enforcement of the substantive rights Article 1, Section 1 establishes aligns with the holdings of courts in sister states. Courts in Alaska, Florida, Kansas, Kentucky, Minnesota, New Hampshire, New Jersey, and Pennsylvania have all found that their constitutional analogs to Article 1, Section 1 confer judicially enforceable rights. *See, e.g.*, *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972); *Grissom v. Dade County*, 293 So.2d 59, 62 (Fla. 1974); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471 (Kan. 2019);

[15] The State criticizes the trial court's reliance on *Beebe* by suggesting that *Schmitt* "repudiated" that case. Not so. *Schmitt* rejected *Beebe*'s holding as to whether regulating alcohol was within the state's police power, but did not alter the conclusion that Article 1, Section 1 encompasses and protects inalienable rights. *Schmitt*, 120 N.E. at 19-27; *see also In re Leach*, 134 Ind. 665, 34 N.E. 641, 642 (1893) (invalidating statutory requirement prohibiting women from joining the Indiana bar on the grounds that Article 1, Section 1 provided an inalienable right for women to practice law).

Commonwealth v. Campbell, 117 S.W. 383, 385 (Ky. Ct. App. 1909); *Women of State by Doe v. Gomez*, 542 N.W.2d 17, 26-27 & n.10 (Minn. 1995); *Petition of Kerry D.*, 737 A.2d 662, 665 (N.H. 1999); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000); *Denoncourt v. Commonwealth, State Ethics Comm'n*, 470 A.2d 945, 947-948, 950 (Pa. 1983). In short, the weight of authority—in Indiana and in states with analogous constitutional provisions—supports the conclusion that Article 1, Section 1 creates judicially enforceable rights.

B. The Indiana Constitution Establishes a Right to Determine Whether to Carry a Pregnancy to Term

As the trial court correctly recognized, Article 1, Section 1 confers "a privacy right, a right to bodily autonomy, a right of self-determination, a bundle of liberty rights," which includes "decisions about whether to carry a pregnancy to term." App. II, 37. This Court has a long and consistent history of interpreting Article 1, Section 1 to embody specific liberty rights necessary for Hoosiers to make deeply personal decisions foundational to their control over their own bodies and life trajectories, regardless of whether such rights are protected by the federal Constitution. The right to determine whether to carry a pregnancy to term falls squarely within this bundle of liberty rights.

Indeed, this Court has repeatedly interpreted Indiana's Constitutional provisions as providing greater protections than their federal counterparts. *See Overstreet v. State*, 877 N.E.2d 144, 174-175 (Ind. 2007) ("Indiana's constitution affords even greater protection than its federal counterpart.") (internal citation omitted); *see also Dycus v. State*, 108 N.E.3d 301, 304 (Ind. 2018) (explaining "broader protections offered by our State Constitution"); *State v. Taylor*, 49 N.E.3d 1019, 1024 (Ind. 2016) (Indiana's right to counsel provides "greater protection" than the

Sixth Amendment). The Indiana Constitution is thus not constrained by interpretation of the federal Constitution.[16]

i. Article 1, Section 1's text, read in light of its history, establishes the right to determine whether to carry a pregnancy to term

This Court interprets Article 1, Section 1's text in light of the history surrounding its drafting and ratification as well as its purpose and this Court's own precedent. *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). Article 1, Section 1's text, history, purpose, and relevant precedents all make clear that Article 1, Section 1 confers liberty rights that guarantee Hoosiers' ability to determine whether to carry a pregnancy to term.

a) Text and History

Article 1, Section 1's text, as amended in 1984,[17] provides:

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and

[16] Indiana is not alone in recognizing these broader protections under the state constitution. Numerous sister states, including Alaska, California, Kansas, Massachusetts, Minnesota, and Montana, have interpreted their constitutions to afford citizens greater rights—in some instances concerning abortion rights in particular—than the federal Constitution. *See, e.g.*, *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997) ("This express privacy provision … provides more protection of individual privacy rights than the United States Constitution.") (internal citation omitted); *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 809 (Cal. 1997) ("[T]he state Constitution has been interpreted to provide greater protection of a woman's right of choice than that provided by the federal Constitution as interpreted by the United States Supreme Court."); *Hodes & Nauser, MDs*, 440 P.3d at 478 ("[T]he Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution.") (internal citation omitted); *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387, 400 (Mass. 1981) (Massachusetts Declaration of Rights affords greater degree of protection to woman's right to choose abortion than does federal Constitution); *Women of State by Doe v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995) (interpreting Minnesota constitution "to provide more protection than that afforded under the federal constitution"); *Armstrong v. State*, 989 P.2d 364, 375, 384 (Mont. 1999) ("Montana's Constitution affords significantly broader protection than does the federal constitution" and protects "a woman's right of procreative autonomy.").

[17] As originally adopted in 1851, Article 1, Section 1's text provided: "WE DECLARE, That all men 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."

> the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

Article 1, Section 1's plain text therefore establishes Hoosiers' liberty rights are "inalienable," meaning that Hoosiers cannot be required to surrender them.

The history behind the drafting and ratification of the Indiana Constitution and the interests animating its drafting make clear that protecting individual privacy was important to the framers. As noted by Professor Patrick Baude, Indiana

> 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, 853-854 (1994). Indeed, as this 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). George Carr, the president of the constitutional convention that adopted Article 1, Section 1, asserted during the debates on that provision that

> [b]y a fundamental principle of a government like [Indiana's], "life, liberty, and the pursuit of happiness" are declared to be the "inalienable and inherent" rights of the citizen; and the less those rights are limited and circumscribed by artificial rules of legislation, the more republican will be the form of government, as no principle is better established than that that government is the best which governs the least.

1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 502 (1850) (hereinafter *Debates of the Indiana Convention*). He further explained that "the right to pursue happiness" in "[t]he public relations of life," such as "the

acquisition of wealth, the struggle for place, reputation, and preferment" paled in comparison to intimate family and privacy rights in which individuals have their "dearest interests"—"rights that cluster around the cheerful fireside and sanctify the relations of home." *Id.*

This Court's early precedents interpreting Article 1, Section 1 accordingly emphasize that it encompasses natural rights, including "the right of personal liberty." *Beebe*, 6 Ind. at 511 (quoting Chancellor Kent); *see also Herman*, 8 Ind. at 552-560;[18] *Kirtley*, 84 N.E.2d at 714 (Article 1, Section 1's liberty right includes the right to pursue a vocation). These early cases, *Beebe*, *Herman*, and *Kirtley*, construe Article 1, Section 1's liberty right to encompass privacy—the right to make intimate decisions about one's life. Indeed, this Court has recognized that the right to privacy "is a well-established doctrine, derived from natural law and guaranteed by both the Federal and State Constitutions." *Voelker v. Tyndall*, 226 Ind. 43, 75 N.E.2d 548, 549 (1947).

Moreover, the drafters of Indiana's Constitution did not begin from scratch. When Indiana adopted Article 1, Section 1 in 1851, it joined 14 other states that had constitutions including a provision guaranteeing inalienable, natural, or inherent unenumerated rights, which typically "guaranteed a right to enjoy life [and] liberty."[19] *See* Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303, 1305, App. A (2015). These guarantees had their roots in the 1776 Virginia Declaration of Rights, which was itself "influenced by the writings of John Locke and his theories on the natural rights of life, liberty, and property." *Id.* at 1316-1320.

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[18] *See supra* n.15.

[19] By 1868, "twenty-four of the thirty-seven state constitutions existing at that time, nearly a two-thirds majority, contained provisions guaranteeing inalienable, natural, or inherent rights." Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303 (2015).

Additionally, the drafters looked to sister states' constitutions that included Lockean rights, borrowed their language, and mirrored their protection of natural rights including liberty. *See* 1 *Debates of the Indiana Convention* 229 (1850) (noting Indiana delegates looked to other state constitutions). The majority of sister states have interpreted their analogous constitutional provisions establishing inalienable rights such as liberty to create "substantive and enforceable rights affecting [individuals'] lives and livelihoods." Calabresi & Vickery, 93 Tex. L. Rev. at 1312. As discussed *infra* pp. 41-45, this Court has found sister states' interpretations of their analogous constitutional provisions persuasive when interpreting the Indiana Constitution, and many of Indiana's sister states interpret analogous provisions to protect the right to terminate a pregnancy.

b) Article 1, Section 1 Establishes a Right to Intimate Medical Decision-making

This Court has previously recognized that Article 1, Section 1's liberty right protects medical decision-making that profoundly impacts the course of one's life. In *Lawrance*, this Court concluded that Indiana law permitted the family of an incompetent patient in a persistent vegetative state to refuse artificial nutrition and hydration for the patient. 579 N.E.2d at 34. In so doing, this Court noted that the right of a patient to decide whether to accept or reject medical care is derived from "common law [that] evolved in a legal culture governed by the Indiana Constitution, which begins by declaring that the liberty of our citizens is inalienable." *Id.* at 39 (citing Article 1, Section 1). "The debates of our constitutional convention," this Court continued, "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." *Id.*; *see id.* at 39 n.3 ("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[.]" (quoting 1 *Debates of the Indiana Convention* 968 (1850))). Acknowledging that the common law, the Indiana Constitution, and Indiana's statutory scheme all "reflect a commitment to patient self-determination," this Court explicitly recognized the "substantive right of a patient or her representative to refuse life-sustaining medical treatment." *Id.* at 39.

Indiana has also long recognized Hoosiers' right to manage their own lives through its zealous protection of the confidential relationship between patients and their doctors. *See, e.g.*, *Henry v. Community Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435, 437-438 (Ind. Ct. App. 2019) (acknowledging "age-old recognition that medical providers owe a duty of confidentiality to their patients," which was "historical[ly]" established at "common law") (citing *Schlarb v. Henderson*, 211 Ind. 1, 4 N.E.2d 205, 206 (1936) (recognizing "common-law rule" to protect "private and intimate affairs")). The special legal protections against public disclosure afforded to communications between patients and their doctors demonstrate Indiana's recognition that Hoosiers have a right of self-determination to make personal and sometimes difficult medical decisions without fear of public exposure or humiliation. *See, e.g.*, *Canfield v. Sandock*, 563 N.E.2d 526, 530 (Ind. 1990) ("Full and unlimited disclosure of … medical records could reveal, for example, … that a female plaintiff had undergone an abortion procedure."); *Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95, 98 (1971) (preserving the "confidential nature of the physician-patient relationship" and acknowledging the "confidential nature" of medical information). Moreover, Indiana recognizes a "public policy of protecting the doctor/patient relationship" against intrusions on a doctor's "professional judgment and discretion in treating patients." *DeKalb Chiropractic Ctr., Inc. v. Bio-Testing Innovation, Inc.*, 678 N.E.2d 412, 415 (Ind. Ct.

App. 1997); *see Harris*, 715 N.E.2d at 394 ("[T]he relationship between a health care provider … and a patient is special and particularly important in that the patient relies heavily on the expertise of that health care provider in making decisions that may greatly impact the patient's health and well-being.").

This Court's recognition that the Indiana Constitution protects rights to "manage one's own life" and to "self-determination," *Matter of Lawrance*, 579 N.E.2d at 39, naturally extends to other rights involving intimate and life-changing decision-making analogous to the right to refuse life sustaining care in their impact on a person's self-determination. *Id.* This is particularly true in the realm of medical decision-making, where Indiana has long protected the privacy of the doctor-patient relationship. The right to determine whether to continue or end a pregnancy clearly falls within Article 1, Section 1's core protections.

The State's contention that this Court should not find that Article 1, Section 1 encompasses a right to abortion because it might then have to find that individuals have a right to make any decision they want (*e.g.*, use recreational drugs or drive without a seatbelt), State Br. 50, disregards the uniqueness of the decision whether to bear a child and the burdens imposed by such a decision. Unlike the scenarios cited by the state, remaining pregnant, even with a healthy pregnancy, requires an extreme, months-long, bodily metamorphosis that frequently culminates in hospitalization and whose effects linger months, if not years. App. II, 128-130. The process of giving birth can involve extreme physical pain and often medical interventions, many of them serious. *Id.* Beyond these monumental physical impacts, becoming a parent is life-changing and brings with it irreversible genetic ties, serious legal obligations, considerable financial responsibilities, and immense emotional implications. App. II, 130-131. The deeply personal decisions about whether to continue with a pregnancy and become a parent lie at the heart of

Article 1, Section 1's preservation of Hoosiers' ability to make for themselves intimate decisions that determine their lives' courses.

The State's comparison of such a momentous decision to the use of recreational drugs and seatbelts demeans the decision and ignores specific Indiana precedents such as *Lawrance* acknowledging the importance of self-determination in making life-changing medical decisions. For the reasons explained above, the decision to continue a pregnancy, give birth, and become a parent—unlike the decision to leave one's seatbelt unbuckled—clearly implicates the most fundamental, personal, and protected liberty rights.

c) Development of Article 1, Section 1's Liberty Rights

Article 1, Section 1's guarantee of a liberty right encompassing abortion is not diminished by the fact that its drafters in 1851 may not have specifically contemplated it as including the right to abortion. As Justice Perkins noted in 1856—four years after Article 1, Section 1 was adopted:

> [T]he 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, 227-228 (1856) (internal citation omitted).

Justice Perkins' contemporaneous explanation that the precise contours of Article 1, Section 1's liberty right would be developed over time has borne out. For example, as the trial court correctly noted, Hoosier women's liberties were limited at the time Article 1, Section 1 was

adopted in 1851—they could not vote, maintain exclusive control of their own property, practice law, serve in the military or on a jury, or lawfully obtain abortions. *See* Army Reorganization Act of 1901, ch. 192, 31 Stat. 748, 753 (allowing, for the first time, women to serve in the military in Army Nurse Corps); *Palmer v. State*, 197 Ind. 625, 150 N.E. 917, 919 (1926) (first permitting Hoosier women to serve as jurors); *Women's Rights and Suffrage*, Encyclopedia of Indianapolis (visited Dec. 1, 2022), https://indyencyclopedia.org/women-s-rights-and-suffrage/ (Hoosier women did not gain the right to vote until 1919). But by the time this Court decided *In re Leach* in 1893, this Court held that under Article 1, Section 1 women had an "inalienable right[]" to practice law despite the Indiana bar's statutory requirement that all prospective lawyers be able to vote—which women were not yet permitted to do. 134 Ind. 665, 34 N.E. 641, 642 (1893). This Court remarked that "[t]he fact that the framers of the constitution, or the legislators, in enacting our statute, did not anticipate a condition of society when women might desire to enter the profession of law for a livelihood cannot prevail as against their right to do so independently of either." *Id.*

In *In re Leach* this Court interpreted Article 1, Section 1 to encompass liberty and self-determination rights reflective of society's evolution and women's increasingly equal participation in society. It rejected the view that "the construction of" both statutory and constitutional provisions "is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed," explaining that "[a]ll progress in social matters is gradual" and "[w]e pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it." *In re Leach*, 34 N.E. at 642 (quoting *In re Hall*, 50 Conn. 131, 132-33 (1882)).

It follows that abortion's illegality at the time of Article 1, Section 1's adoption in 1851 does not mean that it is not protected by the Indiana Constitution today. State Br. 44-47. Instead, this Court should follow its precedents and interpret the liberty rights guaranteed by Article 1, Section 1 in light of today's legal and societal recognition of women's equal rights to privacy, bodily autonomy, and self-determination. In today's society, the right to abortion is critical for women to partake fully in the rights that the Indiana Constitution guarantees.

Indeed, in 1984 the Indiana legislature and Hoosier voters amended the provision's text to explicitly reject its "antiquated" nature and render it reflective of "today's conditions, practices, or requirements." Ind. P.L.218-1984 (Feb. 24, 1984). As originally enacted in 1851, Article 1, Section 1 stated that "all ***men*** are created equal." Art. 1, § 1 (emphasis added). Today, Article 1, Section 1's text provides: "WE DECLARE, That all ***people*** are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." *Id.* (emphasis added). In approving this amendment, the Indiana legislature and Hoosier voters rejected any lingering outmoded, gendered conception of liberty rights that did not take account of 1984's "conditions, practices, or requirements"—one of which was legal abortion. Ind. P.L.218-1984 (Feb. 24, 1984); *see also In re T.P.*, 475 N.E.2d 312, 313 (Ind. 1985) (describing legal abortion procedure performed in Indiana in 1984). After the 1984 amendment, Article 1, Section 1 cannot be fairly read to return Hoosier women to the inferior place in society they occupied at the time of the 1851 enactment of Article 1, Section 1 by denying them their ability to decide whether to terminate a pregnancy.

Given this history, the State's heavy reliance on *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972), is unconvincing. First, *Cheaney* analyzed abortion rights under the Ninth Amendment to the federal Constitution, which is not at issue in this litigation. Second, in 2005,

when this Court addressed Hoosiers' right to abortion under the Indiana Constitution in *Brizzi*, it did not cite *Cheaney* at all.[20] As the trial court recognized, and as discussed in more detail at pp. 331-32, the Indiana Constitution has been interpreted to provide broader protections than those provided in the federal Constitution. The intervening 1984 amendment to Article 1, Section 1 to acknowledge the liberty rights of all people—not just men—and reflect modern "conditions, practices, or requirements," which included abortion, also further distanced Indiana abortion jurisprudence from *Cheaney*.

ii. Indiana's sister states have interpreted their similar constitutional provisions to confer a substantive right to terminate a pregnancy

This Court should conclude, consistent with the holdings of other courts with similar constitutional provisions, that Article 1, Section 1's inalienable right to liberty protects the right to abortion. In particular, the Kansas Supreme Court interpreted its analogous Article 1, Section 1 constitutional provision, which states "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," as creating the "right of personal autonomy," which includes an abortion right. *Hodes & Nauser, MDs*, 440 P.3d at 471-72 (citing Kan. Const. Bill of Rts. § 1). 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." *Id.* at 483. It 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

[20] In fact, this Court in *Brizzi* left open whether Article 1, Section 1 confers a right to privacy that protects the right to an abortion. 837 N.E.2d at 978 ("We find it unnecessary to determine whether there is any right to privacy or abortion provided or protected by Indiana's Constitution[.]").

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 470-473. 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.

Similarly, the Supreme Court of New Jersey interpreted its analogous Article 1, Section 1, providing, "[a]ll 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," to incorporate a right to privacy including the right to choose to have an abortion. *Planned Parenthood of Cent. N.J.*, 762 A.2d at 629 (interpreting N.J. Const. Art. 1, ¶ 1).

In sum, sister states' highest courts have concluded that provisions analogous to Indiana's Article 1, Section 1 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 also Committee to Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 784 (Cal. 1981); *Women of State*, 542 N.W.2d at 26-27 & n.10 ("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).

Numerous sister states have similarly concluded that their state constitutions provide broad protection for the rights to personal autonomy, privacy, and ordered liberty, and that such protections necessitate constitutional protection for the right to obtain an abortion. *See, e.g.*, *Myers*, 625 P.2d at 784 ("[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*, 417 N.E.2d at 399 ("[T]he decision whether or not to beget or bear a child is at the very heart of th[e] cluster of constitutionally protected choices." (quotation marks and citation omitted)); *Armstrong*, 989 P.2d at 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); *Preterm Cleveland v. Yost*, No. A2203203, 2022 WL 16137799, at *14 (Ohio C.P., Hamilton Cnty. Oct. 12, 2022) ("The Ohio Constitution's substantive due process protections encompass the fundamental right to abortion."); *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."). The decisions of other state supreme courts interpreting their analogous constitutions to protect privacy and abortion rights are "persuasive" in Indiana courts' "interpretation[s] of … state constitutional provision[s]." *City of Indianapolis v. Wright*, 267 Ind. 471, 371 N.E.2d 1298, 1300 (1978).

In contrast, the State cites three cases for the proposition that sister states have declined to hold that references to liberty in their state constitutions protect a right to abortion. State Br. 56-

57. Not only do some of these cases not stand for the proposition for which the State cites them, but courts' analyses of state abortion rights in these three states (Iowa, Kentucky, and Michigan) undermine the State's arguments. First, in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022), *reh'g denied* (July 5, 2022), the Iowa Supreme Court held that the former federal undue burden test "remains the governing standard" under the state constitution and did not address whether there is a privacy right under its Article 1, Section 1 analog. *Id.* at 716, 746. 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. Second, in declining to stay enforcement of the state's trigger law, the Kentucky Supreme Court did not discuss whether the Kentucky Constitution protects the right to abortion. *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, 2022 WL 3641196, at *1-2 (Ky. Aug. 18, 2022). Additionally, two Kentucky Supreme Court judges dissented in part, *id.* at *3-5, and two other judges expressed wanting to see the outcome of a ballot initiative that would amend the Kentucky constitution to explicitly state that nothing in the state constitution creates a right to abortion, *id.* at *2.[21] Third, 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." App. III, 150 (*Planned Parenthood of Mich. v. Attorney Gen. of Mich. and Mich. House of Representatives and Mich. Senate*, No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022) (order and opinion granting preliminary injunction)). In reaching that holding, the court explained that *Mahaffey v. Attorney Gen.*, 564 N.W.2d 104

[21] In the November 2022 elections, Kentucky voters rejected that ballot initiative. Melissa Chan, *Kentucky voters reject anti-abortion ballot measure, NBC News projects*, NBC News (Nov. 9, 2022), https://www.nbcnews.com/politics/2022-election/kentucky-voters-reject-anti-abortion-ballot-measure-rcna56313.

(Mich. Ct. App. 1997), the case the State cites (State Br. 56-57), "did not address the constitutionality of [the abortion law] through a bodily-integrity lens, nor was it asked to." App. III, 126. Just as the weight of sister states' courts supports a holding that Article 1, Section 1 is judicially enforceable, *see supra* pp. 30-31, the weight of authority from sister state courts supports an interpretation of Article 1, Section 1 that protects the right to abortion.

C. S.B. 1 Materially Burdens the Right to Terminate a Pregnancy

The General Assembly "may qualify but not alienate" the core values contained in the Indiana Bill of Rights. *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993); *see City Chapel*, 744 N.E.2d at 446-447. "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 960 n.7. S.B. 1 unconstitutionally materially burdens the core right to determine whether to continue a pregnancy.

This Court has recognized that the "material burden" analysis in the context of Article 1, Section 1 is "virtually indistinguishable" from the "undue burden" standard previously used by federal courts to analyze the constitutionality of abortion restrictions. *Brizzi*, 837 N.E.2d at 983-984. To determine whether an abortion restriction 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 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.* (quoting *Price*, 622 N.E.2d at 960 n.7).

S.B. 1 materially burdens the right to terminate a pregnancy by banning abortion in almost all circumstances. Under S.B. 1's extremely narrow exceptions, only a tiny fraction of

Hoosiers can access vital healthcare and only if they have suffered rape, incest, or certain severe medical threats. Even then, myriad logistical hurdles would prevent eligible Hoosiers from obtaining abortions. *See supra* pp. 41-45. As a result, Hoosiers—particularly those with limited financial resources —would be forced to carry unwanted and dangerous pregnancies to term. App. II, 118, 127-130. S.B. 1 would also force some Hoosiers to travel across state lines for an abortion, materially burdening their right to abortion care by unnecessarily delaying access to care and imposing additional costs. Such unwarranted delays can have harmful consequences on Hoosiers' health, careers, families, and finances. *See supra* pp. 17-18; *see also Women of State*, 542 N.W.2d at 30-31 (funding restrictions can impact fundamental right to abortion access); *Planned Parenthood of Cent. N.J.*, 762 A.2d at 629, 633-638 (considering resulting delay and financial burdens—and correlated risk that more patients would self-manage abortions outside the medical system—resulting from notification statute).

S.B. 1 would also materially burden the abortion right by dramatically increasing expenses for the few abortions it would permit because those abortions could only be provided at a licensed hospital or ASC majority-owned by a hospital. *See supra* pp. 14, 17, 19-20. Moreover, S.B. 1 would create a material burden on 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* pp. 18. The State mischaracterizes Plaintiffs' argument as asserting that the Indiana Constitution guarantees an unfettered or unqualified right to abortion. This is plainly incorrect. Plaintiffs have repeatedly asserted—and the trial court found—that even though the State has an interest in regulating abortion, S.B. 1 goes too far. App. II, 37-38. As this Court clearly articulated in *Brizzi*, the State may regulate abortion so long as its regulations do not materially burden the core of Hoosiers' privacy and bodily

autonomy rights. *See supra* pp. 45. Thus, the trial court was correct to conclude that S.B. 1's extreme nature—banning all abortions unless a Hoosier has suffered rape, incest, or an exceedingly severe medical condition—materially burdens Hoosiers' constitutional rights. App. II, 37-38. As the State reminds the Court repeatedly, Indiana has permissibly regulated abortion for decades prior to the passage of S.B. 1. What it cannot do is ban abortion in all but the most extreme circumstances.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT, WITHOUT AN INJUNCTION, PLAINTIFFS AND THEIR PATIENTS WILL SUFFER IRREPARABLE HARM

The trial court did not abuse its discretion in determining that S.B. 1 inflicts irreparable harm. S.B. 1 would cause irreparable harm to each of the Plaintiffs, including by forcing providers to choose between their ethical obligations to their patients and criminal punishment or loss of their medical licenses for performing an abortion, or by making it impossible for others to carry out their mission of assisting clients in need. App. II, 133, 142-143.

Plaintiffs have also put forth ample evidence to support the trial court's factual finding that the patients and clients they represent in this action would be certain to suffer actual, tangible, and irreparable harms if S.B. 1 were permitted to take effect. First, S.B. 1 would force many of the pregnant Hoosiers who do not satisfy one of S.B. 1's narrow exceptions to carry their pregnancies to term and give birth against their will, inflicting physiological, psychological, and economic harm on already-vulnerable Hoosiers and their families. *See supra* pp. 15, 17-18. Second, even for those who could gather the resources needed to access abortion care out of state, S.B. 1 would delay their care and increase its cost. *See supra* pp. 17-19; *infra* pp. 50. Third, although abortion is extremely safe and significantly safer than continuing pregnancy through childbirth, delaying abortion care unnecessarily increases medical risk. *See supra* pp. 15-16, 18; *infra* pp. 50-51. Delay would push some patients past the gestational age limits for

obtaining an abortion in other states. *See supra* pp. 17-18. Consequently, some Hoosiers would try to self-manage their abortions outside the medical system. App. II, 117-118, 121-122, 127, 143.

Additionally, the trial court was correct in holding that S.B. 1, as an unlawful state action, constitutes a *per se* irreparable harm. *Gibson v. Indiana Dep't of Corr.*, 899 N.E.2d 40, 56 (Ind. Ct. App. 2008) ("[I]f [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. Department of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004); *B&S of Fort Wayne, Inc. v. City of Fort Wayne*, 159 N.E.3d 67, 73 (Ind. Ct. App. 2020).[22] Indiana courts "tailor" their analysis 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 infringed, it need not further consider the nature of the harms inflicted on plaintiffs or whether the balance of harms weighs in their favor. *Carter*, 854 N.E.2d at 863-864; *L.E. Servs., Inc. v. State Lottery Comm'n of Indiana*, 646 N.E.2d 334, 349 (Ind. Ct. App. 1995), *trans. denied*. Because S.B. 1's violations of the Indiana Constitution inflict irreparable harm *per se*, Plaintiffs need not demonstrate that S.B. 1 would inflict irreparable harms on themselves and on people seeking abortions. *See Carter*, 854 N.E.2d at 864.

[22] The State cites *Indiana Family and Social Services Administration v. Walgreen Co*., 769 N.E.2d 158 (Ind. 2002), to argue that "this Court has never held that *all* legal violations automatically inflict irreparable harm" and instead that it is "*only* proper for cases involving *clearly unlawful* conduct against the *public interest*." State Br. 59 (quotation marks omitted). Yet, *Indiana Family & Social Services Administration*, in which this Court held that a mere procedural challenge to a statute will rarely justify enjoining state action, *see* 769 N.E.2d at 162, is a far cry from a constitutional challenge alleging a clear violation of fundamental constitutional rights.

Finally, 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 would money adequately compensate providers who are forced to choose between their ethical obligations to their patients and criminal punishment or loss of their medical licenses for performing an abortion, nor those Plaintiffs who are unable to carry out their mission of assisting clients in need. The trial court did not abuse its discretion in determining that the irreparable harms that Plaintiffs would suffer under S.B. 1 weigh in favor of the grant of a preliminary injunction.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT THE BALANCE OF HARMS WEIGHS IN FAVOR OF GRANTING AN INJUNCTION

The trial court appropriately determined that the threatened injury to Plaintiffs and their patients, absent a preliminary injunction, outweighs any potential harm that the injunction would inflict on the State, and this Court endorsed the trial court's weighing of the harms by denying the State's emergency motion to stay the trial court's preliminary injunction pending appeal. In conducting its balancing, the trial court recognized that "the potential constitutional deprivations for Indiana women and girls should be given significant weight." App. II, 40 (¶ tt). The trial court also acknowledged that the State has an interest in regulating abortion to the extent permitted by the Indiana Constitution, but it noted that the State's "ability to enforce abortion regulations" would continue even under the preliminary injunction "with maintenance of the status quo." App. II, 40-41 (¶ uu). The trial court's weighing of the facts to inform its balancing-of-the-harms analysis is entitled to substantial deference. *See Martin*, 731 N.E.2d at 5 ("Upon review of the trial court's" grant of a preliminary injunction, reviewing courts "will not

weigh conflicting evidence" and "will only consider the evidence which supports the trial court's findings, conclusions, and order").

The State attempts to diminish the devastating harms experienced by Plaintiffs, their patients, and their clients as mere "difficulties," State Br. 61, disregarding the serious personal, medical, and familial consequences that would be faced by Hoosiers denied needed abortion care. *See supra* pp. 47-48. Pregnant Hoosiers whose situations do not fall under the limited, specific, and devastating circumstances required to obtain an abortion under S.B. 1's extremely narrow exceptions will at the very least be delayed in accessing abortion care—thereby imposing unnecessarily increased medical risks, increased costs, and disruptions to their family and work lives. Many Hoosiers—particularly those with limited financial resources—will be wholly prevented from obtaining needed abortions, thereby forced to carry pregnancies to term, face dramatically increased medical risks, and give birth against their will. App. II, 111-113, 117-118, 121-122, 127-133, 135-136, 142-143.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

As the trial court recognized, it is the judiciary's role to ensure legislation does not violate Hoosiers' constitutional rights and unlawfully inflict irreparable harm on them. App. II, 36-37. The trial court properly determined that the preliminary injunction is in the public interest because it preserves Indiana's longstanding abortion regime, App. II, 41-42 (¶¶ xx-ddd), ensuring that Hoosiers do not suffer unprecedented and irreparable harm while the courts evaluate the merits of the case, a decision that is entitled to substantial deference. *See Martin*, 731 N.E.2d at 5.

Plaintiffs have also 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 881-883 (reversing denial of preliminary injunction and concluding that public interest would not be disserved by upholding plaintiffs' constitutional right to privacy in medical records).

As the trial court appropriately found, "the public has an interest in Hoosiers being able to make deeply private and personal decisions without undue governmental intrusion." App. II, 41 (¶ zz). And contrary to the State's assertions, it is the trial court's role to determine how its factual findings affect the public interest. *See Bowling v. Nicholson*, 51 N.E.3d 439, 445 (Ind. Ct. App. 2016) ("Whether the public interest is disserved is a question of law for the court to determine from all the circumstances."). The trial court did not "second guess '[Indiana's] elected representatives'' determinations as to where the public interest lies," as the State claims. State Br. 61. Rather, the trial court "specifically acknowledge[d] the significant public interest in *both*" the "constitutional rights of Indiana women and girls," *and* the "public interest served by protecting fetal life." App. II, 41 (¶ aaa) (emphasis added). The trial court appropriately weighed each of these considerations, *see* App. II, 42, and concluded that the public interest would be served by enjoining S.B. 1. The State may not now ask this Court to re-weigh the evidence presented. *See Abbott v. State*, 183 N.E.3d 1074, 1085 (Ind. 2022) ("Under our standard of review, we will not reweigh the evidence.").

CONCLUSION

For all these reasons, this Court should affirm the trial court's grant of a preliminary injunction and allow the state's long-standing status quo abortion regime to remain in effect during the pendency of the litigation.

Respectfully submitted,

/s/ Kenneth J. Falk

December 1, 2022

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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 14,000 words. It contains 13,704 words, including footnotes, in accordance with Appellate Rule 44E, and excluding the items permitted to be excluded by Appellate Rule 44(C).

/s/ Kenneth J. Falk
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December 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2022, I electronically filed the foregoing document using the Indiana E-Filing System ("IEFS"). I also certify that on December 1, 2022, the foregoing document was served upon the following parties using the IEFS:

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