IN THE CIRCUIT COURT OF MONROE COUNTY
STATE OF INDIANA

	)	
	)	**CAUSE NO. 53C06-2208-PL-001756**
PLANNED PARENTHOOD	)	
NORTHWEST, HAWAI'I, ALASKA,	)	
INDIANA, KENTUCKY, INC., et. al.	)	
Plaintiffs,	)	
	)	
Vs.	)	
	)	
MEMBERS OF THE MEDICAL	)	
LICENSING BOARD OF INDIANA, et. al.	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs' Motion for Preliminary Injunction to enjoin the Defendants from enforcing Senate Bill 1 as enacted in various sections of the Indiana Code. Plaintiffs appear by Counsel Kenneth Falk, Stevie Pactor, and Gavin Rose. Defendants appears by Solicitor General Thomas Fisher, and by Deputy Attorneys General Melinda Holmes and Julia Payne.

Procedural History

On August 5, 2022, after a brief special legislative session, the Indiana General Assembly passed Senate Bill 1 ("S.B. 1"). S.B. 1 criminalizes abortion in Indiana, subject to limited exceptions involving rape, incest, or a serious risk of substantial and irreversible physical impairment of a major bodily function or death of the expectant mother. S.B. 1 also requires that abortions be performed at hospitals or ambulatory surgery centers that are majority-owned by a hospital, and disallows the procedure to be performed at licensed abortion clinics where the huge majority of abortions were performed prior to S.B. 1's enactment. On August 31, 2022 Plaintiffs filed their Complaint for Injunction and Declaratory Relief along with their Motion for Preliminary Injunction. On September 12, 2022 Plaintiffs filed their Motion for Temporary Restraining Order. The Court declined to issue a Temporary Restraining Order pending hearing on the Motion for Preliminary Injunction.

With the benefit of additional time to consider the requested injunctive relief, and having considered the record of evidence, the text of the relevant provisions of the Indiana Constitution, the relevant case law, and the thoughtfully presented arguments and submissions of Counsel for all Parties, the Court concludes that injunctive relief is warranted. Accordingly, the Court GRANTS the Plaintiffs' Motion for Preliminary Injunction and prohibits the Defendants'

enforcement of S.B. 1, pending a decision on the merits in this matter. In support of this determination, the Court FINDS and CONCLUDES as follows:

I. FINDINGS OF FACT

Parties & Background

a. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc. (hereinafter "PPGNHAIK") is a not-for-profit corporation incorporated in the State of Washington. Declaration of Rebecca Gibron filed in support of Plaintiffs' Motion for Preliminary Injunction (hereafter "Gibron Decl.") ¶ 3.

b. PPGNHAIK is the largest provider of reproductive health services in Indiana, operating 11 health centers throughout the state. Gibron Decl. ¶ 7. PPGNHAIK provides healthcare and educational services. Gibron Decl. ¶ 8. In Indiana, PPGNHAIK also offers medication abortion up to 10 weeks after the pregnant patient's last menstrual period ("LMP") at its Lafayette health center, and medication abortion up to 10 weeks LMP and procedural abortion up to 13 weeks 6 days LMP at its Bloomington, Merrillville, and Georgetown Road health centers. Gibron Decl. ¶ 9.

c. Women's Med Group Professional Corporation (hereinafter "Women's Med") is a for-profit organization incorporated in Ohio. Declaration of William Mudd Martin Haskell, M.D. filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Haskell Decl.") ¶ 1.

d. Women's Med operates a licensed abortion clinic in Indianapolis that provides both procedural abortions until 13 weeks 6 days LMP and medication abortions until 10 weeks LMP. Haskell Decl. ¶ 5. Women's Med also provides contraceptive services. *Id.*

e. Whole Woman's Health Alliance (hereinafter "WWHA") is a not-for-profit organization incorporated in Texas. Declaration of Amy Hagstrom Miller filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Hagstrom Miller Decl.") ¶ 1.

f. WWHA operates a licensed abortion clinic in South Bend, which provides medication abortions until 10 weeks LMP as well as contraceptive services. Hagstrom Miller Decl. ¶ 5.

g. Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in Indiana. Declaration of Dr. Amy Caldwell filed in support of Plaintiffs' Motion

for Preliminary Injunction (hereinafter "Caldwell Decl.") ¶ 1. She provides abortion care at IU Health and the Georgetown Road Health Center operated by PPGNHAIK. *Id.*

h. All-Options is a not-for-profit organization incorporated in Oregon. Declaration of Parker Dockray filed in support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Dockray Decl.") ¶ 1. All-Options provides support concerning pregnancy, parenting, adoption, and abortion. *Id.*

i. More specifically, All-Options operates a Pregnancy Resource Center in Bloomington that offers peer counseling, referrals to social service providers, and resources such as free diapers, wipes, menstrual products, and contraceptives. The Pregnancy Resource Center also operates the Hoosier Abortion Fund, which provides financial assistance to help pay for abortions for Indiana residents who would otherwise be unable to afford the procedure. Dockray Decl. ¶¶ 1, 4.

j. In their official capacities, Members of the Medical Licensing Board of Indiana have the authority to regulate the practice of medicine in Indiana pursuant to I.C. § 25-22.5-2-7. This includes the revocation of the medical licenses of physicians who perform abortions outside of the limitations imposed in S.B. 1.

k. Pursuant to I.C. § 33-9-1-5, the Hendricks County Prosecutor, Lake County Prosecutor, Marion County Prosecutor, Monroe County Prosecutor, St. Joseph County Prosecutor, Tippecanoe County Prosecutor, and Warrick County Prosecutor (referred to collectively herein as "Prosecutor Defendants") all have a statutory duty to conduct the prosecution of felonies and misdemeanors within their respective jurisdictions, including the prosecution of medical providers who perform abortions outside the limitations imposed by S.B. 1.

Abortion Regulation in Indiana Immediately Prior to the Passage of S.B. 1

l. Until enactment of S.B. 1, abortion was legal in Indiana until the earlier of viability or 22 weeks LMP. Ind. Code § 16-34-2-1(a)(2)(2021).

m. In a normally progressing pregnancy, viability typically will not occur before approximately 24 weeks LMP. Caldwell Decl. Ex. H. Prior to enactment of S.B. 1, abortions were permitted at licensed abortion clinics, hospitals, and ambulatory outpatient surgical centers ("ASCs"), including those majority-owned by a licensed hospital, *see, e.g.*, Ind. Code §§ 16-18-2-1.5(2021), 16-21-2-1(2021).

n. Although allowed in multiple settings prior to the enactment of S.B. 1, the vast majority of abortions occur in licensed abortion clinics.[1]

o. Procedural abortions (also known as surgical abortions) and medication abortions are common. See Caldwell Decl. Ex. B; Caldwell Decl. Ex. C at 10. Complications from abortion are rare, and when they do occur, can usually be managed in an outpatient setting. Caldwell Decl. Ex. C at 77; Caldwell Decl. Ex. J; Caldwell Decl. ¶ 17.

Impact of S.B. 1 on Abortion Services in Indiana

p. In June 2022, the United States Supreme Court held that the federal constitution did not confer a right to abortion, reversed *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and "returned to the people" of Indiana and "their elected representatives" the "authority to regulate abortion." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. at 2279. Shortly thereafter, in August 2022, the Indiana General Assembly enacted S.B. 1, which makes performing an abortion a criminal act unless one of the following three statutory exceptions apply. Ind. Code § 16-34-2-1(a) (as amended by S.B. 1, Sec. 21):

i. Indiana Code § 16-34-2-1(a)(1) permits abortions "before the earlier of viability of the fetus or twenty (20) weeks postfertilization age of the fetus" where (i) "reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or (ii) "the fetus is diagnosed with a lethal fetal anomaly." A "serious health risk" is one "that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function," but "does not include psychological or emotional conditions." Ind. Code § 16-18-2-327.9.

[1] See Indiana Dep't of Health, 2021 Terminated Pregnancy Report (June 30, 2022) at 17, https://www.in.gov/health/vital-records/files/2021-ITOP-Report.pdf (hereinafter "2021 Terminated Pregnancy Report"); Indiana Dep't of Health, 2020 Terminated Pregnancy Report (June 30, 2021) at 18, https://www.in.gov/health/vital-records/files/ANNUAL-TPR-CY2020.pdf; Indiana State Dep't of Health, 2019 Terminated Pregnancy Report (June 30, 2020) at 16, https://www.in.gov/health/vital-records/files/2019-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, 2018 Terminated Pregnancy Report (June 30, 2019) at 17, https://www.in.gov/health/vital-records/files/2018-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, 2017 Terminated Pregnancy Report (June 30, 2018) at Exec. Summ., https://www.in.gov/health/vital-records/files/2017-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, 2016 Terminated Pregnancy Report (June 30, 2017) at Executive Summ., https://www.in.gov/health/vital-records/files/2016-Indiana-Terminated-Pregnancy-Report.pdf; Indiana State Dep't of Health, 2015 Terminated Pregnancy Report (June 30, 2016) at Exec. Summ., https://www.in.gov/health/vital-records/files/2015-TP-Report.pdf.

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

q. Indiana Code § 16-34-2-1(a)(3) permits abortions "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age and any time after" where "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Subsection (a)(3) permits abortions later in the pregnancy than subsection (a)(1), and imposes some additional requirements. Those include that the abortion be "performed in a hospital" and be "performed in compliance with" Indiana Code § 16-34-2-3. Ind. Code § 16-34-2-1(a)(3)(C)–(D).

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

s. Physicians who perform abortions outside the exceptions of S.B. 1 are subject to prosecution. Performing an abortion outside S.B. 1's exceptions is a Level 5 felony, punishable by imprisonment of one to six years and a fine of up to $10,000. § 28(7)(A) (Ind. Code § 16-34-2-7(A)); Ind. Code § 35-50-2-6(B).

t. S.B. 1 also dictates specific circumstances where a physician "shall" have their license to practice medicine revoked if they do not comply with the above-mentioned provisions. § 41(b)(2) (Ind. Code § 22-22.5-8-6(b)(2)).

u. S.B. 1 also eliminates licensed abortion clinics and requires that any abortions performed take place at a licensed hospital or ASC majority-owned by a licensed hospital ("Hospitalization Requirement"). §§ 21(1)(B), (3)(C) (Ind. Code § 16-34-2-1(1)(B), 3(C)); § 21(2)(C) (Ind. Code § 16-34-2-1(2)(C)).

v. Of the 8,414 abortions performed in Indiana in 2021, 8,281 were performed at abortion clinics that are prohibited from providing abortion care under S.B. 1. *See* 2021 Terminated Pregnancy Report at 19-20. Less than two percent of abortions in the state were performed in hospitals that are still able to provide abortions under S.B. 1. *Id.* From 2015 through 2021, very few abortions were performed at

an ASC—hospital-owned or otherwise. *See* ISDH Terminated Pregnancy Reports 2015-2020 (full citations contained in Footnote 1).

w. For patients who fall into S.B. 1's narrow exceptions, the law's requirement that they obtain care in a hospital or ASC creates a significant burden on obtaining care. Gibron Decl. ¶ 18. Abortions performed in hospitals are far more expensive than abortions performed at clinics. *Id.* S.B. 1 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. *Id.*; *See generally* ISDH Terminated Pregnancy Reports 2015-2020 (full citations contained in Footnote 1).

x. Women and girls choose to end a pregnancy for familial, medical, financial, personal, and other reasons. Caldwell Decl. ¶ 14. Some patients choose to obtain abortions because they are facing serious health risks, including long-term risks to their physical or mental health. *Id.* However, these risks do not always rise to the level of death or a serious risk of substantial and irreversible physical impairment of a major bodily function such that these patients would qualify for an exception under S.B. 1. *Id.*

y. Significant scientific advancements in our understanding of fetal development have come to inform the legal and moral questions surrounding abortion. *See generally* Defendants' Exhibit 1, Declaration of Tara Sander Lee.

z. Abortion continues to be a legally and morally fraught issue presenting challenges to both legislatures and courts when balancing constitutional protection of the bodily autonomy of women and girls and the policy considerations of maternal health and protection of fetal life.

II. CONCLUSIONS OF LAW

Preliminary Injunction Standard

a. Prior to issuance of a Preliminary Injunction, four elements must be established:

   i. the moving party is reasonably likely to prevail on the merits;

ii. the remedy at law is inadequate and the moving party will suffer irreparable harm pending resolution of the action;

iii. the threatened injury to the moving party if the injunction is denied outweighs the threatened harm to the adverse party if the injunction is granted; and

iv. the public interest will be disserved if the relief is not granted. *Leone v. Commissioner, Indiana Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1248 (Ind. 2010).

b. If the moving party fails to prove any one of the four required elements, the application for injunction should be denied. *Id.*

c. Injunctive relief is intended to maintain the status quo as it existed prior to the pending controversy until the dispute between the parties can be decided on the merits. *In Re Rueth Development Co.*, 976 N.E.2 42 (Ind. Ct. App. 2012).

d. "Status quo" means the last actual, peaceful, and non-contested status that proceeded the pending controversy between the parties to an action. *Rees v. Panhandle Eastern Pipeline Co.*, 377 N.E.2d 640 (1978).

e. An injunction does not create or enlarge the rights of a party, it merely protects existing rights and prevents harm to the aggrieved party that cannot be corrected by final judgment. *Indiana & Michigan Elec. Co. v. Whitley County Rural Elec. Membership Corp.*, 316 N.E.2d 584, 586 (Ind. Ct. App. 1974).

Reasonable Likelihood of Prevailing on the Merits: Article I, § 1 Claim

f. Article I, § 1 of the Indiana Constitution 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; 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.

g. Plaintiffs argue that the liberty guarantee of Article I, § 1 of the Indiana Constitution provides a privacy right that includes a woman's right to determine whether she will carry a pregnancy to term. Defendants argue that no judicially enforceable right to privacy exists. Defendants additionally argue that the Court need not reach the issue of whether such a right exists because—if such a right indeed exists—it does not include a right to abortion.

h. In order to interpret the Indiana Constitution, a court must examine the language of the provision in light of the history surrounding the drafting and its ratification as well as its purpose. *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dep't. of Redevelopment*, 744 N.E.2d 443, 447 (Ind. 2001) ("[t]he language of each provision of the Constitution must be treated with particular deference, as though every word has been hammered into place.").

i. Article I, § 1 of the Indiana Constitution is not hortatory. Although our Supreme Court has discussed the aspirational nature of similar provisions in other state constitutions, no such interpretation has been adopted. *See Doe vs. O'Connor*, 790 N.E.2d 985, 991 (Ind. 2003)(declining to decide whether Art. I, § 1, presents any justiciable issues).

j. Article I § 1 provides judicially enforceable rights. These judicially enforceable rights as to questions of bodily autonomy have been previously recognized. *See Herman v. State*, 8 Ind. 545 (1855); *Beebe v. State*, 6 Ind. 501 (1855).

k. Although liberty is an enormous concept, the Court should nonetheless attempt to understand its constitutional significance by considering its plain meaning. Liberty is defined by Black's Law Dictionary as "1. Freedom from arbitrary or undue restraint, especially by a government. 2. A right, privilege, or immunity, enjoyed by proscription or by grant; the absence of a legal duty imposed on a person." The Merriam-Webster Dictionary also provides multiple definitions including, in pertinent part, "the quality or state of being free"; "the power to do as one pleases";

"freedom from physical restraint"; "freedom from arbitrary or despotic control"; "the positive enjoyment of various social, political, or economic rights and privileges"; "the power of choice".

l. Whether a right to privacy exists under the Indiana Constitution is an open question. *See Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 978 (Ind. 2005). By virtue of this question being unanswered, whether any existing right under Article I, § 1 of the Indiana Constitution runs parallel to those rights guaranteed by the Fourteenth Amendment to the United States Constitution is also an open question.

m. Our Court of Appeals previously and directly addressed the question at hand in 2004, holding that a privacy right—including a right to abortion—existed under Article I, § 1 of the Indiana Constitution, however the decision was vacated when the Indiana Supreme Court granted transfer of the matter. *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004), *vacated by Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 978 (Ind. 2005).

n. In *Clinic for Women, Inc. v. Brizzi* (hereinafter "*Brizzi*") the Indiana Supreme specific declined to address the question of the existence of a privacy right under the Indiana Constitution, however it did generate two separate dissents, one from Justice Dickson and one from Justice Boehm, with each dissent advocating in favor of deciding the Indiana constitutional question and with each dissent reaching a different determination as to the existence of such a right. *Id.* at 988, 994.

o. The majority in *Brizzi* explicitly adopted the *Casey* decision's "undue burden" test for purposes of analyzing regulation that is alleged to violate any privacy interest that may exist under Article I, § 1 of the Indiana Constitution. *Id.* at 984.

p. The reasoning of Justice Boehm's dissent as to the potential existence of a "bundle of liberty rights" contained in the Indiana Constitution is most compelling and provides ample legal support that Plaintiffs are reasonably likely to prevail on the merits. *See Id.* at 994-1005.

q. In interpreting the Indiana Constitution, one does not need to seek inferences or penumbra to find an express liberty right—the right is contained in the text of the Indiana Constitution. *Id.* at 1002; Ind. Const. Article I, § 1.

r. The text of the Indiana Constitution is more explicit in its affirmation of individual rights and its limitation of legislative power to intrude into personal affairs than its federal counterpart. *Id.* at 1002.

s. While *Dobbs* has certainly shaken the analytical landscape where federal questions surrounding substantive due process rights are concerned, Indiana Courts are not bound by the *Dobbs* majority's analysis in interpreting our Indiana Constitution. Several provisions of the Indiana Constitution, despite having the same or similar language to an analogous provision of the United States Constitution, have been interpreted to give greater protection to the individual liberties of Hoosiers. *See, e.g., Andrews v. State*, 978 N.E.2d 494, 502-03 (Ind. Ct. App. 2012) (noting that Indiana's ex post facto clause offers greater protection than that of the United States Constitution's and stating, "Greater protection of Hoosier's rights under the Indiana Constitution is not an uncommon principle in our state's jurisprudence."), *trans. denied*; *see also State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind. 2002) (addressing Indiana's search and seizure provision and noting, "[t]he Indiana Constitution has unique vitality, even where its words parallel federal language.").

t. The Indiana Constitution also provides greater protection than its federal counterpart where the right to consultation with counsel prior to consenting to a search—and by extension privacy—is concerned. *See, e.g., Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

u. There is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify through the proper use of its police power but may not alienate. *Price v. State*, 622 N.E. 2d 954, 960 (Ind. 1993).

v. Bodily autonomy has been recognized in Indiana case law as a basic component of liberty. *See e.g. In re Lawrance*, 579 N.E.2d 32, 39 (Ind. 1991).

w. A core value is materially burdened when "the right, as impaired, would no longer serve the purpose for which it was designed." *Price*, at 961.

x. The material burden test is failed if a state regulation totally blocks the purpose for which the constitutional right was designed. But a lesser impairment can also constitute a material burden. A state regulation creates a material burden if it imposes a substantial obstacle on a core constitutional value serving the purpose for which it was designed. *Clinic for Women, Inc. v. Brizzi*, at 984.

y. In *Brizzi,* the Indiana Supreme Court held that *Price's* material burden test is the equivalent of *Casey's* undue burden test, at least for purposes of assessing whether

a state regulation violates any fundamental right of privacy that may include protection of a woman's right to terminate her pregnancy that might exist under Article I, § 1 of the Indiana Constitution. *Id.*

z. The debates of our Constitutional Convention leading up to ratification of the current Indiana Constitution suggest that those who wrote our Indiana 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*, at 39. The common law, our constitution, and Indiana's statutes all reflect a commitment to self-determination. *Id.*

aa. The Court acknowledges that abortion was not lawful at the time the Indiana Constitution was ratified. However, this does not foreclose the language of Article I, § 1 from being interpreted at this point as protecting bodily autonomy, including a qualified right by women not to carry a pregnancy to term. The significant, then-existing deficits of those who wrote our Constitution—particularly as they pertain to the liberty of women and people of color—are readily apparent. As Justice Boehm points out in his *Brizzi* dissent, "[i]n 1851 we had slavery in many states and Article II, Section 5 of the 1851 Constitution denied the right to vote on the basis of race. Married women had no property rights until they were conferred by statute in 1923. Both of these subjects were debated at length in the 1851 Constitution, but both were left in a state that, by today's lights, is wholly incompatible with fundamental principles of ordered liberty." *Brizzi* at 999. Our analysis here cannot disregard this reality, particularly when considering questions of bodily autonomy.

bb. Regardless of whether the right is framed as a privacy right, a right to bodily autonomy, a right of self-determination, a bundle of liberty rights, or by some other appellation, there is a reasonable likelihood that decisions about family planning, including decisions about whether to carry a pregnancy to term—are included Article I, § 1's protections.

cc. It is without question that the State has an interest in regulating abortion. Plaintiffs concede as much at oral argument. State interests in abortion regulation can include protection of maternal health, preserving fetal life, maintaining societal ethics, promulgating medical ethical standards, and creating bright line rules distinguishing between infanticide and lawful abortion to name a few. *See Dobbs*, at 2312 (Roberts, C.J., *concurring in the Judgment*).

dd. It is also without question that the judicially enforceable liberty rights that are reasonably likely to exist under Article I, § 1 are not unqualified. S.B. 1, however, materially burdens Hoosier women and girls' right to bodily autonomy by making that autonomy largely contingent upon first experiencing extreme sexual violence or significant loss of physical health or death.

ee. S.B. 1 also materially burdens the bodily autonomy of Indiana's women and girls by significantly and arbitrarily limiting their access to care. S.B. 1 does so by

requiring women and girls to seek treatment at hospitals or ambulatory surgery centers that are majority hospital-owned. The huge majority of abortions are performed in the clinic setting. The evidence supports that the hospitalization requirement is likely to significantly limit the availability of the procedure (even for currently excepted rape and incest victims), will likely significantly increase the cost, and is unlikely to increase the safety of Hoosier women and girls. The Indiana State Health Department's own reports support the contention that abortion clinics are capable of safely providing the treatment. *See generally* ISDH Terminated Pregnancy Reports 2015-2020 (full citations contained in Footnote 1).

ff. Because of these considerations, and the history of Indiana's Constitution being interpreted to provide greater protection to individual citizens than its federal counterpart, there is a reasonable likelihood that this significant restriction of personal autonomy offends the liberty guarantees of the Indiana Constitution and the Plaintiffs will prevail on the merits as to their claim that S.B. 1 violates Article I, § 1 of the Indiana Constitution.

Likelihood of Prevailing on the Merits: Article I, § 23 Claims

gg. The Court limits the analysis here to the stand-alone claim that S.B. 1 violates Article I, § 23 of the Indiana Constitution and does not address any undue/material burden analysis that may be applicable to other claims.

hh. Plaintiffs argue that S.B. 1 "violates Article 1, Section 23's guarantee of equal privileges and immunities by discriminating against abortion providers." Pls. Br. 20. Section 23 provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. Art. I, § 23. Under that clause, any "disparate treatment" must be "reasonably related to inherent characteristics which distinguish the unequally treated classes," and any "preferential treatment" must be "uniformly applicable and equally available to all persons similarly situated." *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 382 (Ind. 2017) (quoting *Myers v. Crouse-Hinds Div. of Cooper Indus., Inc.*, 53 N.E.3d 1160, 1165 (Ind. 2016)).

ii. In this context, "'inherent' does not refer only to immutable or intrinsic attributes, but to *any* characteristic sufficiently related to the subject matter of the relevant . . . classes." *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 200 (Ind. 2016) (emphasis added). Courts, moreover, must "accord the legislature substantial deference when making classifications and require the plaintiff to 'negate every conceivable basis which might have supported the classification.'" *KS&E Sports v. Runnels*, 72 N.E.3d 892, 906 (Ind. 2017) (quoting *Whistle Stop Inn*, 51 N.E.3d at 199).

jj. S.B. 1 does not discriminate against abortion providers PPGNHAIK, Women's Med, and Whole Woman's Health. Under S.B. 1, those Parties can continue performing abortions if they meet the licensing requirements for a "hospital licensed under IC 16-21 or an ambulatory surgical center (as defined in IC 16-18-2-14) that has a majority ownership by a hospital licensed under IC 16-21." Ind. Code § 16-34-2-1(a)(1)(B); *see id.* § 16-34-2-1(a)(2)(C), (a)(3)(C).

kk. Even if S.B. 1 is viewed as treating abortion clinics operated by PPGNHAIK, Women's Med, and Whole Woman's Health differently from and less favorably than hospitals and ASCs, any differential treatment would be reasonably related to inherent characteristics that distinguish those classes. Post-*Dobbs*, and absent protection of abortion by the Indiana Constitution (which is addressed separately herein) there is no requirement that the State codify and recognize abortion clinics as a separate classification of medical facility.

ll. Significantly, abortion clinics are licensed separately from hospitals and surgical centers. For hospitals and surgical centers, the Centers for Medicare and Medicaid Services impose minimum inspection requirements. *See* Centers for Medicare & Medicaid Services, *Fiscal Year (FY) 2021 Mission & Priority document (MPD)—Action*, at 11, https://www.cms.gov/files/document/fy-2021-mpd-admin-info-20-03-all.pdf. Private accrediting organizations can conduct those inspections. The Indiana Department of Health thus does not need to independently inspect hospitals accredited by private accrediting bodies to ensure compliance with health and safety standards. *See* Ind. Code § 16-21-2-13(a)(2). Because no similar accrediting organization exists for abortion clinics, however, any inspections must be done by the Indiana Department of Health. The increased burdens on the State associated with maintaining a separate licensing and inspection regime for abortion clinics is a legitimate and reasonable rationale for ending that regime.

mm. For the forgoing reasons, the Plaintiffs are unlikely to prevail on the merits as to their Article I § 23 claim.

Likelihood of Prevailing on the Merits: Article I, § 12 Claim

At hearing, Plaintiffs withdrew their Article I, § 12 claim based upon the asserted position contained Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction filed on September 16, 2022.

Adequacy of Remedy at Law/Irreparable Harm

nn. The Plaintiffs carry the burden to show that the remedy at law is inadequate and that they will suffer irreparable harm pending resolution of the action. *Leone* at 1248.

oo. Plaintiffs have standing to raise the injury claims of their clients and patients. See, e,g., *In re Ind. Newspapers, Inc.*, 963 N.E. 2d 534, 549 (Ind. Ct. App. 2012); *Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 870 (Ind. Ct. App. 2006); see also *Planned Parenthood of Wisc. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998)(citing cases).

pp. Our Court of Appeals has stated that "[a] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete, redressable injury, that he has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his own interests." *Planned Parenthood of Ind. v. Carter* at 870 (*citing Osmulski v. Becze*, 638 N.E.2d 828, 833-34 (Ind. Ct. App. 1994)).

qq. For the reasons outlined in the analysis of the Article I § 1 claim, Plaintiffs have demonstrated that there is a reasonable likelihood that S.B. 1 violates the Indiana Constitution, which is a *per se* irreparable harm for purposes of preliminary junction analysis. *See Planned Parenthood of Ind. v. Carter* at 864.

rr. This factor supports the Plaintiffs' claim for injunctive relief.

Weighing of Harms

ss. Plaintiffs must show that their threatened injury if the injunction is denied outweighs the threatened harm to the Defendants if the injunction is granted. *Leone* at 248.

tt. S.B. 1 was effective on September 15, 2022. Because the Plaintiffs have demonstrated a reasonable likelihood of prevailing on the merits, the potential constitutional deprivations for Indiana women and girls should be given significant weight in this balancing.

uu. As mentioned previously, the State has an interest in regulating abortion so long as that regulation is not in violation of the Indiana Constitution. The Defendants' ability to enforce abortion regulations continues with maintenance of the status

quo, however it does not continue to the breadth and degree S.B. 1 contemplates. The named Defendants have statutory duties of enforcement that will either track S.B. 1 as enacted or, if the relief is granted, would be subject to the status quo.

vv. The state constitutional issues have never been directly addressed by our Supreme Court. *Clinic for Women v. Brizzi* at 978. However, multiple surrounding State Courts have found likely merit in what appear to be similar claims under their respective state constitutions. *See Doe v. O'Connor*, 781 N.E.2d 672, 674, (Ind. 2003)(generally supporting the proposition that the openness of a constitutional question as well as determination of similar issues by other jurisdictions in a manner favorable to the moving party may be a consideration in granting injunctive relief); Ex. 1-3 to Plaintiffs' Reply in Support of the Motion for Preliminary Injunction.

ww. On balance, the weighing of these harms favors granting injunctive relief.

Public Interests

xx. Plaintiffs also carry the burden to show that public interest will be disserved if the relief is not granted. *Leone* at 1248.

yy. The public has an interest in Plaintiffs' constitutional rights being upheld. *See, e.g., Carter*, 854 N.E.2d at 881–83.

zz. Plaintiffs have also demonstrated that the public has an interest in Hoosiers being able to make deeply private and personal decisions without undue governmental intrusion.

aaa. In considering the public interests, the Court must consider the constitutional rights of Indiana women and girls, but the Court cannot and should not disregard the legitimate public interest served by protecting fetal life. The Court specifically acknowledges the significant public interest in both.

bbb. If injunctive relief is granted, the public will continue to be subject to the previous abortion regulation regime that was significantly influenced by the United States Supreme Court juris prudence that identified and expressly reaffirmed a privacy right that included abortion for nearly fifty years. Staying enforcement of S.B. 1 maintains that fifty-year-old scheme long enough for the Court to address the issue on the merits.

ccc. Weighing the considerations, the Court concludes that the public interest will be disserved by if the relief is not granted.

ddd. The Plaintiffs have shown by a preponderance of the evidence that: (1) there is a reasonable likelihood of success on the merits, (2) their remedies at law are inadequate, resulting in irreparable harm pending resolution of the substantive action if a preliminary injunction is not granted, (3) that the balance of harms favors preliminary injunction such that the threatened injury to the Plaintiffs outweighs the injunction's potential harm to the Defendants, and (4) that the public interest would not be disserved by the relief. *Kuntz v. EVI, LLC*, 999 N.E.2d 425, 427-428 (Ind. Ct. App. 2013). Plaintiffs are entitled to the injunctive relief they seek.

ORDERS

Based upon the foregoing analysis, the Court hereby GRANTS Plaintiffs' Motion for Preliminary Injunction. It is therefore ORDERED that Defendants shall be enjoined from enforcing the provisions of S.B. 1 as enacted in Titles 16, 25, 27, and 35 of the Indiana Code pending trial on the merits. No bond shall be required of Plaintiffs.

So ORDERED this 22nd day of September, 2022.

Kelsey B. Hanlon, Special Judge
Monroe Circuit Court

Dist:

Parties and Counsel through IEFS