IN THE

Indiana Supreme Court

No. 22S-PL-00338

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

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SUMMARY OF THE ARGUMENT

By urging this Court to recognize a new exception to standing, a judicial entitlement to "life, liberty, and the pursuit of happiness," and a novel abortion right, plaintiffs ask the judiciary to rewrite the Constitution. As the constitutional text and this Court's precedents make clear, however, constitutional changes must come, if at all, from the people of Indiana and their elected representatives.

I. To safeguard the constitutional structure, this Court's decisions require litigants to assert their own personal rights. That rule forecloses plaintiffs from asserting what they characterize as the "most . . . personal" of rights belonging to hypothetical patients not before the Court.

Plaintiffs urge an especially permissive form of third-party standing, but ignore its many problems—weakened constructional structure, conflicts of interest, and doctrinal inconsistencies. And their policy arguments for treating abortion providers as special presume the existence of a novel constitutional right never recognized by this Court, overlook standing's constitutional function, contravene precedent, and disregard practical realities.

Public standing—an unsettled, embattled doctrine—does not allow plaintiffs to assert the *personal* rights of strangers, either.

II. Article 1, § 1 is not enforceable regardless. Plaintiffs offer no textual, structural, or historical argument for holding that § 1 creates enforceable rights—text, structure, and history are all against them. Plaintiffs cite overruled decisions

and dicta. But neither justifies disregarding constitutional text or precedents squarely foreclosing § 1 as a source of enforceable rights.

III. Nothing in the Constitution itself or Indiana history supports recognizing a novel abortion right. By express statutory text applied in repeated prosecutions, the Indiana General Assembly outlawed abortion at all stages of pregnancy before, during, and after the 1850–51 period of constitutional adoption. Plaintiffs urge another version of the trial court's theory that the judiciary may disregard constitutional boundaries whenever they purportedly suffer "deficits." As precedent firmly establishes, however, the judiciary has no power to amend the Constitution by fiat. Reading novel "rights" into the Constitution would set the judiciary on a dangerous, unprincipled path destructive to rule of law.

Abstract dicta about liberty and privacy, and common-law decisions about doctor-patient confidentiality, provide no support for an abortion right. This Court's precedents require *objective evidence* that the Constitution protects the *specific right* asserted, not inferences or emanations from abstract ideas or collateral protections. And abortion—which destroys unborn children's lives—is nothing like (allegedly protected) conduct that does no harm to others. The intentionally fatal consequences of abortion for unborn children gives the State ample justification to prohibit it.

IV. Plaintiffs do not identify any irreparable harm to themselves from S.B. 1, as required for an injunction. And the State's compelling interest in protecting life overcomes whatever practical difficulties third parties allegedly face.

ARGUMENT

I. Plaintiffs Lack Standing To Assert an Article 1, § 1 Claim

A. Plaintiffs do not allege injury from violations of their own rights

Plaintiffs say standing focuses "on whether the plaintiff is injured by the action she challenges." Response Br. 23. Injury is necessary, but not sufficient. A controversy is justiciable only if resolution is "essential to the protection of the rights *of the parties concerned*." *Ind. Educ. Emp't Relations Bd. v. Benton Cmty. Sch. Corp.*, 266 Ind. 491, 365 N.E.2d 752, 754 (1977) (emphasis added); *see Brewington v. Lowe*, 1 Ind. 21, 23 (1848) (holding dispute must concern "the *rights of the parties*" (emphasis added)). Critically, "[c]onstitutional rights are personal, and violation of a third party's constitutional rights cannot be claimed." *Adler v. State*, 248 Ind. 193, 225 N.E.2d 171, 172 (1967); *see Leonard v. State*, 249 Ind. 361, 232 N.E.2d 882, 885–86 (1968). (*Taylor v. Fall Creek Regional Waste District*, 700 N.E.2d 1179 (Ind. Ct. App. 1998) (cited Response Br. 23), did not address standing to assert others' constitutional rights.)

That rule, which plaintiffs ignore entirely, forecloses their suit. Plaintiffs allege only that S.B. 1 will impact them, Response Br. 23, *not* that the Indiana Constitution secures a right to be free from such financial and regulatory impacts. Their core theory is that Article 1, § 1 secures a "right to determine whether to carry a pregnancy to term"—supposedly the "most . . . personal," "private," and "intimate" of rights. Response Br. 31, 34, 38, 51 (citation omitted). Any such right belongs to pregnant women—not abortion providers and advocates—so plaintiffs are not "proper person[s] to invoke" judicial power. *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019).

B. The Court should reject federal third-party standing

Conferring standing on plaintiffs would require this Court to embrace not only third-party standing (for the first time), but also a permissive form that "ignore[s]" many of the doctrine's usual limitations. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022). Plaintiffs do not refute that allowing third-party standing risks suits by persons whose sole stake is an abstract interest in legal compliance or whose views conflict with the rightsholders'. Opening Br. 29–31. Instead, they argue that "the Indiana Constitution [i]s more permissive than its federal counterpart." Response Br. 24. That overstates matters. Opening Br. 28, 31. The Indiana Constitution does not permit overbreadth challenges to laws restricting expression, *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993)—a form of third-party standing federal law permits, *see Sabri v. United States*, 541 U.S. 600, 609 (2004). It may not recognize associational standing. *See Bd. of Comm'rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 169–70 (Ind. 2017). And it is at least as strict on the assertion of third-party rights. *See, e.g.*, *Leonard*, 232 N.E.2d at 885–86 (no standing to assert third party's right against self-incrimination); *Adler*, 225 N.E.2d at 172 (same for unreasonable searches).

Nor does a "considerable body" of Indiana cases accept third-party standing. Response Br. 25. Plaintiffs overlook several decisions from this Court expressly rejecting third-party standing. Opening Br. 28, 31. They identify only three Indiana Court of Appeals decisions from the last 38 years invoking third-party standing. Response Br. 25. And while plaintiffs claim that this Court has purportedly "assumed" third-party standing's existence, *id.*, the cited *Batson* cases assumed nothing about

state law. They applied binding precedent governing the Fourteenth Amendment's application to state cases. *See Ashabraner v. Bowers*, 753 N.E.2d 662, 666–67 (Ind. 2001); *Wright v. State*, 690 N.E.2d 1098, 1104–05 (Ind. 1997). And *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005), did not mention standing at all.

Finally, plaintiffs argue that the traditional rule against asserting third parties' constitutional rights is "at odds" with "public standing." Response Br. 24. Yet public standing is itself an embattled, "unsettled" doctrine, *City of Gary v. Nicholson*, 190 N.E.3d 349, 352 (Ind. 2022), that "risks pushing the judiciary's role beyond the boundaries contemplated by our distribution-of-powers doctrine," *Horner*, 125 N.E.3d at 595. Regardless, public standing at most concerns public rights that cannot be otherwise vindicated, not private rights, which rightsholders must invoke. *State ex rel. Steinke v. Coriden*, 831 N.E.2d 751, 755–56 (Ind. Ct. App. 2005); *see* pp. 15–16, *infra*.

C. Plaintiffs cannot satisfy third-party standing's requirements

Federal third-party standing requires the plaintiff have a "'close' relationship with the person who possesses the right" and "a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citation omitted). Plaintiffs do not deny that, outside the abortion context, relationships with unidentified clients or clients who could initiate litigation themselves are insufficient. Opening Br. 32–34. They instead rely, Response Br. 25–26, on federal decisions "ignor[ing]" standing's usual limitations on the theory that abortion is a preferred right, *Dobbs*, 142 S. Ct. at 2275. That alone is reason to reject plaintiffs' approach to standing: It both presupposes a right to abortion and contravenes this Court's declaration

that, under the Indiana Constitution, no right "occupies a 'preferred' position." *Price*, 622 N.E.2d at 958.

Moreover, plaintiffs are not suing on behalf of any specific, identifiable women with whom they have a doctor-patient relationship of "confidence and trust." Response Br. 26 (citation omitted). Attorney-client relationships also imply "confidence and trust," *see In re Goebel*, 703 N.E.2d 1045, 1049 (Ind. 1998)—usually of a type more personal and enduring, *see June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting). Yet attorneys do not have third-party standing to assert the rights of "hypothetical" clients. *Kowalski*, 543 U.S. at 131; *see Garau Germano, P.C. v. Robertson*, 133 N.E.3d 161, 172 (Ind. Ct. App. 2019).

Critically, abortion providers' interests do not always align with women's. *See June Med.*, 140 S. Ct. at 2166 (Alito, J., dissenting). Planned Parenthood admits to financial incentives for challenging S.B. 1, which would require its clinics to close. Response Br. 19–20. That pits their interests against women's, whose health S.B. 1 safeguards by requiring any legal abortions to occur in hospitals or ambulatory surgical centers. Opening Br. 33. Plaintiffs say clinic abortions are allegedly "safe[]" (for pregnant women, not unborn children). Response Br. 28 n.12 (citation omitted). But even a "potential[]" conflict is disqualifying, so the very existence of a safety dispute forecloses third-party standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004); *see June Med.*, 140 S. Ct. at 2166 (Alito, J., dissenting).

With respect to "hindrance," plaintiffs nowhere deny that pregnant women desiring abortions could challenge S.B. 1 themselves. Opening Br. 34; *see June Med.*,

140 S. Ct. at 2174 (Gorsuch, J., dissenting) ("interested women have challenged abortion regulations on their own behalf in case after case"). They cite a generic concern that *some* women might fear the consequences of "publicity from a court suit." Response Br. 26 (citation omitted). As plaintiffs' lawyers know from other cases challenging S.B. 1, *see Anonymous Plaintiffs 1–5 v. The Individual Members of the Medical Licensing Board of Indiana*, No. 49D01-2209-PL-031056 (Marion Super. Ct.), women can sue anonymously to avoid any repercussions from publicity. *See Doe v. Town of Plainfield*, 860 N.E.2d 1204, 1206–11 (Ind. Ct. App. 2007).

Possible "mootness" is no hindrance either. Response Br. 27. Courts have capacity to act with speed—this case will now be argued before the State's highest court four and a half months after being filed, even without expedited appellate briefing. And foreseeable mootness could at most provide a basis for applying an exception to mootness doctrine, *see June Med.*, 140 S. Ct. at 2169 (Alito, J., dissenting)—though even that is questionable. In no way, however, is potential mootness grounds for conferring standing on third parties to enforce putative personal rights.

D. Public standing cannot be used to end-run prohibitions on asserting others' personal rights

Although some decisions "involving the enforcement of a public right or duty" invoke public standing, *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 981 (Ind. 2003), personal or "private" rights do not warrant the same treatment, *Steinke*, 831 N.E.2d at 755. *Contra* Response Br. 28–29. None of the "constitutional challenges" mentioned in *Cittadine* involved individual constitutional rights, 790 N.E.2d at 981—a type of "personal" right third parties cannot assert, *Adler*, 225

N.E.2d at 172. Permitting plaintiffs to assert what they say is women's "most . . . personal" right, Response Br. 38, would require expanding public standing.

Plaintiffs' public-standing theory illustrates why the doctrine should be discarded: It threatens to make "all government action subject to judicial review" by anyone who can hypothesize impingement of some unidentified person's rights. *Horner*, 125 N.E.3d at 595. Under plaintiffs' theory, public standing is not a "rare[]" exception for "extreme circumstances," *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995), but available in every case of "public import," Response Br. 29. This Court should reject a doctrine whose existence invites continual attacks on the constitutional structure. *See Horner*, 125 N.E.3d at 611–17 (Slaughter, J., concurring).

II. Article 1, § 1 of the Indiana Constitution Does Not Confer Judicially Enforceable Rights

Section 1 is not enforceable regardless. "Interpretation of the Indiana Constitution is controlled by the text itself, illuminated" by "structure," "purpose," "history," and "case law." *State v. Katz*, 179 N.E.3d 431, 443 (Ind. 2022) (quoting *Price*, 622 N.E.2d at 957). Plaintiffs, however, skip text, structure, purpose, and history. They never grapple with § 1's text, which declares the "natural rights philosophy that informs the Indiana Constitution" instead of guaranteeing specific civil rights. *Id.* at 447; *see* Opening Br. 35–36. They ignore the constitutional delegates' explanation that § 1 describes "the rights of man as existing under the law of nature" and does "not contravene the power of man[,] . . . by the public or municipal laws of States, to divest other men of those rights." 1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 959, 973 (1850); *see*

Opening Br. 36–37. And they do not deny that treating § 1 as enforceable would wreak havoc on the constitutional structure, vitiating concrete constitutional limitations and requiring the judiciary to make policy without objective standards to guide it. Opening Br. 37–40.

Plaintiffs' *amici* offer equally feeble analysis. Glancing past textual and structural difficulties, they declare that those who debated the Constitution believed in "natural rights," "expected the Constitution to facilitate progress," and thought § 1 would have some "effect." Historians Br. 16–19. But none of those vague and sweeping pronouncements establish that the Constitution would secure all natural rights or facilitate "progress" through judicial enforcement of § 1 (nor do they prove that an abortion right is "natural" or somehow facilitates "progress"). *Amici*, moreover, overlook constitutional delegates' explanations of § 1's limits. *See* Opening Br. 36–37. Section 1 has "effect" not as an enforceable guarantee but as a guide to understanding the Constitution's philosophy.

Precedent stands against plaintiffs' position as well. In *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 20, 22 (1918), this Court rejected the notion that the judiciary can invalidate a statute that violates no "particular provision of the Constitution," even if it is "repugnant to general principles of justice, liberty, and rights not expressed in the Constitution." That holding forecloses reliance on § 1—which at most references "general principles of . . . liberty" and "rights not expressed in the Constitution"—to invalidate state statutes. Opening Br. 40–41. Plaintiffs do not wrestle, Response Br. 30 n.15, with *Schmitt*'s express language.

Aside from the liquor-law cases *Schmitt* overruled, plaintiffs and their *amici* cite only a few others mentioning § 1. Response Br. 29–30; Historians Br. 21. The two insurance cases they cite merely say that police-power legislation cannot be "arbitrary." *Dep't of Fin. Institutions v. Holt*, 231 Ind. 293, 108 N.E.2d 629, 634 (1952); *see Dep't of Ins. v. Schoonover*, 225 Ind. 187, 72 N.E.2d 747, 749 (1947). That is far different from saying § 1 protects "natural rights"—a claim that "could not be sustained." *Weisenberger v. State*, 202 Ind. 424, 175 N.E. 238, 240 (1931). And plaintiffs themselves admit (Response Br. 30) that their cases addressing wages, price controls, and ticket scalping—which used "discredited" economic-rights theories, *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000)—invoked §§ 21 and 23. The Court would have had no need to invoke those express guarantees if § 1 secured substantive rights.

As *In re Leach*, 134 Ind. 665, 34 N.E. 641 (1893), illustrates, this Court has understood § 1 at most as a guide for interpreting express guarantees rather than an independent source of rights. There, the Court held that women may practice law because voters of good character were entitled to bar admission and "the letter" of Article 1, § 23 guarantees women equal privileges. 34 N.E. at 641–42; *see Collins v. Day*, 644 N.E.2d 72, 80–81 (Ind. 1994) (describing *Leach* as "applying . . . Section 23"). The Court merely mentioned § 1 when rejecting the idea that "the Constitution was adopted . . . in reliance on any supposed rule of common law that would exclude women." *Id.* at 642. It did not hold that § 1 conferred substantive rights.

The "weight of authority" from other States does not support plaintiffs' position either. Response Br. 31; *see Doe v. O'Connor*, 790 N.E.2d 985, 990–91 (Ind. 2003)

(collecting cases from nine States); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 n.23 (Iowa 2022). Of the plaintiffs' eight out-of-state cases, seven undertake *no* textual, structural, and historical analysis. Only *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 473–80 (Kan. 2019), attempted some analysis—and it relied on Kansas-specific history without addressing the textual and structural difficulties with treating a provision like § 1 as enforceable. Such decisions make a "poor excuse" for taking an approach that text, structure, history, and precedent all show to be "*wrong*." *Fry v. State*, 990 N.E.2d 429, 442 (Ind. 2013).

III. Any Rights Secured by Article 1, § 1 of the Indiana Constitution Do Not Include an Abortion Right

To the extent § 1 is enforceable, it does not secure a right to abortion. Any such claims would require "text and history" showing that the "founding generation would have considered" an interest "fundamental." *Price*, 622 N.E.2d at 959 n.4. *No* text or history supports an abortion right. The parties agree that the founders would not have "contemplated [§ 1] as including the right to abortion"—a criminal act. Response Br. 38; *see* Opening Br. 44–47. Plaintiffs simply urge another version of the trial court's unprecedented theory that Indiana courts may disregard constitutional boundaries whenever those boundaries purportedly suffer "deficits."

A. No text or history supports an abortion right

This Court has repeatedly held that "[i]nterpretation of the Indiana Constitution is controlled by the text itself." *Katz*, 179 N.E.3d at 443 (quoting *Price*, 622 N.E.2d at 957). Here, it is undisputed that the text itself nowhere mentions an undifferentiated right to privacy or bodily integrity, much less abortion. Opening Br. 44. Plaintiffs

have abandoned their argument, App. II 90 n.20, that a privacy right including abortion can be stitched together from provisions as disparate as Article 1, § 3's protections for religion, § 21's constraints on government takings, and § 34's prohibition against quartering of soldiers.

Plaintiffs invoke vague notions of § 1's purpose. Response Br. 33–36. But "[t]here is no spirit pervading the Constitution outside of the expressed limitations in it which enables this court to declare a law void." *Schmitt*, 120 N.E. at 22. Constitutional claims cannot be rooted in the "shifting sands of philosophical inquiry" but must "'have their origin in the express terms of the constitution or which are necessarily to be implied from those terms.'" *Price*, 622 N.E.2d at 959 n.4 (quoting *O'Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981)).

Nor does the Constitution prioritize "individualism" above the "general welfare." Response Br. 33 (citation omitted). "Our founders . . . perceived no dichotomy between individual rights and communal needs." *Price*, 622 N.E.2d at 959. They understood that individuals "ceded a quantum of their 'natural' rights in exchange for 'receiving the advantages of mutual commerce.'" *Id.* (citation omitted). "The aggregate of these concessions, often called the state's police power, constitutes the authority by which the advantages of political community are secured." *Id.* Thus, "the State may exercise its police power to promote the health, safety, comfort, morals, and welfare of the public," even when it "impair[s] 'natural rights.'" *Id.* (quoting *Weisenberger*, 175

N.E. at 240). Saying that the founders believed in "liberty" fails to establish that "liberty" includes abortion or that the State lacks the power to prohibit abortion—something it did before, during, and after the Constitution's ratification.

Indeed, Indiana's consistent prohibition of abortion as a criminal act from before statehood forecloses any notion that § 1 secures an abortion right. Opening Br. 44–47. *Amici* (but not plaintiffs) quibble over the extent to which Indiana prohibited abortion in the nineteenth century and why. Historians Br. 23–31. But they cite no evidence that the "founding generation" considered abortion to be a "fundamental" liberty and sought to protect it. *Price*, 622 N.E.2d at 959 n.4. *Amici* at most allege that some individuals "subtly" offered or sought out abortion notwithstanding criminal prohibitions. Historians Br. 25 (citation omitted). True or not, surreptitious criminal activity falls "far" short of the robust "historical evidence" this Court's cases demand. *Doe v. Town of Plainfield*, 893 N.E.2d 1124, 1132 (Ind. Ct. App. 2008).

The historical record belies *amici*'s attempts to minimize Indiana's prohibitions as well. *Amici* contend that the common law Indiana incorporated in 1807 "expressed no interest in regulating pregnancies before quickening." Historians Br. 23. But pre-quickening abortions could support a homicide charge under a "proto-felony-murder rule." *Dobbs*, 142 S. Ct. at 2250. Any quickening standard was "abandoned in the 19th century," with the British Parliament rejecting it before Indiana enacted its common-law reception statute. *Id.* at 2252. And Indiana courts deemed an "unborn child" to have an independent existence "without regard to the state of gestation." *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265, 267 (1972).

Whatever the status of abortion at common law, moreover, it is undisputed that Indiana prohibited abortion by statute beginning in 1835. Opening Br. 45–46. *Amici*'s assertion that Indiana's statutory prohibition "likely did not apply at all before quickening," Historians Br. 29, is groundless. *Amici* identify no pre-quickening exception in the text; cite no Indiana decisions refusing to apply Indiana's abortion ban pre-quickening (no later than the eighteenth week of pregnancy); and overlook decisions from this Court upholding pre-quickening abortion convictions. *See, e.g.*, *Sharp v. State*, 215 Ind. 505, 19 N.E.2d 942, 943 (1939) ("pregnant five or six weeks"); *Hauk v. State*, 148 Ind. 238, 46 N.E. 127, 131 (1897) ("three months advanced in pregnancy"); *Carter v. State*, 2 Ind. 617, 623 (1851) ("four or five months foetus").

Amici's assertion that the statute merely prohibited "certain methods of abortion" to prevent "attempted murder [of the pregnant woman] by poisoning," Historians Br. 27 (brackets and citation omitted), is equally devoid of merit. The statute criminalized the administration of "*any* medicine, drug, substance or thing whatever," and "use or employ [of] *any* instrument *or other means whatever*," to secure a miscarriage. 1835 Ind. Laws ch. XLVII, p. 66, § 3 (emphasis added). *Amici* identify no abortion method that would escape the statutory language. And the statutory language likewise unambiguously prohibits securing a "miscarriage"—not poisoning, which was a separate offense. *Id.*; *see* 2 Ind. Rev. Stat. ch. 7, § 11 (1852).

In short, Indiana's 1835 abortion ban was not about ensuring "safe" abortions; it was about prohibiting them altogether. As this Court has recognized, the reason Indiana—and many other States—have long prohibited abortion is that abortion

"destr[oys]" "independent life begin[ning] at conception." *Cheaney*, 285 N.E.2d at 268–69; *see Dobbs*, 142 S. Ct. at 2255 ("[P]assage of these laws was . . . spurred by a sincere belief that abortion kills a human being."). The constitutional text and history provide no support for an abortion right.

B. Courts have no power to amend the Constitution

Faced with overwhelming evidence that the Constitution does not protect abortion, the trial court invented a new right on the unprecedented theory that the Constitution and its authors had "significant . . . deficits." App. II 37. Plaintiffs try to distance themselves from the trial court's "deficits" rationale—they never mention it—preferring to dress up the trial court's frank rejection of the Constitution in the language of "progress." Response Br. 38–40. However labeled, their theory that the Constitution is subject to judicial amendment is just as destructive to precedent, principled decisionmaking, and the rule of law.

No decision from this Court holds that the judiciary may disregard constitutional text deemed deficient or antiquated. This Court has repeatedly emphasized that "[j]udges must enforce the Constitution as written and intended." *Bd. of Trustees of Pub. Employees' Ret. Fund of Ind. v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984); *see* Opening Br. 42–43, 48–49. The Constitution is not an "elastic instrument" that "stretches to meet the demands of the moment." *Finney v. Johnson*, 242 Ind. 465, 179 N.E.2d 718, 721 (1962). The plurality opinion in *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217 (1856), is not to the contrary. The judiciary, it stated, may invalidate a law "only" when "the law conflicts with the constitution." *Id.* at 222. It

"cannot run a race of opinions." *Id. Leach* likewise did not overthrow constitutional boundaries in the name of progress. It enforced "the letter" of Article 1, § 23, disclaiming that it was giving the Constitution a "new interpretation." 34 N.E. at 642.

True, *Leach* observed that earlier generations "did not anticipate" that "women might desire to enter the profession of law." 34 N.E. at 642. But applying texts of fixed meaning to "unforeseen" circumstances is fundamentally different from creating "new rights." *Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J., concurring). "Drafters of every era know . . . the rules they create will one day apply to all sorts of circumstances they could not possibly envision." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 86 (2012). But that reality does not imply the constitutional text itself changes, that "every judge [may] decide for himself what it should mean," or that courts may "limit[] the democratic process" by prohibiting "acts of self-governance that 'We the people' never, ever, voted to outlaw." *Id.* at 87–88.

Plaintiffs, moreover, identify no principled way to decide which constitutional provisions courts may amend. Citing only a 1984 amendment to § 1 in which "all men are created equal" was amended to read "all people are created equal," they invoke "legal and societal recognition of women's equal rights." Response Br. 40. But saying both sexes have equal rights does not define those rights. And it is unfathomable that Indiana voters in 1984, when adopting a slate of amendments to make the Constitution gender-neutral throughout, thought that they were embracing abortion. "Men" in § 1 already "include[d] both sexes." 1 *Debates of the Convention*, *supra*, at 958. The

1984 amendments were merely "stylistic changes designed to make the Indiana Constitution more understandable through the use of modern language." *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 513 (Ind. 1992).

To support the view that "abortion is critical for women to partake fully" in society, plaintiffs offer only their own say-so. Response Br. 40. They ignore that Hoosiers of all generations have consistently treated abortion as criminal, including during what plaintiffs believe to be more enlightened times. Opening Br. 44–47, 50. And they ignore that a "significant percentage of Americans with pro-life views are women." *Dobbs*, 142 S. Ct. at 2304 (Kavanaugh, J., concurring).

Embracing plaintiffs' view that judges can read into the Constitution whatever a majority deems "critical" for society would undermine the rule of law and enfeeble the democratic process. *See* Opening Br. 49. Written constitutions depend on "the commitment of legal arbiters to abide" by "discernable meanings." Scalia & Garner, *supra*, at xxix. "What incentive is left for our citizens to exercise their constitutional right of 'applying to the General Assembly for redress of grievances,'" or to undertake the amendment process, if the judiciary can be convinced to disregard the Constitution? *Horner*, 125 N.E.3d at 595 (quoting Ind. Const. art. 1, § 31).

C. Generic statements about liberty, autonomy, and privacy cannot support an abortion right

1. Lacking textual and historical evidence of an abortion right, plaintiffs invoke assorted statements from disparate sources about abstract "liberty," "privacy," and "self-determination" and an entirely collateral right to confidentiality of medical records. Response Br. 34–40. Such statements are no substitute for evidence of an

abortion right. This Court's precedents demand textual and historical evidence that a specific "type" of right existed. *Katz*, 179 N.E.3d at 448; *see* Opening Br. 43–44, 51. "[T]ext and history" must demonstrate that the "founding generation" considered a "given interest"—here, abortion—to be a protected core value. *Price*, 622 N.E.2d at 959 n.4. Plaintiffs nowhere explain how their position can be reconciled with this Court's decisions demanding evidence that the specific conduct at issue is protected.

Nor do plaintiffs explain how principled lines can be drawn if it suffices for an interest to "fall[] . . . within" abstract buckets of "liberty," "privacy," or "self-determination." Response Br. 31. Plaintiffs do not deny that those concepts are capacious enough to include "do[ing] as one pleases." Opening Br. 49–52 (quoting App. II 34). They assert that abortion involves a more "momentous decision" than consuming drugs or refusing seatbelts. Response Br. 38. No doubt: It intentionally kills human beings. But plaintiffs themselves believe § 1 governs even trivial actions, such as "walk[ing] abroad [to] look upon . . . the sun at noon-day," fatally undermining any distinction resting on purported significance. *Id.* at 36 (citation omitted). And saying the consequences of abortion are greater does not explain why "privacy" includes abortion but not everything else done outside of public view, or why "self-determination" includes abortion but not every other action affecting a person's body or life.

Plaintiffs, moreover, overlook the principal reason why abortion is more momentous than most other decisions: "[a]bortion destroys" unborn children's lives. *Dobbs*, 142 S. Ct. at 2258; *see* Opening Br. 52. That distinguishes abortion from pu-

tative rights to confidential paperwork, midday walks, and refusing medical treatment for oneself. And the consequences of abortion for others is precisely why general statements about liberty are insufficient to show abortion itself is protected. Even pre-*Schmitt* cases taking a broad view of § 1 recognized that "[n]o man . . . has a right . . . to injure another." *Madison*, 8 Ind. at 234 (plurality op.); *see* Opening Br. 45.

2. None of plaintiffs' authorities, Response Br. 34–37, establish that § 1 protects abortion. Even setting aside that "privacy" is a modern—not nineteenth century—concept and that *Beebe v. State*, 6 Ind. 501 (1855), and *Herman v. State*, 8 Ind. 545 (1855), were overruled, those decisions stated that § 1 protects only "common law" rights and demanded those rights be described with "precision." *Beebe*, 6 Ind. at 510–11; *see* Opening Br. 45, 53. That express language forecloses a broad privacy right including abortion, a practice common law condemned. *Kirtley v. State*, 227 Ind. 175, 84 N.E.2d 712 (1949), does not mention privacy either. It at most recognized a "now discredited," *Lochner*-esque, *McIntosh*, 729 N.E.2d at 975, "right to pursue any proper vocation" subject to "restraints necessary to secure the common welfare." 84 N.E.2d at 714. Plaintiffs do not mention that limitation.

Voelker v. Tyndall, 226 Ind. 43, 75 N.E.2d 548 (1947), is no help either. It concerned whether the state or federal constitutions prohibit police from retaining fingerprint and signature records. 75 N.E.2d at 549. The Court held they did not. *Id.* at 551. Although the decision included stray language about a privacy interest derived from "natural law," the Court did not define its contours, and held that the State could "limit[]" any such right by its "police power." *Id.* at 549–50.

And while *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991), recognized a *statutory* right to refuse life-sustaining medical treatment, it had no occasion to hold § 1 confers any enforceable rights. Opening Br. 53. Plaintiffs, moreover, overlook how *Lawrance* decided a right existed: It examined "text and history." *Price*, 622 N.E.2d at 959 n.4. For example, *Lawrance* observed that the "common law" required patients to consent to treatment. 579 N.E.2d at 38–39. Abortion received no such protection.

Even greater problems attend decisions recognizing the confidentiality of doctor-patient communications and medical records. Confidentiality does not imply a substantive right to particular medical interventions, and regardless, as plaintiffs recognize, Response Br. 36, their cases are "common-law"—not constitutional—decisions, *Schlarb v. Henderson*, 211 Ind. 1, 4 N.E.2d 205, 206 (1936). Any rights they recognize therefore cannot be separated from the common law's condemnation of abortion.

3. By trying to make this case about a general right to liberty, privacy, or medical decisions, plaintiffs undermine their claim that S.B. 1 materially burdens the asserted right. Opening Br. 54–55. Plaintiffs do not explain how a court can conduct the material-burden analysis when plaintiffs themselves struggle to say whether abortion is part of a "liberty" right, a "privacy" right, or something else. *See* Response Br. 31. Nor do they explain how S.B. 1 prevents either one of those putative rights from serving its purpose by regulating a tiny amount of conduct within them. After all, concepts as abstract as "liberty" and "privacy" may encompass an infinite array of human activity, with abortion but a minute sliver of it.

Plaintiffs cite *Brizzi*, 837 N.E.2d 973, for the proposition "S.B. 1 goes too far" in regulating abortion. Response Br. 45–46. Like the trial court, however, they apply it selectively. Opening Br. 55–56. They complain that S.B. 1 raises abortion "costs," Response Br. 46, ignoring that *Brizzi* itself said increased "cost[s]" do not constitute a material burden, 837 N.E.2d at 981. And since *Brizzi upheld* the challenged regulations, it cannot be taken as a guide for how and when the much more capacious range of activities under the rubric of "liberty" and "privacy" are materially burdened by S.B. 1's abortion regulations.

4. Plaintiffs cite an article saying other state courts have recognized that Lockean provisos like § 1 create enforceable rights. Response Br. 34–35. But the article nowhere says those rights include privacy or abortion; indeed, it cites a case upholding an abortion conviction. *See* Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1389 n.534 (2015). According to the article, moreover, Lockean provisos were not "strong limitations on legislative powers." *Id.* at 1441. "In nearly every case," courts "defer[red] to the legislature to regulate those rights." *Id.* Consistently applying the Lockean philosophy those cases supposedly embraced thus would allow the legislature to ban abortion. *See* Steven G. Calabresi, *On Originalism and Liberty*, 2015-2016 Cato Sup. Ct. Rev. 17, 53 (2015).

Plaintiffs also cite out-of-state decisions recognizing abortion rights. Response Br. 41–43. Whatever other state courts have done, however, "an interpretation of Indiana's Constitution" must ultimately be "conducted independently." *Hoagland v.*

Franklin Twp. Cmty. Sch. Corp., 27 N.E.3d 737, 741 (Ind. 2015). And none of the cited decisions conducted the rigorous examination of "text and history" required under Indiana law to show that the "founding generation" would have regarded a "given interest" as "fundamental." *Price*, 622 N.E.2d at 959 n.4. For example, *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000), engaged in no textual or historical analysis. It traced New Jersey's putative "long-standing" recognition of abortion rights to a dissent penned in 1967 and a generic "commitment to the protection of individual rights." *Id.* at 629.

Plaintiffs do not even attempt to explain why most of the decisions they cite—many of which relied on constitutional provisions bearing no resemblance to § 1—should persuade. The only one they discuss is *Hodes*, 440 P.3d 461. *Hodes*, however, applied a different approach than Indiana law demands. It did not ask whether textual and historical evidence showed abortion to be a protected fundamental right; it instead asked whether Kansas law protects "personal autonomy" and "bodily integrity" in some contexts, and having concluded it did, then leapfrogged to the conclusion that abortion must therefore be protected. *Id.* at 480–86.

Hodes, moreover, engaged in what commentators have dubbed "revisionist history." Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt*, 32 U. Fla. J.L. & Pub. Pol'y 71 (2021). It ignored that "many" sources it cited "condmen[ed] abortion." *Id.* at 72–73; *see id.* at 81–94. It artificially narrowed the historical record, dismissing historical prohibitions on the ground they did not "reflect[] the will of the people." 440 P.3d at 486. And

relying on a single source, it incorrectly assumed that abortion was "neither morally nor legally wrong" pre-quickening. *Id.* at 487; *see Dobbs*, 142 S. Ct. at 2249–56.

The Iowa Supreme Court therefore rejected *Hodes* with good reason. *See Planned Parenthood of the Heartland*, 975 N.W.2d at 740 n.19. Plaintiffs claim the Iowa decision "undermines" S.B. 1. Response Br. 44. Relying on text and history, however, the Iowa Supreme Court held that the "Iowa Constitution is not the source of a fundamental right to an abortion." 975 N.W.2d at 716. The court did not decide what test should govern—and left that question to be "litigated further" on remand—merely because the "State *d[id] not*" ask the court to address the issue. *Id.* at 716, 744–45.

Nor does the fact that a Michigan trial court recently tried to sidestep *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997) (per curiam), "undermine[]" the appellate court's holding no abortion right exists. It suggests willfulness. And while some justices wrote separately in *EMW Women's Surgical Center, P.S.C. v. Cameron*, No. 2022-SC-0326-I, 2022 WL 3641196 (Ky. Aug. 18, 2022), the court still let the State's abortion ban take effect. (The Georgia Supreme Court recently did the same for another ban challenged on different grounds. *See State v. Sistersong Women of Color Reproductive Justice Collective*, No. S23M0358 (Ga. Nov. 23, 2022).)

D. S.B. 1 is a permissible exercise of police power

Plaintiffs do not deny that, if no abortion right exists, S.B. 1 is a permissible exercise of the police power. Opening Br. 57–58. Indeed, in *Cheaney*, this Court recognized a "compelling" state interest in protecting unborn children by prohibiting

abortion. 285 N.E.2d at 270. That *Cheaney* involved federal constitutional law, Response Br. 40, does not undermine its observation. Either protecting unborn children is a compelling state interest, or it is not. Nor is it noteworthy that *Brizzi* "did not cite *Cheaney*." *Id.* at 41. *Brizzi* upheld the challenged law under a standard that did not permit consideration of the State's compelling interest. *See* 837 N.E.2d at 978.

IV. The Lack of Irreparable Harm and the State's Significant Interest in Protecting Unborn Children Preclude a Preliminary Injunction

The remaining requirements for a preliminary injunction are not met.

A. No irreparable harm will occur absent a preliminary injunction

The trial court's sole rationale for finding irreparable harm was that the alleged violation inflicts "*per se*" harm. App. II 40. That rationale defies this Court's holding that a relaxed standard is proper (if at all) "only" in cases involving "clearly unlawful" conduct "against the public interest." *Ind. Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002) (citation omitted); *see* Opening Br. 59; *Leone v. Comm'r, Ind. Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1248 n.6 (Ind. 2010). That *Walgreen* happened to involve a "procedural challenge," Response Br. 48 n.22, does not alter its holding.

Plaintiffs try to rescue the decision below by alleging that "pregnant Hoosiers" will experience difficulties without an injunction. Response Br. 47–48. But the plaintiffs have no response to precedent holding that "the movant's remedies"—not third parties' remedies—must be "inadequate." *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003); *see* Opening Br. 59–60. And abortion

hardly offers unmitigated benefits. *See, e.g.*, App. III 41–51 (explaining deficiencies with data collected on abortions and abortion-related health risks).

Without citation, plaintiffs assert that S.B. 1 makes abortion providers "choose between their ethical obligations to patients and criminal punishment." Response Br. 49. That is false. As the only medical ethics expert in this case testified, "centuries of medical tradition" supports doing no harm to unborn children. App. II 219; *see* Opening Br. 61. Even *Roe v. Wade*, 410 U.S. 113, 130–31 (1973), recognized that the Hippocratic Oath, the "medical profession['s]" "ethical guide," prohibited physicians from performing abortions. And plaintiffs cite no ethical standard that requires doctors to violate criminal laws regulating medicine.

B. The compelling public interest in protecting unborn children from destruction militates against injunctive relief

A "compelling" state interest in protecting unborn children precludes an injunction regardless. Opening Br. 60–61 (quoting *Cheaney*, 285 N.E.2d at 270). Plaintiffs and their *amici* blind themselves to unborn children's interests. They allege that women not qualifying for S.B. 1's exceptions could face "medical risks," "costs," and "disruptions to their family and work." Response Br. 50. But the same could be said about women who could not obtain abortions under the more-restrictive abortion ban in *Cheaney*, yet this Court upheld the ban to protect life. Opening Br. 61–62.

Plaintiffs' *amici* decry S.B. 1, even going so far as to claim the "Hippocratic Oath" requires unrestricted abortion access. Medical Ass'ns Br. 26–27. Not once, however, do the medical associations supporting plaintiffs mention that "medical science"

shows “independent life begins at conception,” that abortion “destr[oys]” unborn children, *Cheaney*, 285 N.E.2d at 268; *see* App. II 187–196, or that the Hippocratic Oath forbade physicians from performing abortions, *Roe*, 410 U.S. at 130–31; *see* App. II 208–19; App. III 5–9. *Amici*’s utter disregard for any interests of the unborn illustrates exactly why S.B. 1 is needed to “protect[] the integrity and ethics of the medical profession.” *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (citation omitted).

Nor does the principle against reweighing “conflicting evidence,” Response Br. 49–51, prevent this Court from reversing determinations regarding the balance of harms and public interest. *See, e.g.*, *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 733 (Ind. 2008) (disagreeing with trial court in part); *Walgreen*, 169 N.E.2d at 169 (disagreeing with trial court). Plaintiffs themselves admit that the public interest involves a “question of law.” Response Br. 51 (citation omitted).

CONCLUSION

The preliminary injunction should be vacated and reversed.

Respectfully submitted,

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I hereby certify that on December 16, 2022, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on November 2, 2022, the foregoing document was served upon the following persons using the IEFS:

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