IN THE
COURT OF APPEALS OF INDIANA

No. 25A-PL-00782

CAITLIN BERNARD, M.D., and CAROLINE ROUSE, M.D., Plaintiffs-Appellees, v. INDIANA STATE HEALTH COMMISSIONER, in the officer's official capacity, and VOICES FOR LIFE, INC., Defendants-Appellants.	Interlocutory Appeal from the Marion Superior Court, No. 49D13-2502-PL-006359, The Honorable James A. Joven, Judge.

BRIEF OF APPELLANT VOICES FOR LIFE, INC.

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VFL concurs with the Indiana Health Commissioner's Statement of the Facts.

SUMMARY OF THE ARGUMENT

The Plaintiffs-Appellees ("Plaintiffs") have not shown the standing necessary for the exercise of judicial power. The Plaintiffs' case rests upon conjured fears that an unknown third-party will combine information gleaned from a Termination of Pregnancy Reports ("TPRs") with other publicly available information to identify a specific patient and then go so far as to publicly disclose the patient's identity and treatment. The claimed injuries are remote, speculative, and subjective, and based on conjecture about actions of third parties who are not before the court. The Plaintiffs' claims are also belied by history. The TPR requirement has been in place for 30 years, but the Plaintiffs cannot point to a single case in which a TPR was used to cause the harm they claim to fear so much. Indiana's courts routinely refuse to exercise jurisdiction over such claims. This Court should refuse to do so in this case.

Even assuming the Plaintiffs could show the standing necessary to invoke the judicial power, the Plaintiffs have not made the showing required to justify preliminary injunctive relief, or for that matter, to state a claim for any relief at all. The Court erred as a matter of law when it interpreted the "patient medical record" exemption contained in Indiana's Access to Public Records Act ("APRA") to include TPRs and, on that basis, held they had a likelihood of success on the merits. TPRs are not "patient medical records" as a matter of law for the simple reason that they do not identify any patient.

In fact, the Plaintiffs' argument implicitly concedes that TPRs are not patient medical records. The Plaintiffs recognize that a third party cannot identify the patient by examining the TPR. Rather, a third party must combine the information contained in the TPR with additional information derived from other (extrinsic) sources in order to create a collation of information that approximates a given patient's actual medical record. If a TPR were a patient medical

record, such machinations would not be necessary. But they are necessary because the TPR alone is simply not a "patient medical record."

The court below also abused its discretion when it held that the Plaintiffs made the showing required to justify a preliminary injunction. It erred in finding that the Plaintiffs established irreparable harm because the Plaintiffs' harms are subjective and wholly speculative, not actual or imminent. It erred when it sacrificed VFL's statutory right to access public records to allay the Plaintiffs' subjective and farfetched fears. And it showed contempt for the judgment of the elected officials and the public interest when it minimized the role that private parties like VFL play in assuring good government by reviewing public records and bringing potential problems to the attention of public officials.

This Court should reverse the decision below and order that the case be dismissed for lack of jurisdiction. But even if this Court believes the Plaintiffs have made the showing necessary to invoke the judicial power, it should reverse the decision below and direct the court to dismiss the Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion. *Willow Haven on 106th Street, LLC v. Nagireddy*, 252 N.E.3d 418, 422 (Ind. 2025). An abuse of discretion occurs "if the trial court's decision was against the logic and effect of the facts and circumstances before the court" or if it "misinterpret[ed] the law." *Id.* Factual findings are reviewed for clear error and legal conclusions de novo. *Id.*

ARGUMENT

I. The Plaintiffs Cannot Establish Standing Necessary For This Court's Jurisdiction.

A showing of standing is necessary to invoke judicial power. *Holcomb v. Bray*, 187 N.E.3d 1268, 1284-85 (IN 2022). As the Supreme Court of Indiana recently explained:

> Standing is a doctrine deriving from our constitutional separation of powers. Under our tripartite system of government, the judicial branch is limited to exercising the "judicial power" of resolving "real issues through vigorous litigation." To ensure courts resolve only "real issues" rather than engage in "academic debate or *mere abstract speculation,*" we require plaintiffs to show they have "standing" to present the contested issue and to invoke a court's adjudicative power. That means they must demonstrate "a personal stake in the outcome of the litigation" and that they have suffered, or are in imminent danger of suffering, "a direct injury as a result of the complained-of conduct." These requirements apply when a plaintiff seeks to invoke a court's authority to determine the constitutionality of a statute.
>
> Because "[c]onstitutional rights are personal," a plaintiff generally lacks standing to contest state action that results in only a "violation of a third party's constitutional rights." But if a statute's enforcement imminently threatens a plaintiff with their own direct injury, they have standing to challenge the statute's constitutionality, even if their claim is that the statute is invalid because it violates the rights of third parties.

Members of the Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, et al., 211 N.E.3d 957, 965-966 (2023) (cleaned up) (emphasis added). As the Supreme Court has emphasized, "fundamentally, standing is a restraint upon this Court's exercise of its jurisdiction in that we cannot proceed where there is no demonstrable injury to the complainant before us." *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995).

A. The Plaintiff Doctors Do Not Have Standing To Advance Their Own Claims, which are Hypothetical and Speculative, not Real.

In *Members of the Medical Licensing Board*, supra, the Indiana Supreme Court held that the plaintiff doctors had standing because if they performed an elective abortion they were "in immediate danger of sustaining their own direct injury from criminal prosecution and regulatory

enforcement." *Id.* 966. In this case, the Plaintiffs cannot show that they are in any danger, let alone "in immediate danger of sustaining their own direct injury from criminal prosecution and regulatory enforcement." *Id.* Therefore, they cannot show standing, and consequently, this Court does not have jurisdiction.

The Plaintiffs base standing on two hypotheticals, each of which is far-fetched and attenuated. The first postulates the Plaintiffs treating a hypothetical patient who decides to terminate her pregnancy. The Plaintiffs file a TPR about the treatment. A third-party (like VFL) requests the TPR under APRA and the IDOH releases the TPR because it determines the TPR is not a "patient medical record" exempt from disclosure without the patient's release. The third party identifies the patient from the TPR and publishes information about the patient. The Medical Licensing Board sanctions *the Plaintiffs* for performing their legal duty to file a TPR.

The Plaintiffs' second hypothetical scenario, similar and equally speculative, involves harm to the patient. In that scenario, the hypothetical patient does not even come to the Plaintiffs for treatment because she knows that if she does all of the previously mentioned consequences could follow: If the treatment involves a termination of a pregnancy, the Plaintiffs will file a TPR about the termination; a third-party like VFL might request the TPR under APRA; the IDOH would release the TPR; the patient might be identified and information about her might be published; and the patient might suffer the kind of harm that in fact was perpetrated on one of Plaintiff Dr. Bernard's patients through Dr. Bernard's own unethical behavior.

Both hypothetical scenarios are speculative and insufficient to establish an actual injury. The Plaintiffs have not cited any evidence to support their assertion that a TPR can be reverse engineered to disclose a patient's identity. Since 1993, when the TPR requirement was first enacted, see 1993. P.L.2-1993, §17, not even once has a third-party reverse engineered a TPR to

identify a patient and then publicized that identity. Dr. Bernard's own sanctioned misconduct does not support standing as it did not arise from reverse engineering a TPR. Plaintiffs' argument for standing is based on pure speculation, totally unsupported by facts.

Courts do not allow standing based on hypothetical or speculative injury. In *Morales v. Rust*, 228 N.E.3d 1025 (IN 2024), the plaintiff challenged a state law requiring a candidate to be affiliated with a party in order to appear on that party's primary ballot. The Indiana Supreme Court denied the plaintiff standing because he did not identify a candidate for whom he was unable to vote because of the affiliation requirement. *Id.* at 1053-1054.

The Court in *Morales* cited its opinion in *Solarize Indiana, Inc. v. Southern Indiana Gass and Electric Co.*, 182 N.E.3d 212, 218-220 (Ind. 2022), where standing was also denied. In that case, Vectren, a purchaser of electricity, filed for regulatory approval of its rates to buy electricity. When the rates were approved, Solarize sued to void the approval, but the Indiana Supreme Court held that Solarize lacked standing because it did not show that any of its solar power projects would be adversely affected by Vectren's purchase of electricity at the rates that had been approved. *Id.* at 219-220. The Court noted that "the threshold issue of standing determines whether a litigant is entitled to have a court decide the substantive issues of a dispute," *id.* at 216, and emphasized that "a party must show it has sustained or is in immediate danger of sustaining a direct injury…." *Id.* 218.

An Indiana appeals court found no direct injury to confer standing where *unvested* public employees challenged the State's failure to transfer monies to their retirement fund. The possibility of insufficiency of funding at some future date was not a "demonstrable injury to a present and substantial interest" in view of the plaintiffs' unvested status. *Aikens v. Alexander*, 397 N.E.2d 319, 322-324 (Ind. App. 1979).

The Plaintiffs' argument for injury is also faulty because harm would only be caused by the actions of third parties. Only if a third party disclosed the identity of a patient – something that has not happened in the 30-odd years since TPRs have been publicly released – would Plaintiffs arguably be subject to injury. (Indiana recognizes a claim for disclosure of private facts and uses the Restatement (Second) of Torts to define the elements and scope of the tort. *See Community Health v. McKenzie*, 185 N.E.3d 368, 380 (Ind. 2022).) Courts routinely reject standing based on intervening acts of third parties. For example, in *Franciscan Alliance, Inc. v. City of Hammond*, 212 N.E.3d 1270 (Ind. App. 2023), the Court of Appeals cited *Solarize*, supra, in holding that a city did not have standing to challenge a private hospital's closing. The city argued the hospital had promised it would not close and that its breach of the oral promise would damage the city by forcing it to incur additional costs for ambulance service as well as the loss of prospective businesses moving to Hammond. *Id.* 1274-75. After noting that the Supreme Court's decision in *Solarize*, *supra*, turned in part on the requirement that "[t]he direct injury required for standing is an injury resulting directly from a particular cause, without any intervening causes," *Franciscan Alliance*, at 1274, the Court of Appeals held the city lacked standing because the "[h]ospital's closure is not the direct cause of the City's feared harms." *Id.* 1275.

The court below erred in holding that the Plaintiffs had standing. The Court relied on Plaintiffs' testimony that the TPR requirement led patients to distrust their ability to protect their medical information and prompted one patient to seek care out of state. App. II p. 15. But such subjective fears of exposure, belied by fifty years of history, are insufficient to confer standing. *See Hulse v. Indiana State Fair Board*, 94 N.E.3d 726, 731 (Ind. App. 2018) ("allegations of subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.")

The Plaintiffs professed fear that they will be disciplined for complying with the legal requirement to file a TPR, see Ind. Code § 25-22-502-8(a)(7) fails for the same reason. *See Hulse v. Indiana State Fair Board*, 94 N.E.3d 726, 731 (Ind. App. 2018), where the court held the plaintiff lacked standing to challenge a rule alleged to chill artistic expression noting that "allegations of subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," and requiring the plaintiffs to show "that she faces a credible threat of prosecution." *Id*. No such credible threat exists here so long as Plaintiffs obey extant Indiana abortion laws. It is absurd to suppose that the doctors would be disciplined for performing a duty imposed by state law, and there is no question that the board would be estopped from doing so. *Cf. Equicor Development, Inc. v. The Westfield-Washington Township Plan Commission*, 785 N.E.2d 34 (2001) (noting estoppel of government entities is appropriate where party asserting estoppel has detrimentally relied on the governmental assertion and holding that governmental entity was estopped from prohibiting development it had approved.).

Finally, the lower court erred when it held that the Plaintiffs had standing based on the right to intervene created by the statutory claim by those who are denied access to public records authorized by Ind. Code § 5-14-3-9(e). App. Vol. II pp. 16-17. As the Attorney General has noted, the statute creates a claim to *enforce* the disclosure obligation not *thwart* disclosure. More fundamentally, "the legislature cannot expand…beyond constitutional limits the class of persons who possess standing." *See, Solarize Indiana*, 182 N.E.3d at 216 n.2. APRA's intervention provision must not be extended to parties who advance remote and hypothetical interests because such an expansive interpretation of the provision would place the statute in conflict with core constitutional requirements.

The cases above lay out why the Plaintiffs cannot make the showing required to establish standing. They cannot show injury to a cognizable legal injury that is real or imminent as opposed to hypothetical and speculative. They cannot establish the direct causal connection between their submission of the TPR and the hypothetical injury they posit.

B. The Plaintiffs Do Not Have Standing To Advance The Hypothetical Claims of Their Hypothetical Patients.

Because the Plaintiffs cannot show that a statute's enforcement imminently threatens a direct injury to the Plaintiffs themselves, *see Members of the Medical Licensing Board*, 211 N.E.3d at 966, they cannot advance a hypothetical claim on behalf of their hypothetical patients. And because the Plaintiffs' clients are hypothetical, the Plaintiffs also cannot show that their hypothetical clients cannot advance their own hypothetical claims. As a result, they cannot "demonstrate… that there exists some hindrance to the third-party's ability to protect his own interests," as required to advance the claim of another person. *Osmulski v. Becze*, 638 N.Ed.2d 828, 833-834 (Ind. App. 1994).[1]

The Plaintiffs' effort to advance claims for hypothetical clients are so far-fetched that only a couple of similar cases turned up, and in both cases the claims were dismissed for lack of jurisdiction. In *Garau German, P.C. v. Robertson*, 133 N.E.3d 161 (Ind. App. 2019), the Court

[1] This points to yet another insuperable obstacle to the Plaintiffs' effort to base standing on the injury to hypothetical clients. The nature of the Plaintiffs' argument is that if someone used the information contained in the TPR to link the procedure to an individual patient and then revealed the patient's identity, their hypothetical patient would suffer the kind of harm caused by Dr. Bernard's misconduct. That harm is a cognizable legal interest because the person who engaged in that reverse-engineering and disclosure would be liable to the patient for the disclosure of private facts. *See Community Health v. McKenzie*, 185 N.E.3d 368, 380 (Ind. 2022)(holding that Indiana recognizes a claim for disclosure of private facts and using the Restatement (Second) of Torts to define elements and scope of the tort.). But the Plaintiffs cannot base their standing on this injury because the tort is personal and cannot be advanced by another. *See Felsher v. University of Evansville*, 755 N.Ed.2d 589, 594 (2001)(noting that "the privacy right is personal ... .and it cannot be maintained by other persons…." (Citing Restatement (Second) of Torts §652 cmt a (1977)).

of Appeals affirmed dismissal of a suit for declaratory relief brought by a lawyer and an actual (not hypothetical) client because "the Plaintiffs' arguments…rests on a future contingency that might not occur as anticipated, or might not occur at all," *id*. at 168, so the "[t]he bottom line is that the question presented by the Plaintiffs is still purely hypothetical," *id*. at 170. In *Kowalski v. Tesmer*, 543 U.S. 125 (2004), the Supreme Court of the United States rejected a similar attempt by lawyers to advance claims on behalf of hypothetical clients—after assuming for the purpose of argument that the lawyers could show standing—because it recognized that "it would be a short step from the…grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." (assuming lawyers had standing but rejecting their challenge to state procedure for appointing appellate counsel for indigent defendants on behalf of hypothetical indigent clients.) *Id*. at 134.[2] In summary, the Plaintiffs cannot establish standing based on their hypothetical injury. Therefore, they cannot show standing to advance the hypothetical claims of their hypothetical clients.

The Court must reject the Plaintiffs' effort to avoid compliance with the TPR requirement because the "argument seeks implicitly to engage [this Court] in making societal and medical value judgments … [although courts] are neither equipped nor empowered to make such determinations." *Stetina v. State, ex. Rel. Medical Licensing Bd of Indiana*, 513 N.E.2d 1234, 1238 (Ind. App. 1987). The Plaintiffs' request for declaratory and injunctive relief asks this

[2] Standing doctrine under the Indiana Constitution is a matter of state law. *See*, *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003) (observing that the requirements for the "judicial doctrine of standing" are a "matter of Indiana jurisprudence"). But as the Court of Appeals has recognized, federal jurisprudence addressing the standing requirement are relevant because "the standing requirement under both federal and state constitutional law fulfills the same purpose: ensuring that the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Schulze v. State*, 731 N.E.2d 1041, 1044-1045 (Ind. App. 2000).

Court to nullify state legislation in violation of the separation of powers required by the Indiana Constitution. This Court should reject the Plaintiffs' invitation to violate that separation of powers and dismiss their request for declaratory relief now.

II. The Court Below Erred When It Held That the Plaintiffs Satisfied the Requirements for Preliminary Injunctive Relief.

Even if one assumed that the Plaintiffs had standing and this Court had jurisdiction to resolve the case, the Plaintiffs have not made the showing required to justify preliminary injunctive relief. The Plaintiffs cannot show a reasonable likelihood of success on their claim because the Termination of Pregnancy Report is a report, not a patient medical record. In fact, the Plaintiffs' reverse-engineering argument implicitly concedes that the TPR is not a patient record. They cannot show irreparable harm because expressed fear that the IDOH's release of redacted TPRs will compromise patient privacy is unsupported by evidence and based on sheer speculation. The Plaintiffs' hypothetical fears provide no basis to hold that the balance of equities favors depriving VFL of its actual statutory right to access public records, and the Plaintiffs cannot show that the public interest will be advanced by preventing IDOH from fulfilling its legal duty under Indiana's Access to Public Records Act (APRA).

A. The Plaintiffs Did Not Establish a Reasonable Likelihood of Success.

The Court below erred when it held that the Plaintiffs had shown a reasonable likelihood of success on their claim. The Plaintiffs seek a declaration that TPRs are not "public records," subject to disclosure under Section 3 of APRA, Ind. Code § 5-14-2-3(a), but rather, "patient medical records" that are exempt from disclosure under Ind. Code. § 4(a)(9). The Plaintiffs argue

that the TPRs fit under the Code's definition of "medical record",[3] and APRA's definition of "patient medical records and charts".[4]

"Matters of statutory interpretation present pure questions of law; as such, these questions are reviewed *de novo*." *Robertson v. State*, 141 N.E. 3d 1224, 1227 (Ind 2020). As the Indiana Supreme Court has noted:

> When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. If it is, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings. This Court has articulated that, "[t]he primary purpose in statutory interpretation is to ascertain and give effect to the legislature's intent." The statute itself is the best evidence of legislative intent, "and we strive to give the words in the statute their plain and ordinary meaning." We construe statutes only where there is some ambiguity which requires construction. The plain meaning of the statute, if it has one, must be given effect.

State v. American Family Voices, Inc., 898 N.E.2d 293, 297 (Ind. 2008) (quotations and citations omitted). The Plaintiffs' motion should be denied because TPRs are "public records" subject to disclosure under Section 3 of APRA and are not "patient medical records" exempted from disclosure under Section 4 of APRA.

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[3] Ind. Code § 1-1-4-5(a)(6) states: "'Health record', 'hospital record', or 'medical record' means written or printed information possessed by a provider (as defined in Ind. Code § 16-18-2-295) concerning any diagnosis, treatment, or prognosis of the patient, unless otherwise defined. Except as otherwise provided, the terms include mental health records and drug and alcohol abuse records." Sec. 5(a) states that the definition "appl[ies] to the construction of all Indiana statutes, unless the construction is plainly repugnant to the intent of the general assembly or of the context of the statute."

[4] APRA exempts from disclosure "Patient medical records and charts created by a provider, unless the patient gives written consent under Ind. Code § 16-39 or as provided under Ind. Code § 16-41-8." Ind. Code § 5-14-3-4(a)(9).

1. TPRs are not shielded from disclosure as patient medical records under Ind. Code § 5-14-3-4(a)(9).

a. The legislature intentionally used the term "report" in the TPR statute because it did not understand or intend a TPR to be a "patient medical record."

The TPR statute (Indiana Code § 16-34-2-5) terms a TPR as a "report", not a "medical record" or "patient medical record". When a court interprets a statute, it assumes that the legislature knows the meaning of the words it uses and selects those words intentionally. The court's job is to give effect to the meaning of each word. *State v. Neukam*, 189 N.E.3d 152, 154 (2022), citing *Clippinger v. State*, 54 N.E.3d 986, 989 (Ind. 2016). The court assumes that when the legislature uses different terms, it does so to mean different things. *State v. Neukam*, supra, (citing *Walczak v. Lab. Works-Fort Wayne LLC,* 983 N.E.2d 1146, 1154 (Ind. 2013)). This Court must assume that when the legislature drafted APRA and the TPR statute, it understood the difference between a "report" and a "patient medical record" and chose "report" in the TPR statute because it intended the TPR to be a report, and not a patient medical record.

The legislature understood these terms correctly. The TPR is a report[5] filed by a medical provider and is submitted to the government (IDOH). The report describes selected facts and circumstances of the medical (abortion) care that was delivered. A TPR must be filed for each abortion performed in Indiana and has a two-fold purpose: "to improv[e] maternal health and life through the compilation of relevant maternal life and health factors and data"; and to "monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of law." Ind. Code § 16-34-2-5(a). The TPR is designed to facilitate these legislative

[5] Dictionary.com defines "report" as "an account or statement describing in detail an event, situation, or the like, usually as the result of observation, inquiry, etc." REPORT Definition & Meaning | Dictionary.com (accessed July 19, 2024).

goals. The TPR is a vital enforcement tool. The legislature provided that a provider's failure to report a TPR in a timely and proper manner is a Class B misdemeanor. Ind. Code § 16-34-2-5(d).

Patient medical records[6] have a quite different purpose from a TPR. While a TPR does not identify a patient, but reports data, a patient's medical record "records" the diagnosis, prognosis, and history of treatment "of the patient." Ind. Code § 1-1-4-5(a)(6) (see supra fn. 2). Medical information in the record is linked to the patient through a unique identifier, such as a patient number, name and address, social security number, etc., and thereby becomes part of the patient's "medical record." The medical record is "possessed by a provider" to facilitate the provider's (or another provider's) care of the patient to whom the data is linked. *Id.*

The patient has a protectable privacy interest in the data in his or her medical record. Section Four of APRA exempts from public release "[p]atient medical records and charts created by a provider, unless the patient gives written consent under Ind. Code § 16-39 or as provided under Ind. Code § 16-41-8." Ind. Code § 5-14-3-4(9). But if medical data is de-linked from the patient to whom it applies, the patient's privacy interest in it is extinguished, and it is no longer a medical record since it is no longer "of the patient," as required by the definition. Anonymous medical data cannot be used to treat an unknown patient. It is, therefore, no longer part of any patient's medical record and is free to be included in a report, such as a TPR. No consent is needed for its release; there is no one to consent. Once released, it is no longer possessed by the provider.

[6] Merriam Webster defines "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)." Medical record Definition & Meaning | Merriam-Webster Medical (accessed July 19, 2024).

APRA's exemption for "medical records and charts" follows this logic. APRA exempts "*patient* medical records and charts" (emphasis added) from public disclosure.[7] APRA's provision for consent for release assumes the existence of a patient to give or withhold consent.[8] Since the TPR "report" does not identify the individual patient who received care, there is no patient to give or withhold consent, and no patient privacy interests to protect.[9] Hence, TPRs are not "patient medical records and charts" under APRA.

These differences in purpose and use fully justify the legislature's choice to call a TPR a "report," and not use the term "medical record" or "patient medical record." Since it does not name a patient, the TPR just contains medical data and cannot be considered a medical record. The TPR collects facts relevant to compliance with law *by the provider*, is not directed at a patient at all, and contains no information concerning the diagnosis, prognosis or treatment of a patient. The TPR cannot reasonably be considered a medical record and thus is not exempt under Section 4 of APRA. Plaintiffs' argument boils down to the claim that a TPR is a "patient medical

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[7] APRA defines "patient" by incorporating Ind. Code § 16-18-2-272(d). See Ind. Code § 5-14-3-2(m). That section (Ind. Code § 16-18-2-272(d)) defines "patient" as "an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition." Ind. Code. § 16-18-2-272(d).

[8] APRA provides that "patient medical records and charts created by a provider," may not be disclosed "unless the patient gives written consent under Ind. Code § 16-39 or as provided under Ind. Code § 41-8." Ind. Code § 5-14-3-4(a)(9). The relevant portion of Title 39 of the Indiana Code is Ind. Code § 16-39-4, permits "release of medical records concerning an individual," to "a person authorized in writing by the individual to receive the medical record," Ind. Code § 16-41-8-1(e)(2). Likewise, the relevant portion of Title 41 of the Indiana Code provides that "release may be made of medical. . . information with the written consent of "all individuals identified in the information released," Ind. Code § 16-41-8-1(b)(2). But such release is not possible for a TPR because it does not identify an individual patient.

[9] A provision of Title 41 relating to consent, which is incorporated by reference into Section 4(a)(9) of APRA, reiterates the legislative principle of protecting privacy through anonymity. It provides that "[r]elease may be made of medical or epidemiologic information for statistical purposes if done in a manner that does not identify an individual." Ind. Code § 16-41-8-1(b)(1).

record" because it contains "patient-specific" data, i.e. data derived from a patient. But anonymized data, even if derived from a patient, is not part of the patient's medical record once the identifying link to the patient is removed.[10]

b. The TPR Statute's requirement that IDOH release "public" quarterly reports does not imply that TPRs are "private" rather than public records.

The Plaintiffs argue that the TPR should be considered a patient medical that should be kept private because the statute also requires a "public" quarterly report of aggregate data. Here, they single out the word "public" in subsection (e) of the TPR statute, enacted in 2022, which requires that the IDOH "[o]n a quarterly basis. . . shall compile a *public* report providing" statistics for the prior quarter based on individually filed TPRs (emphasis supplied). The Plaintiffs ask the Court to reason that because the word "public" does not appear in subsection (a) of the TPR statute, the section which requires submission of TPRs, then it follows that the legislature intended TPRs to be "private and confidential" patient medical records. In support of their argument, they rely on subsection (e)'s caution that IDOH should not include "identifying information of a pregnant woman" in the quarterly report reinforces their interpretation.

These arguments are without merit because they ignore the definition of "public record". A public record includes both a "report…received by…a public agency," and a "report…created by…a public agency…." Ind. Code § 5-14-3-2(r). The TPR is completed by the healthcare provider who provided abortion-related services, as required by Ind. Code § 16-34-2-5(a). It is a report *received by* the IDOH. The quarterly report is a report *created by* the IDOH to fulfill its

[10] In a footnote the Plaintiffs claim that the TPR contains patient information protected by federal law. Plaintiffs' Memo at p. 10 n.1. But the statutory section cited in the footnote shows that the TPR does not contain "individually identifiable health information" within the meaning of 42 U.S.C. 1320(d)(6) for two reasons. First, the TPR does not identify the patient. See Sec. 1320d(6)B)(i). Second, there is no reasonable basis to believe that the information in the TPR can be used to identify the individual treated by the provider filing the TPR. See, Sec. 1320d(6)B)(ii).

duty under Ind. Code § 16-34-2-5(e). Subsection (e) describes the quarterly report as a "public report" for the simple reason that it is a report *created by* a public agency. Ind. Code § 5-14-3-2(q)(1). IDOH publishes this public report on its website. A TPR is created by a private provider and is therefore not described as a "public" report. But the definition of "public record" still applies to it, as it does to the quarterly report. And both are disclosable as public records.

The court below erred when it relied upon the Plaintiffs evidence that TPRs contain medical information relating to a specific encounter with a specific patient as a ground for its decision that TPRs were "patient medical records" within the meaning of APRA. That evidence lacks logical relevance because whether a TPR is a "patient medical record" is a question of law, not fact. *See, e.g.*, *Kaser v. Barker*, 811 N.E.2d 930, 932 (2004) (noting that "the interpretation of a statute is a question of law" that is reviewed *de novo* by appellate courts). Moreover, the court's reasoning is illogical. It confuses the source of the information, i.e., the doctor-patient encounter, with the places in which information derived from that encounter is recorded, i.e., a patient medical record or a TPR. And it ignores the critical difference between a "patient medical record" and a TPR, i.e., the link to the specific patient. If a TPR is a "patient medical record" then one should be able to look at the TPR and determine, based on its contents, the patient to which the record belongs. One cannot do so with a TPR because it is not a "patient medical record."

In sum, the Plaintiffs' motion should be denied because an examination of the statutory terms shows that TPRs are "public records" subject to disclosure under Section 3 of APRA, and not "patient medical records" excepted from disclosure under Section 4 of APRA.

The same result is required when one interprets the statutes implicated by the Plaintiffs' motion together as required by the canons of interpretation as explained below.

2. A harmonized reading of APRA and Indiana's abortion law recognizes that TPRs are accessible "public records" and not exempt "medical records."

The primary rule of statutory construction is to ascertain and give effect to the intent of the drafters. *E.g.*, *Broad Ripple Prop. Grp., LLC v. City of Indianapolis*, 87 N.E.3d 1112, 1116 (Ind. Ct. App. 2017). "The best evidence of that intent is the language of the [statute], and all words must be given their plain and ordinary meaning unless otherwise indicated by the [statute]." *Id.* When two statutes are being read, the court reads them in harmony in accordance with principles set forth in *Wagler v. West Boggs Sewer Dist., Inc.*, 898 N.E.2d 815, 818 (Ind. 2008) (quotations and citations omitted):

> When interpreting more than one statute, we recognize[] a strong presumption that when the legislature enacted a particular piece of legislation, it was aware of existing statutes relating to the same subject. We attempt to harmonize two conflicting statutes. So long as two statutes can be read in harmony with one another, we presume that the Legislature intended for them both to have effect. The standard of statutory construction requiring harmonization must be applied unless a later act is so repugnant to an earlier one as to render them irreconcilable.

Indiana courts are "compelled to ascertain and execute legislative intent in such a manner as to prevent absurdity and difficulty and prefer public convenience. In so doing, (they) are required to keep in mind the objects and purposes of the law as well as the effect and repercussions of such a construction." *Koppin v. Strode*, 761 N.E.2d 455, 461 (Ind. Ct. App. 2002.

Reading APRA and the TPR statute in harmony confirms that TPRs are "public records" accessible to the public. The Plaintiffs' effort to exempt TPRs from public access, if accepted by the Court, would frustrate the goals and purposes of these statutes. For these reasons, the Court should reject the Plaintiffs' reading of the statute.

a. Recognizing that TPRs are non-exempt public records advances the goal of APRA's disclosure requirement and patient medical records exemption.

APRA's preamble explains that "[a] fundamental philosophy of the American constitutional form of representative government . . . is that government is a servant of the people," and "[a]ccordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding…the official acts of those who represent them as public officials…." Ind. Code § 5-14-3-1. For this reason, APRA specifies that "[p]roviding persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials…." Id. For the same reason, the legislature directs that APRA "shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." *Id*.

The value of APRA cannot be overstated. It allows citizens of Indiana to access information they need to determine whether existing laws should be amended, or additional legislation is needed to promote the public health, safety, welfare, and morals. It allows citizens to determine whether public officials are enforcing the laws that the citizens of Indiana have enacted and, in this way, to hold public servants accountable. And it allows citizens of Indiana access to information they need to assist public officials in the discharge of their duty.

Recognizing that TPRs are "public records" because they are "reports. . . received. . . by a public agency," see Ind. Code § 5-14-3-2(r), to which access is authorized by APRA, see Ind. Code § 5-13-3-3(a), advances the statutory purpose of APRA by giving the citizens of Indiana access to the information they need to determine whether public officials are enforcing the laws that the citizens of Indiana have enacted. Allowing public access to TPRs also furthers the

purposes of APRA by providing private citizens, including Voices For Life, with information needed to assist in a regulatory goal of ensuring healthcare providers comply with Indiana laws regulating abortion, see Ind. Code § 16-34-1-1 et. seq., and whether the IDOH and the Attorney General, who have regulatory authority, are exercising it properly by enforcing the law.

Recognizing that TPRs are not "patient medical records created by a provider" within the meaning of Ind. Code § 5-14-3-4(a)(9), and "possessed by a provider" within the meaning of Ind. Code § 1-1-4-5(a)(6), is also consistent with the legislative goal of the "patient medical records" exception in APRA to protect patient privacy. See Ind. Code § 4-14-3-4(a)(9). Section 2(m) of APRA defines "patient" by reference to Ind. Code § 16-18-2-272(d). That section in turn defines "patient" as "an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition." Ind. Code. § 16-18-2-272(d). The qualifier "patient" confirms that the exemption from disclosure in Ind. Code § 5-14-3-5(a)(9) is intended to protect the patient's privacy, i.e. to prevent the public from using APRA to gain access to records that identify an individual patient and detail the medical care that individual patient has received from a provider. Since the TPR does not name the individual patient who received the care described in the TPR, these privacy concerns are not present, and the information contained in the TPR cannot be considered "patient medical records and charts".

In sum, when APRA Sections 3 and 4 are read in harmony in light of their purposes, it is recognized that a TPR is an accessible public record under Section 3 and is not exempt from disclosure under Section 4. The Plaintiffs now seek to force the IDOH to withhold TPRs as patient medical records. If the IDOH sought to withhold TPRs, it would bear the burden of proving that TPRs are exempt "patient medical records and charts", see Ind. Code § 5-14-1-1.

The IDOH could not meet that burden for the reasons explained herein. The Plaintiffs cannot use this lawsuit to circumvent the disclosure required by APRA.

b. Recognizing that TPRs are non-exempt public records advances the goals of Indiana's abortion law.

The requirement to complete a TPR is set forth in Title 16 (Health), Article 34 (Abortion), of the Indiana Code. Section 1 of Title 16, Chapter 1("Public Policy Concerning Performance of Abortions…") sets out Indiana's overall policy concerning abortion and childbirth: "Childbirth is preferred, encouraged, and supported over abortion." Ind. Code § 16-34-1-1. Section 1 of Chapter 2 ("Requirements of Performance of Abortions; Criminal Penalties") states that "[a]bortion shall in all instances be a criminal act, except when performed under the following circumstances," which are then set forth. Ind. Code § 16-34-2-1. Section 5 of Chapter 2 imposes the duty to complete a form (the TPR) on [e]very healthcare provider who performs. . . [specified abortion-related care]," Ind. Code § 16-34-2-5(a), and requires that the health provider transmit the form to the state department [IDOH]. Ind. Code § 16-34-2-5(b).

The TPR required by Ind. Code § 16-34-5-2(a) provides information needed to determine if the abortion-related care was provided as permitted by law or was a criminal act under Ind. Code § 16-34-2-1.[11] Ind. Code § 16-34-5-2. In this way, the TPR advances the objectives of Indiana law governing abortion. It provides the IDOH with information necessary for it to perform its statutory duty to "supervise the health of life of the citizens of Indiana," and to "bring actions in the courts for the enforcement of health laws and health rules…." Ind. Code § 16-19-3-1. And it facilitates action by private citizens and public officials that advance the objectives of

[11] See also, Ind. Code § 22-22.5-2-8, specifying that the failure to file the TPR is grounds for civil penalties. Ind. Code § 22-22.5-2-8(a)(7).

Indiana's abortion law. At the state level, the Office of the Attorney General (OAG) is empowered to "receive, investigate, and prosecute (third-party) complaints concerning regulated occupations." Ind. Code § 25-1-7-2.[12] The OAG's ability to enforce Indiana law regulating abortion is conditioned on a prior complaint being filed by a member of the public. The public's ability to complain, in turn, is dependent on the availability of TPRs and the data contained there describing each abortion performed.

The Plaintiffs acknowledge that the Attorney General of Indiana has concluded that TPRs are public records and issued an opinion to that effect. Plaintiffs Memo at 8 (citing Attorney General, Opinion Letter 2024-2 on Nondisclosure of Terminated Pregnancy Reports, 1 (Apr. 11, 2024). The Attorney General's opinion explains that recognizing that TPRs are non-exempt public records enables private citizens to obtain information about whether Indiana's law governing abortion is being violated, whether public officials are enforcing Indiana's abortion law, and also, to request the Attorney General investigate conduct that appears to violate Indiana law. In this legislative scheme, the TPR advances the purposes of APRA and of Indiana law governing abortion. Finally, and fundamentally, it allows citizens to access information needed to determine whether additional laws are necessary.

The Plaintiffs ask this Court to disregard the Attorney General's opinion and give legal force and effect to the opinion of the Public Access Counselor (PAC). Plaintiffs' Memo at 7. But the PAC's opinion provides no valid grounds to prohibit access to the TPRs. The PAC conclusion that TPRs should be classified as patient medical records based on the requirement to

[12] Penalties can include disciplinary sanctions on physicians who "has knowingly violated any state statute or rule… regulating the [medical] profession…" Ind. Code § 25-1-9-4(a)(3). And a physician who intentionally performs an unlawful abortion is subject to professional discipline through the state medical licensing board. Ind. Code § 16-34-4-9; Ind. Code § 25-1-9-4.

produce quarterly public reports is wrong for the reasons explained here. The PAC's assertion that redactions are necessary but impossible rests upon the mistaken classification of TPRs as patient medical records. The PAC's analysis is also inconsistent with the approach taken by *Indiana Supreme Court in Evansville Courier & Press v. Vanderburgh County Health Dept.*, 17 N.E. 3d 922 (Ind. 2024), where the Indiana Supreme Court held that a certificate of death was a public record because its purpose was to provide information for public officials. *Id*. at 930. The TPR serves such a public health purpose as explained above.[13] The TPR's purpose shows that it is a public record as the legislature indicated when it imposed the statutory duty to provide the report to public health officials.

3. Adopting the Plaintiffs' claim that TPRs are patient medical records exempt from disclosure would undermine APRA and Indiana's Abortion Law.

In contrast, for the Court to accept the Plaintiffs' claim that TPRs are not public records subject to disclosure under APRA would undermine both APRA and Indiana law regulating abortion. These statutes rely on and envision public access to TPRs, which enables citizens to monitor potential violations of Indiana laws regulating abortion, to bring apparent violations to the attention of public officials, and to hold their public officials accountable to enforce the law.

Accepting the Plaintiffs' claim that TPRs are not public records subject to disclosure would undermine the ability of private citizens, and groups like Plaintiff, to perform their important watchdog role, which would stymie achieving the goals of APRA and Indiana abortion law. And it would do so at a time when the TPR has increased importance given the United

[13] Its purpose is "the improvement of maternal health and life through compilation of relevant maternal life and health factors and data, and a further purpose and function shall be to monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law." Ind. Code § 16-34-2-5.

States Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), 142 S.Ct. 228, which returned power to regulate abortion to the states.

The Plaintiffs concede that the Attorney General has concluded that TPRs are public records and issued an opinion to that effect. See Plaintiffs Memorandum at 8 (citing Attorney General, Opinion Letter 2024-2 on Nondisclosure of Terminated Pregnancy Reports (Apr. 11, 2024). The Attorney General's letter underscores the importance of public access to TPRs, given the essential role that public interest groups like Plaintiff Voices For Life plays in enforcing Indiana's law regulating abortion. Groups like Voices For Life review TPRs, identify anomalies, and then ask for investigation and enforcement of the law by the Attorney General and local prosecutors if appropriate.

Plaintiffs suggest that access to IDOH's quarterly aggregate reports is sufficient to satisfy the TPR statute's twin goals. But, as noted by Attorney General Rokita in his April 11, 2024, Official Opinion 2024-2, at p. 10, the quarterly report, which is a statistical compilation of data from TPRs, does not offer the granularity needed to monitor and enforce Indiana's abortion laws. See Complaint, Exhibit 14, at p. 10. The TPR is designed to have this granularity.

As an example, the aggregate report lists the number of drug-induced abortions performed before and after 8 weeks post-fertilization age during the given quarter. The quarterly report for the first quarter of 2024 states that all 26 nonsurgical abortions were performed after 8 weeks post-fertilization age.[14] Drug-induced abortions are prohibited after 8 weeks, except that such abortions can be legally performed up to 10 weeks in certain limited circumstances, such as if the pregnancy occurred by rape or incest. Ind. Code § 16-34-2-1(a)(1) and (2). The aggregate report does not say how far beyond 8 weeks each abortion was performed, or whether the

[14] See https://www.in.gov/health/vital-records/files/CY2024Q1-TPR-Report.pdf (last accessed 7/19/2024).

pregnancy resulted from rape or incest, or another allowable exception. Thus, the quarterly report does not allow a judgment as to whether the abortion performed was within legal parameters or was illegal.

As noted, the Plaintiffs implicitly concede that the TPR is not a patient medical record. In fact, the gravamen of the Plaintiff's argument is that information contained in a TPR might be combined with extraneous information in such a way as to create a composite of information equivalent to a patient medical record. Of course, this argument shows that the TPR itself is not a patient medical record. If the TPR were a patient medical record, one would not need to combine it with information from extraneous sources to create the composite of information contained in a patient medical record. If the TPR were a patient medical record, one could pick it up and identify the patient to whom the record belonged. One cannot do so because the TPR is not a "patient medical record." It is a report filed with a regulatory agency. It is a public record.

C. The Court Below Erred When It Found That the Plaintiffs Had Shown Irreparable Harm.

The court below abused its discretion when it held that the Plaintiffs made the showing required to justify a preliminary injunction. App. Vol. II 23-24. It erred in finding that the Plaintiffs established irreparable harm because the Plaintiffs' harms are subjective and wholly speculative, not actual, or imminent. The claim that the release of TPRs will lead to harassment of doctors and patients is factually unsupported and based on sheer speculation. The remedy for any real problem created by the TPR requirement is legislative, not amendment of the statute, not a judicial revision of it. The Plaintiffs' stated fear that the Medical Board will sanction them for performing the statutory duty imposed by Ind. Code § 16-34-2-5 is a subjective and chimerical fear that is insufficient to support standing or a claim for injunctive relief from a legal duty.

D. The Court Below Erred When It Held That the Balance of Equities Weighs Against Injunctive Relief.

The Court below erred when it sacrificed VFL's statutory right to access public records to allay the Plaintiffs' subjective and farfetched fears. App. Vol. II at 25-28. VFL enjoys a statutory right to access public records, and TPRs are public records. The chimerical fears of injury conjured by the Plaintiffs provide no basis for this Court to nullify the public policy goals advanced by the TPR requirement or APRA. The court abused its discretion when finding that the Plaintiffs had shown that the balance of equities justified depriving VFL of its statutory rights.

E. The Court Below Erred When It Held That Granting Injunctive Relief Would Not Disserve the Public Interest.

The Court below abused its discretion when it failed to acknowledge that granting the Plaintiffs' request for injunctive relief would not disserve the public interest. App. Vol II at 25-28. It showed contempt for the judgment of the legislative branch, when it minimized that private

parties like VFL play in assuring good government which is acknowledged by APRA. It undermined the statutory claim created to ensure private parties have access to public records so that they can bring potential problems to the attention of public officials and hold their elected representatives responsible. And it disregarded the opinion of the Attorney General acknowledging the important role that private parties play in helping public officials perform their duty.

The result worked by the decision below is egregious. The state has a "valid and compelling" State interest in protecting prenatal human life at all stages. *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972); *see Planned Parenthood*, 211 N.E.3d at 963, 979. One of the purposes of the TPRs is to ensure that "abortions are done only" in accordance with "the law." Ind. Code § 16-34-2-5(a). For reasons that are inexplicable, the Attorney General Office cannot investigate without a complaint from someone outside the Office. § 25-1-7-4. This shows that organizations like VFL play an important role in enforcing Indiana law protecting the unborn. The court below erred when it minimized the important public interest served by protecting VFL's statutory right to obtain access to TPRs.

CONCLUSION

For the reasons explained above, this Court should reverse the decision below and order that the case be dismissed for lack of jurisdiction. If this Court believes the Plaintiffs have made the showing necessary to invoke the judicial power, then it should reverse the decision below and direct the court to dismiss the Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

Hoosiers have made a commitment to protect the lives of the unborn. One of the purposes of the TPRs is to ensure that "abortions are done only" in accordance with "the law." Ind. Code § 16-34-2-5(a). VFL's statutory right to obtain TPRs plays an important role in enforcing

Indiana's abortion laws. This Court should reverse the decision below to vindicate VFL's statutory right to obtain TPRs under APRA, and more fundamentally, the commitment to protect the unborn that the TPR requirement serves.

Respectfully submitted, this 4th day of June 2025.

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*Petition for Temporary Admission is to be filed shortly.

CERTIFICATE OF WORD COUNT

I verify that this brief contains 8658 words.

/s/ **Benjamin D. Horvath**
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CERTIFICATE OF SERVICE

I certify that on June 4, 2025, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date the foregoing document was served upon the following person(s) via IEFS:

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