Filed: 6/26/2025 12:06 PM

IN THE
INDIANA COURT OF APPEALS

Case No. 25A-PL-00782

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

APPELLEES' BRIEF

Tanya Pellegrini
Attorney No. 9416-95-TA
LAWYERING PROJECT
584 Castro St., No. 2062
San Francisco, CA 94114

Stephanie Toti
Attorney No. 8519-95-TA
LAWYERING PROJECT
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
(646) 490-1083
stoti@lawyeringproject.org

Kathrine D. Jack
Attorney No. 26851-49
JACK LAW OFFICE LLC
1 Courthouse Plaza
Greenfield, IN 46140

Juanluis Rodriguez
Attorney No. 6343-95-TA
LAWYERING PROJECT
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

STATEMENT OF ISSUES

Whether, in a declaratory judgment action seeking confirmation that terminated pregnancy reports ("TPRs") are exempt from disclosure under Indiana's Access to Public Records Act ("APRA"), the superior court abused its discretion by entering a preliminary injunction that bars the Indiana Department of Health ("Health Department") from publicly disclosing TPRs while the case is pending given that:

(a) the preliminary injunction maintains the status quo that has existed for more than a year, since the Health Department voluntarily imposed a moratorium on the public release of TPRs based on its own concern that the reports are exempt from disclosure under APRA;

(b) the Public Access Counselor concluded that TPRs are exempt from disclosure under APRA;

(c) the Medical Licensing Board of Indiana ("Medical Board") concluded that disclosure of a small subset of the information contained in a TPR led to the identification of an abortion patient and therefore violated both the Health Insurance Portability and Accountability Act ("HIPAA"), 110 Stat. 1936 (1996), and a state medical privacy regulation, 844 Ind. Admin. Code 5-2-2;

(d) the statute requiring the creation of TPRs directs the Health Department to compile a "public report" on a quarterly basis that summarizes data contained in TPRs without revealing any "identifying information of a pregnant woman," Ind. Code § 16-34-2-5(e), implying that the legislature did not intend the TPRs themselves to be "public"; and

(e) if the superior court were to ultimately determine that TPRs are exempt from disclosure under APRA, reports released in the meantime could not be clawed back,

but on the other hand, if the superior court were to ultimately determine that APRA requires disclosure of TPRs, reports withheld in the meantime could be released at the conclusion of the case.

STATEMENT OF CASE

On May 1, 2024, Voices for Life, Inc. ("VFL"), an anti-abortion organization based in South Bend, Indiana, sought judicial review in Marion Superior Court of the Health Department's decision to deny its requests to obtain TPRs under APRA. Compl., *Voices for Life, Inc. v. Ind. Dep't of Health*, No. 49D02-2405-MI-019876 (Ind. Super. Ct. May 1, 2024). Dr. Caitlin Bernard and Dr. Caroline Rouse (collectively, the "Doctors"), who had created many of the TPRs that VFL sought, Tr. of Evid. vol. 2 at 71:3-16 (Bernard); 113:7-20 (Rouse), intervened as defendants, Appellants' J.A. vol. 2 at 86. On September 9, 2024, the Court (Oakes, J.) dismissed the lawsuit for failure to state a claim, *id.* at 88-89, and VFL appealed to this Court, Notice of Appeal, *Voices for Life, Inc. v. Ind. Dep't of Health*, No. 49D02-2405-MI-019876 (Ind. Super. Ct. May 1, 2024). On January 14, 2025, VFL moved for an extension of time to file its opening brief, telling the Court that: "VFL has been contacted by the Indiana Office of the Indiana Attorney General (OAG)" and "VFL is in discussions with the OAG that would settle this litigation."[1] Verified Mot. for Extension of Time to File Br. of Appellant at 2, *Voices for Life, Inc. v. Ind. Dep't of Health*, No. 24A-MI-02396 (Ind. Ct. App. Jan. 14, 2025). On February 4, 2025, VFL informed the Court that it had reached an out-of-court settlement with the Health Department and moved to voluntarily dismiss its appeal. Voluntary Mot. to Dismiss at 2, *Voices for Life, Inc. v. Ind. Dep't of Health*, No. 24A-MI-02396 (Ind. Ct. App. Feb. 4, 2025). The settlement agreement between VFL and the

[1] In the superior court, the Health Department was represented by a private law firm and not the Attorney General's office.

Health Department ("Settlement Agreement") requires the Health Department to "[i]mmediately release terminated pregnancy reports as public records upon lawful request and not designate the reports as confidential medical records." Appellants' J.A. vol. 2 at 94. At the same time, it *prohibits* the Health Department from redacting certain information concerning the patient's diagnosis and treatment, including

- "[t]he type of abortion obtained by the patient";
- "[t]he date of the abortion obtained by the patient";
- "[t]he facility at which the abortion is performed";
- "[t]he physician's determination of the gestation of the fetus in weeks";
- "[t]he reason for the abortion including information specifying any of the following: (i) The abortion was necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life, including the pregnant woman's diagnosed medical condition. (ii) The fetus was diagnosed with a lethal fetal anomaly, including the fetus's diagnosed condition.";
- "[f]or an abortion performed before twenty (20) weeks of postfertilization age of the fetus, the medical indication by diagnosis code for the fetus and the mother.";
- "[t]he results of pathological examinations if performed"; and
- "[a]ccess to 'Additional Procedures,' 'Additional Instructions,' and 'Patient Signature' fields on TPR, in cases where additional procedure may include a second method of abortion,"

id. at 94-96, as well as other information that could potentially be used to determine a patient's identity, including:

- "[t]he age of the patient";
- "[t]he state of the patient's residence";
- "[t]he reason for the abortion including information specifying any of the following: . . . (iii) The pregnancy was a result of rape or incest."; and
- "[t]he age of the father,"

id.

On February 6, 2025, the Doctors filed this lawsuit against the Indiana State Health Commissioner, who directs the Health Department, Ind. Code § 16-19-4-1, and VFL seeking a declaratory judgment that (1) TPRs submitted to the Health Department pursuant to Ind. Code § 16-34-2-5 are exempt from disclosure under APRA, and (2) APRA does not authorize the Health Department to grant members of the public access to TPRs it receives pursuant to Ind. Code § 16-34-2-5. Appellants' J.A. vol. 2 at 41. They immediately moved for a temporary restraining order ("TRO") and preliminary injunction to prevent the Health Department from releasing TPRs while the case remains pending. *Id.* at 43-45. The Court entered a TRO on February 19, 2025, and extended it two times, until March 24, 2025.[2] Appellants' J.A. vol. 2 at 12 & n.1. It held an evidentiary hearing on March 12, 2025, *id.*, and entered a preliminary injunction on March 24, 2025, *id.* at 30-31. The defendants subsequently appealed and moved for a stay pending appeal in the superior court and this Court, Appellants' J.A. vol. 3 at 59; *Ind. State Health Comm'r v. Bernard*, No. 25A-PL-782, slip op. at 1 (Ind. Ct. App. May 30, 2025) (mem.). Both motions were denied. Appellants' J.A. vol 3, 59; *Ind. State Health Comm'r v. Bernard*, No. 25A-PL-782, slip op. at 1 (Ind. Ct. App. May 30, 2025) (mem.).

STATEMENT OF FACTS

I. The Doctors' Obligation to Submit Terminated Pregnancy Reports to the Indiana Department of Health

The Doctors are both board-certified obstetrician-gynecologists who are licensed to practice medicine in Indiana. Tr. of Evid. vol. 2 at 64:23-65:4 (Bernard); 110:21-111:2 (Rouse). They both provide clinical care, including abortion care, at several Indiana hospitals. *Id.* at 65:5-13 (Bernard); 111:3-13 (Rouse).

[2] At the preliminary injunction hearing, counsel for the Health Department expressly waived objection to the second extension. Tr. of Evid. vol. 2 at 63:10-64:8.

Indiana law requires physicians, including the Doctors, to submit a TPR to the Health Department in connection with every abortion they provide. Ind. Code § 16-34-2-5. This requirement has evolved over time since it was first enacted in 1973. Originally, the statute required medical facilities where abortions are performed to report the following ten data points about each abortion on a form supplied by the Health Department: (1) The age of the woman who is aborted; (2) The place where the abortion is performed; (3) The full name and address of the physicians performing the abortion; (4) The name of the father if known; (5) If after viability, the medical reason for the abortion; (6) The medical procedure employed to administer the abortion; (7) The mother's obstetrical history including dates of other abortions if any; (8) The results of pathological examinations if performed; (9) Information as to whether the fetus was delivered alive; and (10) Records of all maternal deaths occurring within the health facility where the abortion was performed. Pub. L. No. 322, 1973 Ind. Acts 1740, 1744-45 (codified at Ind. Code § 35-1-58.5-5). In 1993, the statute was recodified to its present location in the Indiana Code. *See* Pub. L. No. 2, 1993 Ind. Acts 244, 572-73.

Beginning in 2011, the legislature made substantive amendments to the statute eight times, collectively requiring more than twenty additional data points to be reported. Pub. L. No. 179, 2022 Ind. Acts 2595, 2625-29; Pub. L. No. 218, 2021 Ind. Acts 3266, 3277-80; Pub. L. No. 205, 2018 Ind. Acts 2930, 2940-43; Pub. L. No. 173, 2017 Ind. Acts 1701, 1708-10; Pub. L. No. 213, 2016 Ind. Acts 3099, 3110-13; Pub. L. No. 92, 2015 Ind. Acts 633, 637-39; Pub. L. No. 193, 2011 Ind. Acts 2476, 2486-88; Pub. L. No. 74, 2011 Ind. Acts 695, 695-96. In 2015, the legislature shifted the duty to submit TPRs from the "medical facility" where an abortion is performed to the "health care provider" who performs the abortion. Pub. L. No. 92, 2015 Ind. Acts 633, 637.

In 2022, following the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), Indiana enacted a statute banning abortion except in limited circumstances. Pub. L. No. 179, 2022 Ind. Acts 2595 ("Abortion Ban").[3] The Abortion Ban added additional reporting requirements for health care providers, *id.* at 2625-29, and in response, the Health Department added "new required fields" to the TPR form including "a new field for indicating the reasons for the abortion as allowed by state law and new fields for diagnostic code(s)." Appellees' App. vol. 2 at 19.

Currently, a TPR must include thirty-one data points about each abortion patient, including demographic information and details about the patient's medical history, medical condition, and abortion care. Ind. Code § 16-34-2-5(a). Each TPR includes a unique patient identifier that links the record with the patient it describes. Tr. of Evid. vol. 2 at 69:16-20 (Bernard); Appellees' App. vol. 2 at 2. Physicians must retain a signed copy of a TPR "in the pregnant woman's patient file." Ind. Code § 16-34-2-5.1; Appellees' App. vol. 2 at 19. On a quarterly basis, the Health Department must compile a "public report" summarizing data contained in the TPRs it receives. Ind. Code § 16-34-2-5(e). In doing so, it must "ensure that no identifying information of a pregnant woman is contained in the report*." Id*. § 16-34-2-5(f).

"Each failure to complete or timely transmit a form . . . for each abortion performed or abortion inducing drug that was provided, prescribed, administered, or dispensed, is a Class B misdemeanor." *Id.* § 16-34-2-5(d). In addition, the Medical Board "may revoke the license of a

[3] The law took effect on September 15, 2022, and was preliminarily enjoined on September 22, 2022. *Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 964 (Ind. 2023). It took effect again on August 21, 2023, and has remained in effect continuously since then. *See Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 214 N.E.3d 348 (Ind. 2023) (mem.) (denying petition for rehearing).

physician if, after appropriate notice and an opportunity for a hearing, the attorney general proves by a preponderance of the evidence that the physician failed to transmit the form to the Indiana department of health as described in [Ind. Code § 16-34-2-5(b)]." *Id.* § 25-22.5-8-6(b)(1).

II. The Health Department's Shifting Position on the Status of TPRs Under APRA

APRA, enacted in 1983, generally requires government agencies to provide members of the public with access to public records in their possession. *See* Pub. L. No. 19, 1983 Ind. Acts 241, 246-53 (codified at Ind. Code §§ 5-14-3-1 to 5-14-3-10). The statute exempts certain public records from its disclosure requirement, however. Ind. Code § 5-14-3-4. These include records "required to be kept confidential by federal law," Ind. Code § 5-14-3-4(a)(3), and "[p]atient medical records and charts created by a provider, unless the patient gives written consent," Ind. Code § 5-14-3-4(a)(9).

Prior to the enactment of the Abortion Ban, the Health Department typically treated TPRs as public records subject to disclosure under APRA. When the Abortion Ban took effect, the Health Department became concerned that TPRs may be exempt from disclosure under APRA. Appellants' J.A. vol. 2 at 82-84. It stopped releasing TPRs in response to APRA requests and sought guidance from Indiana's Public Access Counselor, *id.*, who is tasked with providing advice and assistance concerning the State's public access laws to members of the public and government officials, *see* Ind. Code §§ 5-14-4-1 to 5-14-4-14. The Public Access Counselor summarized the Health Department's inquiry as follows:

> Your inquiry concerns the release of [the TPR] form in its entirety. Given that the report is populated with information that could be reverse engineered to identify patients—especially in smaller communities—you argue that the required quarterly reports should suffice in terms of satisfying any disclosure and transparency considerations.

Appellants' J.A. vol. 2 at 83.

The Public Access Counselor concluded that TPRs are exempt from disclosure under APRA because they are patient medical records. *Id.* (citing Ind. Code § 5-14-3-4(a)(9)). The Public Access Counselor further explained that redaction is not a viable option for TPRs: "Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials. Here, however, the entirety of the form is a medical record." *Id.* at 83 & n.5 (citing *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2005)).

III. The Medical Board's Disciplinary Proceedings Against Dr. Bernard

In 2023, the Medical Board concluded that Dr. Bernard should be disciplined for disclosing certain information about an abortion patient to another physician and a reporter. *Id.* at 71-72. According to the Medical Board, Dr. Bernard disclosed: "(1) Patient had been referred to her on or about June 27, 2022; (2) Patient was ten years old; (3) Patient was from Ohio; (4) she would be providing abortion care to Patient; and (5) Patient was six weeks and three days pregnant." *Id.* at 67. All of this information is included in the TPR concerning the patient at issue. *See* Ind. Code § 16-34-2-5(a); Tr. of Evid. vol. 2 at 76:23-77:7.

The Attorney General's office is largely responsible for investigating and prosecuting alleged misconduct against members of regulated occupations, Ind. Code §§ 25-1-7-1 to 25-1-7-14, including physicians who are licensed by the Medical Board, Ind. Code § 25-0.5-8-11.[4] Thus, it was the Attorney General's office that prosecuted the Medical Board proceeding against Dr. Bernard. Indeed, the Attorney General personally signed the Administrative Complaint that

[4] The Medical Board itself is responsible for investigating certain complaints against licensed physicians, including complaints that solely allege "[f]ailure to complete or timely transmit a pregnancy termination form under IC 16-34-2-5." Ind. Code § 25-22.5-2-8(a)(7); *see* Ind. Code § 25-1-7-3(b).

commenced the proceeding. Administrative Compl., *In re Bernard*, No. 2022 MLB 0024 (Ind. Med Licensing Bd. Nov. 30, 2022) ("Administrative Compl."), https://www.in.gov/apps/pla/litigation/viewer.aspx?id=23388. Among other things, the Administrative Complaint alleged:

> 28. HIPAA imposes a national standard to protect sensitive patient medical records and to prevent disclosure of individually identifiable health information. 42 U.S.C. § 1320d *et seq.*; 45 C.F.R. § 160.103. Health information includes "any information, including genetic information, whether oral or recorded in any form or medium" that is created or received by a health care provider. 45 C.F.R. 160.103. Protected health information includes past, present, or future physical or mental health or condition of an individual and the provision of health care to an individual. 45 C.F.R. § 164.514. It includes all individually identifiable health information, including demographic data, medical histories, test results, insurance information, and other information used to identify a patient or provide healthcare services or healthcare coverage. Protected health information includes much more than a patient's name. 45 C.F.R. § 164.514. The general privacy rule strictly limits health care providers' ability to release a patient's medical records or discuss medical history in any form, except as permitted under the rules. 45 C.F.R. § 164.502(a).
>
> 29. HIPAA does not permit disclosure of protected health information under most circumstances. For example, to disclose protected health information *to the media*, a health care provider must have previously obtained a HIPAA-compliant authorization signed by the patient or her guardian. U.S. Dep't of Health & Human Servs., *Can health care providers invite or arrange for members of the media, including film crews, to enter treatment areas of their facilities without prior written authorization?* (Apr. 16, 2016), www.hhs.gov/hipaa/for-professionals/faq/2023/film-and-media/index.html ("the HIPAA Privacy Rule does not allow media access to the patients' PHI, absent an authorization").
>
> 30. For other (non-media type) disclosures, absent a written authorization, a health care provider must satisfy HIPAA's de-identification standard so that the information may not be used to identify, contact, or locate the person. That standard provides that "[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. § 164.514(a). One way to de-identify protected health information is to follow the rule's safe-harbor provision, which requires the removal of 18 specified identifiers of protected health information *and* that "[t]he covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. § 164.514(b)(2). As relevant here, one of the 18 identifiers that must be removed to qualify as "de-identified information" that is not subject to the privacy rule (and thus may be disclosed) is "[a]ll elements of dates (except year) for dates directly related to an individual, including birth date, admission date, [and] discharge date." 45 C.F.R. § 164.514(b)(2)(i)(C).

> 31. Indiana Law imposes its own protections for patient privacy. Ind. Code § 16-39-1-1 *et seq.*; 844 I.A.C. 5-2-2. Under the rules governing the practice of medicine, "[a] practitioner shall maintain the confidentiality of all knowledge and information regarding a patient . . . and of all records relating thereto" and may divulge that "knowledge and information" only "when required by law . . . or when authorized by the patient or those responsible for the patient's care." 844 I.A.C. 5-2-2; *see also Canfield v. Sandock*, 563 N.E.2d 526, 529 & n.2 (Ind. 1990) (observing that "the ethical rules of the medical profession . . . prohibit disclosure of confidential information in non-judicial settings" and that the "Hippocratic Oath imposes on physicians a duty to maintain confidences acquired in their professional capacity); Am. Med. Ass'n, Code of Medical Ethics Opinion 3.2.1, https://www.ama-assn.org/delivering-care/ethics/confidentiality (stating that physicians "have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient"); *Vargas v. Shepherd*, 903 N.E.2d 1026, 1031-32 (Ind. Ct. App. 2009) (acknowledging argument that medical providers assume a duty to abide by ethical guidelines, including obtaining patient consent before disclosing any medical information, and assuming without deciding that such a duty exists).

Administrative Compl. ¶¶ 28-31. It further alleged that Dr. Bernard "violated 45 C.F.R. § 164.502(a) by disclosing her patient's protected health information to the media without previously obtaining a HIPAA-compliant authorization signed by the patient or her guardian"; that Dr. Bernard "violated 45 C.F.R. § 164.514 by not properly de-identifying the information of the minor patient"; and that Dr. Bernard "violated 844 I.A.C. 5-2-2 by failure to maintain the confidentiality of all knowledge and information regarding a patient and all records of the patient by disclosing information without authorization by the patient or her guardian." *Id.* ¶¶ 39-40.

The Medical Board adopted the Attorney General's view of the law. It found that Dr. Bernard's "disclosures to [the physician and reporter], when taken in their entirety, contained unique identifying characteristics regarding Patient," Appellants' J.A. vol. 2 at 70-71, and concluded that they violated Dr. Bernard's obligations under HIPAA and 844 Ind. Admin. Code 5-2-2, *id.* at 70-72. Consequently, the Medical Board issued a letter of reprimand to Dr. Bernard and directed her to pay a $3,000 fine. *Id.* at 73, 75.

IV. How Public Disclosure of Terminated Pregnancy Reports Harms the Doctors

A. Unwanted Publicity, Reputational Harm, and Increased Harassment

It is undisputed that a TPR contains the name and address of the physician who provided the abortion, Ind. Code § 16-34-2-5(a)(5); Appellees' App. vol. 2 at 3; Tr. of Evid. vol. 2 at 70:4-9 (Bernard), and the Settlement Agreement prohibits the Health Department from redacting this information from TPRs that are released under APRA, Appellants' J.A. vol. 2 at 95. Thus, TPRs that are released under APRA would publicize the Doctors' provision of *specific* abortions, providing details that many abortion opponents may find inflammatory, such as the gestational age of the fetus, the type of procedure used to terminate the pregnancy, and whether "the fetus was delivered alive." Appellants' J.A. vol. 2 at 95-96; *see* Appellees' App. vol. 2 at 2, 4. Although the Doctors sometimes speak publicly about their provision of abortion care, they do not provide the level of detail about specific procedures that TPRs require. *See* Tr. of Evid. vol. 2 at 103:5:11 (Bernard), 117:1-10 (Rouse). Moreover, the Doctors take care to talk about their work in a manner that humanizes abortion patients and providers, *see id.* at 103:5:11 (Bernard), 117:1-10 (Rouse), 118:24-119:5 (Rouse), in stark contrast to the TPRs, which provide decontextualized data and medical jargon, *id.* at 118:24-119:3 (Rouse); Appellees' App. vol. 2 at 2-5.

Further, VFL seeks to use the TPRs to bolster false and misleading claims that abortion providers are breaking the law. *See* Appellees' App. vol. 2 at 8 ("Violations of state & federal law are rampant in the abortion industry . . . . Each month we review hundreds of Terminated Pregnancy Reports from hospitals and facilities, reporting on clear violations to the Indiana State Department of Health and Attorney General . . . . See below for a list of Indiana abortion doctors and violations found on their Terminated Pregnancy Reports since 2022"). VFL posted Dr. Bernard's name and photograph on its website, asserting that she committed four "violations" of Indiana law, even

though she has never been subject to criminal conviction or professional discipline in connection with those alleged violations. *Id.* at 9; Tr. of Evid. vol. 2 at 81:8-21.

The website further asserts that at least one of those violations consists of "Illegal use of Mifepristone and Misoprostol on a 18 week fetus." Appellees' App. vol. 2 at 9. But it is not illegal to use mifepristone and misoprostol to induce an abortion at eighteen weeks of pregnancy in Indiana. Although Indiana law prohibits medication abortion "after eight (8) weeks of post-fertilization age," Ind. Code § 16-34-2-1(a), the prohibition does not extend to induction abortions performed during the second trimester of pregnancy,[5] Tr. of Evid. vol. 2 at 86:3-8 (Bernard), 116:8-22 (Rouse). Indeed, the Health Commissioner provided explicit guidance about this to abortion providers and attorneys representing Indiana hospitals. *Id.* at 116:8-22 (Rouse). VFL's assertion that its review of TPRs demonstrates that abortion providers generally—and Dr. Bernard, in particular—regularly engage in unlawful conduct causes reputational harm to the Doctors. *See id.* at 91:10-11 (Bernard) ("I'm harmed by the fact that they're making false claims against me that cause irreparable damage to my reputation as a physician."). Further release of TPRs to VFL would exacerbate this harm.

Moreover, both the release of TPRs to the public and VFL's use of TPRs to bolster its claims about abortion providers violating the law threaten to inflame abortion opponents and lead to increased harassment of the Doctors. *See id.* at 91:11-14 (Bernard) ("I'm also harmed by the fact that these are inflammatory, that there is real concern that publicly disseminated information like this on a website could be used to target and harm myself and my family."); *id.* at 118:24-

[5] Some patients—especially those with wanted pregnancies who receive a lethal fetal anomaly diagnosis—prefer this method of abortion to surgical alternatives because it results in the vaginal delivery of an intact fetus, enabling the patient "to see and hold their baby before they die or after they have died." Tr. of Evid. vol. 2 at 86:1-2 (Bernard).

119:3 (Rouse) ("I'm concerned that the TPRs can be taken out of context with all of the specific medical information that is included in these medical records when they're released. I worry about how those could be interpreted by people who don't have the medical expertise to fully understand everything that's contained therein."). The Doctors' fears about harassment are not speculative or far-fetched. Before enactment of the Abortion Ban, the FBI notified Dr. Bernard that it had learned about a threat by anti-abortion extremists to kidnap her young daughter. *Id.* at 94:20-95:3 (Bernard). Since then, the political climate has only become more polarized, with violent extremism on the rise.

B. Erosion of Patient Trust and Goodwill

As the superior court found, public release of TPRs would damage the Doctors' relationships with their patients, eroding patient trust and goodwill. Appellants' J.A. vol. 2 at 15; Tr. of Evid. vol. 2 at 95:24-96:3 (Bernard) ("I have to disclose to patients that I'm required by law to release their information and that that information may become publicly available . . . And in my experience, that means that patients don't trust us, and they don't trust our ability to protect their private health information."). Some patients may be less forthcoming with relevant information. Appellants' J.A. vol. 2 at 15 ("A patient could be less likely to disclose certain medical information to the physician knowing that the physician must report such information and the [Health] Department may publicly release that information."). Others may be discouraged from seeking medical care from the Doctors altogether. Indeed, prior to the Health Department's self-imposed moratorium on releasing TPRs, one of Dr. Bernard's patients chose to travel out of state for abortion care rather than risk a breach of her confidentiality. *Id.*; Tr. of Evid. vol. 2 at 96:23-97:4.

Patients' fears about the danger of being identified from information contained in a TPR are credible. Since the Abortion Ban took effect, few patients have been able to obtain abortion

care in Indiana, and many who have been able to obtain such care have rare medical conditions. Tr. of Evid. vol. 2 at 101:9-15 (Bernard), 114:14-115:25 (Rouse), 122:14-18 (Rouse) ("[S]ome of the patients that I treat have very rare conditions. Abortion in Indiana has become quite rare since the abortion ban went into effect. And so when a patient with a rare condition undergoes a rarely performed procedure, . . . that person is identifiable potentially."). The American College of Obstetricians and Gynecologists ("ACOG") recognizes that pregnancy coercion, which "involves coercive behavior such as threats or acts of violence if a partner does not comply with the perpetrator's wishes regarding the decision to terminate or continue a pregnancy," is a serious problem in the United States. Appellees' App. vol. 2 at 13. It would be relatively easy for an abusive partner who thinks his wife or girlfriend lied about having a miscarriage to request all TPRs for the relevant time period and review them to determine whether the demographic and medical information in any report matches their partner. *See* Tr. of Evid. vol. 2 at 115:19-25 (Rouse) (explaining that friends and family members may have knowledge about a patient's medical history that would enable them to identify the patient from information in a TPR). As the Medical Board proceedings against Dr. Bernard demonstrate, a member of the media could also identify an abortion patient by cross-referencing the information contained in a TPR with other publicly available data. *See* Appellants' J.A. vol. 2 at 69.

C. Creation of an Ethical Dilemma

As the Attorney General emphasized in the Administrative Complaint against Dr. Bernard, licensed physicians have an ethical duty to maintain the confidentiality of their patients' personal health information. *See supra* at 16. The Medical Board concluded that publicly disclosing even a fraction of the information contained in TPR forms constitutes a violation of this duty. *See* Appellants' J.A. vol. 2 at 70-72. It issued a letter of reprimand to Dr. Bernard stating, in relevant part:

> The purpose of this reprimand is to stress the important responsibility you have by reason of possession of a license to practice medicine in the State of Indiana. It is your responsibility to conduct your practice of medicine in accordance with the standards of the profession . . . Specifically, you are expected to maintain the confidentiality of *all knowledge and information regarding a patient* . . . .

Id. at 75 (emphasis added). Thus, by virtue of being licensed physicians, the Doctors have a personal interest in safeguarding the confidentiality of their patients' information. If the Health Department were able to release TPRs to members of the public on request, the Doctors would have to choose between violating their legal obligation to submit TPRs to the Health Department and serving as a conduit of patients' personal health information to the public, in violation of their ethical obligation to safeguard patient confidentiality. This ethical dilemma harms the Doctors by putting them in a no-win situation.

SUMMARY OF ARGUMENT

As an initial matter, the Doctors have standing to bring this declaratory judgment action. Standing requires litigants to have a direct, personal stake in the outcome of a lawsuit. *Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022). The Doctors satisfy this requirement in numerous ways. First, if the Health Department were to resume releasing TPRs to VFL and other members of the public, the Doctors would suffer direct, personal injury in the form of erosion of patient trust and goodwill, as happened in the past. *Infra* at 25-27. Second, the Doctors have a direct, personal stake in the outcome of this lawsuit because they created TPRs and supplied them to the Health Department. *Id.* at 27. Third, the Doctors have a direct, personal stake in avoiding unwanted publicity from disclosure of TPRs, which contain their names and addresses, as well as reputational harm from VFL's use of TPRs to bolster its claims that Dr. Bernard and other abortion providers are violating the law, both of which expose the Doctors to an increased risk of harassment by abortion opponents. *Id.* at 27-28. Fourth, the Doctors have a direct, personal stake in avoiding the ethical dilemma that would be created by the Health Department's public release of TPRs. *Id.* at

28. Absent relief from the court, the Doctors would have to choose between satisfying their legal obligation to submit TPRs to the Health Department and satisfying their ethical obligation to safeguard the confidentiality of their patients' personal health information. *Id.* at 28.

The superior court did not abuse its discretion by entering a preliminary injunction to preserve the status quo while it adjudicates the merits of the Doctors' claim for declaratory relief. The Doctors demonstrated that they have a reasonable likelihood of success on the merits of their claim. *Id.* at 29-36. The Declaratory Judgment Act provides the Doctors with a private right of action to seek judicial determination of APRA's requirements, given that they would be directly and personally impacted by the release of TPRs under the statute. *Id.* at 29-31. The superior court correctly concluded that Plaintiffs are likely to succeed on their Declaratory Judgment Act claim because TPRs are patient medical records that are exempt from disclosure under APRA. *Id.* at 31-34. The Indiana Code defines "medical record" as "written or printed information possessed by a provider . . . concerning any diagnosis, treatment, or prognosis of the patient," Ind. Code § 1-1-4-5(a)(6), and TPRs plainly satisfy this definition, *infra* at 19. Additionally, TPRs are exempt from disclosure under APRA because they contain information that is required to be kept confidential by federal law—namely, HIPAA. *Id.* at 34-36.

Appellants are wrong that the superior court should have permitted the Health Department to release redacted TPRs to the public. The Settlement Agreement expressly bars the Health Department from redacting information that satisfies the definition of medical record. *Id.* at 33-34. Moreover, the Health Department's contention that abortion patients could never be identified from the information that it agreed not to redact is in direct conflict with the Medical Board's conclusion that a subset of that information was sufficient to identify one of Dr. Bernard's patients; the position that the Attorney General took when prosecuting the case against Dr. Bernard at the

Medical Board; and the concerns that the Health Department expressed to the Public Access Counselor that TPRs are "populated with information that could be reverse engineered to identify patients—especially in smaller communities." *Id.* at 32; Appellants' J.A. vol. 2 at 83.

The Doctors demonstrated that their remedies at law are inadequate and, absent a preliminary injunction, irreparable harm would occur while the case is pending. *Infra* at 36-37. That harm includes erosion of patient trust and goodwill, unwanted publicity, reputational harm, and increased risk of harassment from anti-abortion extremists. *Id.*

The Doctors further demonstrated that the balance of equities weighs in favor of a preliminary injunction. *Id.* at 37-38. In contrast to the irreparable harm that they would suffer from the release of TPRs, the Health Department and VFL will suffer little, if any, harm from the preliminary injunction. The Health Department has voluntarily treated TPRs as patient medical records since the Abortion Ban took effect in August 2023. *Id.* at 37. It will suffer scant harm from continuing this practice for a few more months while the superior court adjudicates the Doctors' claim. Notably, it remains able to review the TPRs it receives and file complaints with the Attorney General's office if it has a reasonable basis for concluding that a law may have been violated. *Id.* at 37-38. Likewise, VFL will not be meaningfully harmed by the preliminary injunction. If Appellants ultimately prevail in the superior court, VFL can obtain the TPRs it seeks at the conclusion of the proceedings. *Id.* at 38. In the meantime, VFL continues to have access to the public reports that the Health Department is required to publish on a quarterly basis.

Finally, the Doctors demonstrated that the public interest would not be disserved by a preliminary injunction. *Id.* at 38-39. Numerous federal and state laws embody a significant public interest in safeguarding personal health information from public disclosure, and the preliminary injunction serves that interest. *Id.* Further, the preliminary injunction does not undermine the

public interest in enforcement of state abortion laws. *Id.* at 39. The Health Department remains able to review TPRs and file complaints with the Attorney General's office when warranted. Likewise, members of the public with personal knowledge of unlawful or legally questionable conduct remain able to file complaints with the Attorney General's office. In addition, prosecuting attorneys remain able to bring criminal enforcement proceedings against those who violate state abortion laws. *Id.*

ARGUMENT

I. Standard of Review

To obtain a preliminary injunction, the movant must show by a preponderance of the evidence that: (1) the movant has a reasonable likelihood of success on the merits; (2) remedies at law are inadequate, and irreparable harm will occur while the case is pending; (3) the threatened injury to the movant from a denial of the injunction outweighs the potential harm to the nonmovant from granting the injunction; and (4) the public interest would not be disserved by granting the injunction. *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 448 (Ind. Ct. App. 2024), *transfer denied*, 246 N.E.3d 271 (Ind. 2024).

"The issuance of a preliminary injunction is within the sound discretion of the trial court, and the scope of appellate review is limited to deciding whether there has been a clear abuse of discretion." *Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001). "When findings and conclusions are made, the reviewing court must determine if the trial court's findings support the judgment." *Id.* "The trial court's judgment will be reversed only when clearly erroneous." *Id.* "Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them." *Id.* The reviewing court must "consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment." *Id.*

II. The Doctors Have Standing

"Standing requires litigants to demonstrate a sufficient injury before a court can decide the substantive issues of their claims." *Holcomb*, 187 N.E.3d at 1286. "An injury must be personal, direct, and one the plaintiff has suffered or is in imminent danger of suffering." *Id.* "Under the [Declaratory Judgment Act], which is designed to allow parties to resolve conflicts while there is still time for 'peaceable judicial settlement,' plaintiffs can satisfy the injury requirement by showing their rights are implicated in such a way that they *could* suffer an injury." *Id.* at 1287 (emphasis added) (citation omitted). The superior court properly concluded that the Doctors satisfy this standard.

First, the superior court found that, if the Health Department were to resume releasing TPRs to VFL and other members of the public, the Doctors would suffer direct, personal injury in the form of erosion of patient trust and goodwill, as happened in the past. *See* Appellants' J.A. vol. 2 at 15 ("At least one of Dr. Bernard's patients left Dr. Bernard's care for an out-of-state abortion provider to avoid the public release of the patient's information via a TPR APRA request."); *id.* ("A patient could be less likely to disclose certain medical information to the physician knowing that the physician must report such information and that the Department may publicly release that information."); *supra* at 19-20. The superior court's findings are supported by the evidentiary record and reasonable inferences drawn therefrom. *See* Appellants' J.A. vol. 2 at 15; *supra* at 19-20. This Court must "consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment." *Barlow*, 744 N.E.2d at 5.

Contrary to Appellants' argument, this injury is not comparable to the injury alleged by the municipal plaintiff in *Franciscan Alliance, Inc. v. City of Hammond*, 212 N.E.3d 1270, 1274-75 (Ind. Ct. App. 2023). There, in an action for promissory estoppel, the city alleged that it would be injured by the defendant's decision to close a local hospital because, among other things, it would

have to purchase additional ambulances. *Id.* at 1273-74. But the record demonstrated that the city "had no immediate plans to buy new ambulances." *Id.* at 1274. Instead, the city worried that it might have to purchase new ambulances at some unknown time in the future if ambulance response times increased. *Id.* at 1274-75. This Court held that, because "[t]he City merely fears that it will incur the cost of new ambulances from the pressure of increased response times—which arises only indirectly from Franciscan's decision to close the Hospital," there "is no direct injury traceable to Franciscan's conduct." *Id.* at 1275. Here, in contrast, the erosion of patient trust and goodwill that the Doctors seek to avoid would be the direct result of patients' knowledge that the Doctors are legally required to transmit their personal health information to the Health Department, which would then release it to any member of the public on request. Unlike the harm alleged in *Franciscan Alliance*, this harm is both imminent and directly traceable to the Health Department's conduct.

The Health Department's reliance on *Dinerstein v. Google, LLC*, 73 F.4th 502 (7th Cir. 2023), is likewise misplaced. There, the Seventh Circuit held that the transfer of anonymized patient medical records did not injure the patients described in the records. *Id.* at 513-16. The plaintiff, a putative class representative, "appear[ed] to concede that the University adequately discharged its de-identification obligation," and in any event, the court did not find plausible the plaintiff's allegations that the records were insufficiently anonymized. *Id.* at 514. Here, in contrast, it is the Appellants' allegations that TPRs are sufficiently anonymized that are not plausible. The Settlement Agreement prohibits the Health Department from redacting key pieces of information that could be used to identify a patient, including all of the data points that a media outlet used to identify the patient at the center of the Medical Board proceeding against Dr. Bernard. *See supra* at 9, 14. Moreover, the Health Department's position is belied by the position

its own attorney—the Indiana Attorney General—took in that proceeding, less than three years ago, about what is necessary to properly de-identify protected health information, as well as the concerns that it expressed to the Public Access Counselor about the information in TPRs being reverse engineered to identify abortion patients. *See supra* at 13, 15-16. Accordingly, neither *Dinerstein* nor Appellants' implausible claim that abortion patients could never be identified from the information in a TPR deserves any weight in the Court's analysis.

Second, the Doctors have a personal stake in the outcome of this lawsuit because they created TPRs and supplied them to the Health Department. APRA recognizes the injury to "each person who supplied any part of the public record at issue" when someone seeking access to the record files a lawsuit to compel its disclosure, and it grants them an unconditional right to intervene in such lawsuits. Ind. Code § 5-14-3-9(e). Accordingly, the Doctors were granted intervention as of right in VFL's lawsuit seeking to compel disclosure of TPRs. Appellants' J.A. vol. 2 at 86. The Doctors' interest in maintaining the confidentiality of records they created and submitted to the Health Department is not extinguished merely because the Health Department entered into a voluntary settlement of the prior lawsuit. The same interest that supported the Doctors' intervention in the prior lawsuit—namely, an interest in maintaining the confidentiality of records that they created and supplied to the Health Department—supports their standing to bring this lawsuit. *See* Appellants' J.A. vol. 2 at 16.

Third, the Doctors have a direct, personal stake in avoiding unwanted publicity from the disclosure of TPRs, which contain their names and addresses. *See supra* at 17. They also have a direct, personal stake in avoiding reputational harm from VFL's use of TPRs to bolster claims on its website that Dr. Bernard and other abortion providers are violating the law. *Id.* at 17-18. Each

of these is an injury in itself, and each also exposes the Doctors to an increased risk of harassment by abortion opponents. *Id.* at 18-19.

Fourth, the Doctors have a direct, personal stake in avoiding the ethical dilemma that would be created by the Health Department's public release of TPRs. *Id.* at 20-21. As licensed physicians, the Doctors have an ethical obligation to safeguard the confidentiality of their patients' personal health information. *Id.* at 16. And they also have a legal obligation to submit TPRs to the Health Department. *Id.* at 10-13. If the Health Department were to resume releasing TPRs to the public, then by submitting TPRs to the Health Department, the Doctors would be knowingly serving as a conduit of their patients' personal health information to the public. Thus, they would have to choose between satisfying their legal obligation to submit TPRs and their ethical obligation to safeguard patient health information. The declaratory judgment they seek would enable them to avoid this Catch-22.

For all of the foregoing reasons, the Doctors have standing to bring this lawsuit. In arguing that the Doctors lack a personal stake in the release of TPRs submitted to the Health Department by other physicians, the Health Department conflates the issue of standing with the issue of remedy. The Doctors need standing to bring this declaratory judgment action. *See Holcomb*, 187 N.E.3d at 1286. Because they satisfy the requirements for standing, the superior court has jurisdiction to adjudicate the case. *See Members of the Med. Licensing Bd. of Ind*, 211 N.E.3d at 966. As part of its adjudication, the superior court has broad discretion to enter a preliminary injunction, which is a provisional remedy. *See Barlow*, 744 N.E.2d at 5. If the Doctors ultimately succeed at final judgment, the proper remedy would be a declaratory judgment against the Appellants that TPRs are exempt from disclosure under APRA. Such a declaration would apply to all TPRs in the Health Department's possession and all TPRs sought by VFL—not just the ones

submitted by the Doctors. It was not an abuse of discretion for the superior court to enter a preliminary injunction that mirrors the impact a final judgment against Appellants would have, particularly where the preliminary injunction simply maintains the status quo that has existed for more than a year.

III. The Superior Court Did Not Abuse Its Discretion by Entering a Preliminary Injunction

A. The Doctors Are Likely to Succeed on the Merits of Their Claim

1. The Declaratory Judgment Act Provides the Doctors a Private Right of Action

The Health Department's contention that APRA does not provide Plaintiffs a private right of action is inapposite. Plaintiffs do not bring this lawsuit under APRA. Instead, they bring it under Indiana's Declaratory Judgment Act, which grants courts "the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Ind. Code § 34-14-1-1; *see* Appellants' J.A. vol. 2 at 32, 40-41. "Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." *Id.* § 34-14-1-2. "No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for." *Id.* § 34-14-1-1. Further, the Declaratory Judgment Act is "remedial." *Id.* § 34-14-1-12. Its purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and [it] is to be liberally construed and administered." *Id.*

As explained above, Plaintiffs have legally cognizable interests in preventing the release of TPRs under APRA. *See supra* at 25-28. Accordingly, their "rights, status, or other legal relations are affected by" APRA, and the Declaratory Judgment Act authorizes them to seek a declaration that TPRs are exempt from APRA's disclosure requirements. *See Holcomb*, 187

N.E.3d at 1284-85 ("Notably, though the Legislature did not define what it meant to be 'affected by a statute' . . . , we find it requires a plaintiff must have standing and that their claims must be ripe.").

The Health Department contends that, even if the Declaratory Judgment Act provides a private right of action, it does not authorize the issuance of a preliminary injunction. But a trial court does not need statutory authorization to issue a preliminary injunction. The power to grant such equitable relief lies within the court's discretion. *See Barlow*, 744 N.E.2d at 5; *McGlothen v. Heritage Env't Servs., L.L.C.*, 705 N.E.2d 1069, 1073 (Ind. Ct. App. 1999) ("The grant or denial of a preliminary injunction rests within the equitable discretion of the trial court . . . ."). "The purpose of a preliminary injunction is to preserve the status quo pending an adjudication on the merits," regardless of the nature of the claims at issue. *In re Paternity of H.F.D.S.*, 247 N.E.3d 834, 837 (Ind. Ct. App. 2024), *transfer denied sub nom.*, *Kalis v. Simmons*, 253 N.E.3d 524 (Ind. 2025). None of the cases cited by the Health Department hold that courts may not issue preliminary injunctions in declaratory judgment actions. *See Doe #1 v. Ind. Dep't of Child Servs.*, 81 N.E.3d 199, 204 (Ind. 2017); *Coons v. Kaiser*, 567 N.E.2d 851, 852 (Ind. Ct. App. 1991); *Bryarly v. State*, 111 N.E.2d 277, 278-79 (Ind. 1953); *Myers v. State Life Ins. Co.*, 110 N.E.2d 312, 313 (Ind. App. 1953); *Brindly v. Meara*, 198 N.E. 301, 303 (Ind. 1935). To the contrary, this Court has routinely affirmed preliminary injunctive relief in cases seeking declaratory judgments. *See, e.g.*, *MIB, LLC v. City of Noblesville*, No. 24A-PL-1893, 2025 WL 1185978, at *4 (Ind. Ct. App. Apr. 24, 2025) (affirming entry of a preliminary injunction in "a Declaratory Judgment action to obtain declaration . . . that MIB and its owners . . . are prohibited from operating this, or any similar business in any Noblesville zoning district where sex shops are prohibited" (citation omitted)); *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 160 N.E.3d 1103, 1107 (Ind. Ct. App.

2020) (affirming entry of a preliminary injunction in an action for declaratory judgment, damages, and specific performance).

2. Terminated Pregnancy Reports Are Exempt from Disclosure Under APRA Because They Are Medical Records

APRA generally requires government agencies to provide members of the public with access to public records in their possession. *See* Ind. Code § 5-14-3-3. However, the statute exempts certain public records from its disclosure requirement. *Id.* § 5-14-3-4. These include records "required to be kept confidential by federal law" and "[p]atient medical records and charts created by a provider, unless the patient gives written consent" in accordance with Indiana law. *Id.* § 5-14-3-4(a)(3), (9).

The superior court correctly concluded that Plaintiffs are likely to succeed on their Declaratory Judgment Act claim because TPRs are patient medical records that are exempt from disclosure under APRA. Appellants' J.A. vol. 2 at 22; *see* Ind. Code § 5-14-3-4(a)(9). The Indiana Code defines "medical record" as "written or printed information possessed by a provider . . . concerning any diagnosis, treatment, or prognosis of the patient." Ind. Code § 1-1-4-5(a)(6). TPRs plainly satisfy this definition. They contain detailed information about an abortion patient's underlying health conditions, including specific diagnosis codes, as well as detailed information about the abortion itself, which is a medical treatment. *Id.* § 16-34-2-5(a); *see* Appellants' J.A. vol. 2 at 22; Tr. of Evid. vol. 2 at 146:22-147:4 (Stover). Further, TPRs are created and possessed by a provider. *See* Ind. Code § 16-34-2-5(a) (requiring "[e]very health care provider" who provides an abortion to submit a TPR to the Health Department); *id.* § 16-34-2-5.1 (requiring providers to retain a signed copy of a TPR "in the pregnant woman's patient file"); Appellees' App. vol. 2 at 19.

The text of the TPR statute also suggests that the legislature views TPRs as private medical records rather than public records subject to disclosure under APRA. *See* Ind. Code § 16-34-2-5(e)-(f). The statute directs the Health Department to compile a "public report" based on data contained in the TPRs on a quarterly basis, suggesting that the TPRs themselves are not meant to be public. *Id.* § 16-34-2-5(e). And it further directs the Health Department to ensure that "no identifying information of a pregnant woman is contained in the [public] report," a directive that would only be necessary if TPRs contained such identifying information in the first place. *Id.* § 16-34-2-5(f).

Appellants' contention that APRA's use of the phrase "[p]atient medical records," *id.* § 5-14-3-4(a)(9), makes the statutory definition of "medical record" inapplicable is unpersuasive. As defined by the Indiana Code, all medical records are patient medical records because they concern the "diagnosis, treatment, or prognosis *of the patient*." *Id.* § 1-1-4-5(a)(6) (emphasis added). Moreover, the Health Department's contention that abortion patients could never be identified from the information in TPRs lacks credibility because it is in direct conflict with the Medical Board's conclusion that a subset of that information was sufficient to identify one of Dr. Bernard's patients, *see supra* at 16; the position that the Attorney General took when prosecuting the case against Dr. Bernard at the Medical Board, *see supra* at 15-16; and the concerns that the Health Department previously expressed to the Public Access Counselor that TPRs are "populated with information that could be reverse engineered to identify patients—especially in smaller communities," Appellants' J.A. vol. 2 at 83.[6]

[6] The Health Department contends, without evidentiary support, that it has been releasing TPRs under APRA for decades. *See* Br. of Appellant Ind. State Health Comm'r at 40. Even if true, the Health Department's past practice is not relevant to the legal analysis. Furthermore, two significant things happened in recent years that impacted the way both the Health Department and the Doctors viewed TPRs. In 2022, a media outlet was able to identify one of Dr. Bernard's

Likewise, Appellants miss the mark in arguing that TPRs cannot be medical records for purposes of APRA because the statute that creates the reporting obligation, Ind. Code § 16-34-2-5, does not use the term "medical record" to describe them. TPRs satisfy the definition of medical record set forth in Indiana Code section 1-1-4-5(a)(6), which applies to the construction of all Indiana statutes, including APRA. Whether Indiana Code section 16-34-2-5 uses that specific term to describe TPRs is irrelevant.

Appellants' argument that TPRs cannot be patient medical records because healthcare providers are required by law to create them also falls flat. APRA exempts patient medical records from disclosure not because they are created for a particular purpose, but because they contain sensitive information about a patient's health. As explained below, both federal and state law recognize a strong public interest in maintaining the confidentiality of personal health information. *See infra* at 38-39. That is true regardless of whether the information is documented for purposes of providing future treatment, legal compliance, risk management, obtaining payment from an insurance company, or something else.

Finally, Appellants are wrong that the superior court should have permitted the Health Department to release redacted TPRs to the public. The Settlement Agreement expressly prohibits the Health Department from redacting information that satisfies the definition of medical record, including but not limited to: "[t]he type of abortion obtained by the patient"; "[t]he date of the

---

patients by cross-referencing a handful of data points that Dr. Bernard had thought were harmless to disclose with other publicly available information. Appellants' J.A. vol. 2 at 69. In 2023, the Abortion Ban took effect, significantly decreasing the number of patients who are able to obtain abortions in Indiana and significantly increasing the proportion of those patients who have rare medical conditions. *See supra* at 12 n.3, 19-20. Shortly after these events, the Health Department stopped releasing TPRs to the public and told the Public Access Counselor it was concerned that TPRs could be reverse engineered to identify patients. *See id.* at 13. When VFL sued to compel the Health Department to resume releasing TPRs, the Doctors went to court to prevent that from happening. *See id.* at 8.

abortion obtained by the patient"; "[t]he facility at which the abortion is performed"; "[t]he physician's determination of the gestation of the fetus in weeks"; "[t]he reason for the abortion including information specifying any of the following: (i) The abortion was necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life, including the pregnant woman's diagnosed medical condition. (ii) The fetus was diagnosed with a lethal fetal anomaly, including the fetus's diagnosed condition"; "[f]or an abortion performed before twenty (20) weeks of postfertilization age of the fetus, the medical indication by diagnosis code for the fetus and the mother"; "[t]he results of pathological examinations if performed"; and "[a]ccess to 'Additional Procedures,' 'Additional Instructions,' and 'Patient Signature' fields on TPR, in cases where additional procedure may include a second method of abortion." Appellants' J.A. vol. 2 at 94-96. Unless the Health Department redacts all information "concerning any diagnosis, treatment, or prognosis of the patient," Ind. Code § 1-1-4-5(6), a TPR remains a medical record that is exempt from disclosure. Given that the Settlement Agreement bars the Health Department from making the necessary redactions, the Court did not abuse its discretion by entering the preliminary injunction.

3. Terminated Pregnancy Reports Are Exempt from Disclosure Under APRA Because They Contain Information Required to be Kept Confidential by Federal Law

The Doctors are likely to succeed on the merits of their Declaratory Judgment Act claim for an additional reason: TPRs contain information that is required to be kept confidential by federal law. Ind. Code § 5-14-3-4(a)(3). As the Attorney General explained in the Administrative Complaint against Dr. Bernard, under HIPAA, which is a federal law, "[p]rotected health information includes much more than a patient's name." Administrative Compl. ¶ 28 (citing 45 C.F.R. § 164.514). "It includes all individually identifiable health information, including demographic data, medical histories, test results, insurance information, and other information

used to identify a patient or provide healthcare services or healthcare coverage." *Id.* "The general privacy rule strictly limits health care providers' ability to release a patient's medical records or discuss medical history in any form, except as permitted under the rules." *Id.* (citing 45 C.F.R. § 164.502(a)). Further, the HIPAA privacy rule's safe-harbor provision for de-identification cannot be satisfied without removing from a TPR, among other things, "[a]ll elements of dates (except year) for dates directly related to an individual." 45 C.F.R. § 164.514(b)(2)(i)(C); *accord* Administrative Compl. ¶ 30. But the Settlement Agreement prohibits the Health Department from redacting "[t]he date of the abortion obtained by the patient." Appellants' J.A. vol. 2 at 95. Additionally, the privacy rule's de-identification standard cannot be satisfied if there is a "reasonable basis to believe that the information can be used to identify an individual." 45 C.F.R. § 164.514(a); *accord* Administrative Compl. ¶ 30. Here, experience has demonstrated that a mere subset of the information in a TPR (that cannot be redacted under the Settlement Agreement) can be used to identify an abortion patient. Appellants' J.A. vol. 2 at 69.

Although HIPAA does not impose direct obligations on the Health Department, APRA's exception is written in the passive voice. *See* Ind. Code § 5-14-3-4(a)(3). The legislature could have exempted only records that "federal law requires a public agency to keep confidential," but instead, it exempted all records "required to be kept confidential by federal law," *id.*, which is a broader category. There can be no doubt that HIPAA requires healthcare providers to keep the information in TPRs confidential. Thus, TPRs are "required to be kept confidential by federal law." *Id.*

Presumably, the reason for this APRA exception is to avoid conflicts between federal and state law. Exempting TPRs serves this purpose. The TPR statute requires healthcare providers to submit TPRs containing protected health information to the Health Department, even though

HIPAA prohibits the healthcare providers from disclosing the information publicly. *See* Ind. Code § 16-34-2-5. If the Health Department were to turn around and disclose the information publicly, it would be making an end-run around HIPAA to put protected health information in the hands of the public without following any of the standards or protocols outlined in the HIPAA privacy rule. *See* Administrative Compl. ¶¶ 28-30. There is no evidence that the legislature intended that result. To the contrary, the statutory directive requiring the Health Department to publish quarterly, public reports that are fully anonymized demonstrates that the legislature intended the protected health information contained in TPRs to remain confidential, consistent with HIPAA, while providing the public with access to de-identified data about the provision of abortion in Indiana. *See* Ind. Code § 16-34-2-5(e)-(f).

B. Remedies at Law Are Inadequate, and the Doctors Would be Irreparably Harmed by Public Disclosure of Terminated Pregnancy Reports

In *Barlow*, this Court explained that "[a] legal remedy is not adequate merely because it exists as an alternative to an equitable form of relief." 744 N.E.2d at 6. "Instead, injunctive relief will be granted if it is more practicable, efficient, or adequate than that afforded by law." *Id.* at 6-7. In a tort action for intentional interference with a business relationship and defamation, the Court affirmed entry of a preliminary injunction barring the defendants from making disparaging statements about the plaintiffs and engaging in certain activities that interfered with their business. *Id.* at 9 ("We believe that only a preliminary injunction can prevent the [defendants] from irreparably hurting [the plaintiffs'] reputation, and thus, a preliminary injunction was warranted in order to safeguard the good name of the [plaintiffs'] business pending the resolution of the tort suits.").

Here, the superior court's finding that the Doctors would suffer irreparable harm in the form of erosion of patient trust and goodwill without a preliminary injunction is not clearly

erroneous. Appellants' J.A. vol. 2 at 23-24. In addition, the Doctors would suffer unwanted publicity, which is an injury in itself and also brings the threat of harassment from anti-abortion extremists. *See supra* at 17, 18-19. The Doctors would also suffer reputational harm from VFL's use of TPRs to bolster false and misleading claims that they are breaking the law. *Id.* at 17-18.

Because the damage that the Doctors would suffer from the erosion of patient trust and goodwill, unwanted publicity, and reputational harm that would result from disclosure of TPRs is difficult to quantify and could not be fully remedied with a monetary judgment, the superior court did not abuse its discretion in concluding that the Doctors would be irreparably harmed absent a preliminary injunction. *Cf. Barlow*, 744 N.E.2d at 7-9.

C. The Balance of Equities Weighs in Favor of a Preliminary Injunction

In contrast to the significant and irreparable harm that the Doctors would suffer from the release of TPRs, the Health Department and VFL will not be meaningfully harmed by the preliminary injunction.

The Health Department has voluntarily treated TPRs as patient medical records since the Abortion Ban took effect in August 2023. *See supra* at 13. It will not be significantly harmed from continuing this practice for a few more months while the superior court adjudicates the Doctors' claim. The Health Department asserts that its ability to participate in the enforcement of state abortion laws is impaired by the preliminary injunction, which bars it from sharing TPRs with members of the public who might file complaints based on the information contained in the reports. But the Health Department remains able to review the TPRs itself and file complaints if it has a reasonable basis for concluding that a law may have been violated. Appellants' J.A. vol. 2 at 27 ("Nothing prevents the Department from reviewing the TPRs to detect possible violations, which is why the legislature requires abortion providers to submit TPRs to the Department in the first place."). The Health Department does not dispute that it has the authority to file such complaints

as part of its broad power to enforce Indiana laws concerning health. *See generally* Ind. Code § 16-19-3-1 ("The state department shall supervise the health and life of the citizens of Indiana and shall possess all powers necessary to fulfill the duties prescribed in the statutes and to bring action in the courts for the enforcement of health laws and health rules.").

Likewise, VFL is not significantly harmed by the preliminary injunction. If Appellants ultimately prevail in the superior court, VFL can obtain the TPRs it seeks at the conclusion of the proceedings; no one has suggested that the Health Department will fail to maintain the records until then. In the meantime, VFL continues to have access to the "public report[s]" that the Health Department is required to publish on a quarterly basis. *Id.* § 16-34-2-5(e).

Accordingly, the superior court did not abuse its discretion in concluding that the balance of equities weighs in favor of a preliminary injunction.

D. The Preliminary Injunction Does Not Disserve the Public Interest

Numerous federal and state laws embody a significant public interest in safeguarding personal health information from public disclosure. These include HIPAA and its implementing regulations, *see supra* at 34-35, as well as 844 Ind. Admin. Code 5-2-2, which directs healthcare practitioners to maintain the confidentiality of all knowledge and information regarding a patient, including, but not limited to, the patient's diagnosis, treatment, and prognosis, and of all records relating thereto, about which the practitioner may learn or otherwise be informed during the course of, or as a result of, the patient-practitioner relationship. The public interest in safeguarding personal health information from public disclosure is further reflected in the evidentiary privilege for physician-patient communications, Ind. Code § 34-46-3-1(2), and APRA's exception for patient

medical records, *id.* § 5-14-3-4(a)(9).[7] Thus, the public interest is served by preventing the Health Department from publicly disclosing TPRs, which contain abortion patients' personal health information, until the superior court has an opportunity to conclusively determine whether such release would be lawful.

Contrary to Appellants' assertions, the preliminary injunction does not disserve the public interest in enforcing Indiana's abortion laws. As explained above, the preliminary injunction does not affect the Health Department's ability to participate in enforcement activities, including reviewing the TPRs that are submitted to it and filing complaints with the Attorney General's office when warranted. *See supra* at 37-38. Likewise, the preliminary injunction does not prevent members of the public with personal knowledge of unlawful or legally questionable conduct from filing complaints with the Attorney General's office. Nor does the preliminary injunction affect prosecuting attorneys' ability to bring criminal enforcement proceedings against those who violate abortion laws. *See* Ind. Code § 16-34-2-7 (imposing criminal penalties for providing abortions that fail to comply with state laws). Appellants' claim that vigilantism is central to the enforcement scheme for abortion laws created by the legislature is wholly unsupported by legal authority.

Accordingly, the superior court did not abuse its discretion in concluding that the preliminary injunction would not disserve the public interest.

[7] Unlike other records exempted from disclosure under APRA, patient medical records do not become subject to disclosure seventy-five years after their creation. Ind. Code § 5-14-3-4(d) ("Notwithstanding any other law, a public record that is classified as confidential, *other than . . . patient medical records*, shall be made available for inspection and copying seventy-five (75) years after the creation of that record." (emphasis added)). They remain exempt from disclosure permanently, even after a patient's death. *Id.* This underscores the vital nature of the public interest in safeguarding personal health information from public disclosure.

CONCLUSION

For the reasons set forth above, this Court should affirm the preliminary injunction entered by the superior court.

Dated: June 26, 2025

Respectfully submitted,

/s/ Stephanie Toti

Stephanie Toti
Attorney No. 8519-95-TA
LAWYERING PROJECT
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
(646) 490-1083
stoti@lawyeringproject.org

Tanya Pellegrini
Attorney No. 9416-95-TA
LAWYERING PROJECT
584 Castro St., No. 2062
San Francisco, CA 94114
(686) 480-8973
tpellegrini@lawyeringproject.org

Juanluis Rodriguez
Attorney No. 6343-95-TA
LAWYERING PROJECT
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
(646) 490-1080
prodriguez@lawyeringproject.org

Kathrine D. Jack
Attorney No. 26851-49
JACK LAW OFFICE LLC
1 Courthouse Plaza
Greenfield, IN 46140
(317) 477-2300
kjack@jacklawoffice.com

Attorneys for Appellees

WORD COUNT CERTIFICATE

In accordance with Indiana Rule of Appellate Procedure 44, I hereby verify that the foregoing brief contains 11,021 words excluding the cover page, table of contents, table of authorities, signature block, word count certificate, and certificate of service.

/s/ *Stephanie Toti*
Stephanie Toti

CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2025, the foregoing document was electronically filed using the Indiana E-Filing System (IEFS).

I further certify that, on June 26, 2025, the foregoing document was served on the following individuals via IEFS:

James A. Barta
james.barta@atg.in.gov
Jenna M. Lorence
jenna.lorence@atg.in.gov
Katelyn E. Doering
katelyn.doering@atg.in.gov
John M. Vastag
john.vastag@atg.in.gov
Theodore E. Rokita
efile@atg.in.gov
OFFICE OF THE ATTORNEY GENERAL
IGC South, Fifth Fl.
302 W. Washington St.
Indianapolis, IN 46204

Benjamin D. Horvath
HORVATH LEGAL SERVICES, LLC
2307 Edison Rd., Fl. 3
South Bend, IN 46615
bdhorvath@comcast.net

Patrick T. Gillen
THOMAS MORE SOCIETY
309 W. Washington, Ste. 1250
Chicago, IL 60606
pgillen@thomasmoresociety.org

Mark W. Sniderman
SNIDERMAN LAW
One Indiana Square, Ste. 1550
Indianapolis, IN 46204
mark@snidermanlaw.com

William R. Groth
911 E. 86th St., Ste. 201-M
Indianapolis, IN 46240
wgroth@fdgtlaborlaw.com

/s/ *Stephanie Toti*
Stephanie Toti