STATE OF INDIANA	)	MONROE COUNTY CIRCUIT COURT
	) SS:	
MONROE COUNTY	)	CAUSE NO. 53C06-2208-PL-001756

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, INC., and ALL-OPTIONS, INC., on behalf of themselves, their staff, physicians, and patients; and AMY CALDWELL, M.D., on her own behalf and on behalf of her patients,

Plaintiffs,

v.

MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities; and the HENDRICKS COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MARION COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, and the WARRICK COUNTY PROSECUTOR, in their official capacities,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION

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INTRODUCTION

Last summer, the Indiana Supreme Court rejected plaintiffs' initial constitutional challenge to Senate Bill 1 (S.B. 1). It held that the "State's broad authority to protect the public's health, welfare, and safety extends to protecting prenatal life" and that "our laws have long reflected that Hoosiers . . . may collectively conclude that legal protections inherent in personhood commence before birth." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 961 (Ind.), *reh'g denied*, 214 N.E.3d 348 (Ind. 2023).

Although the Supreme Court did not foreclose "as-applied challenge[s]" to S.B. 1 by parties arguing that its exceptions for life-threatening situations and serious health risks do not sufficiently protect against "'great bodily harm'" in "particular set[s] of circumstances," plaintiffs do not bring such a challenge. *Planned Parenthood*, 211 N.E.3d at 976. Rather, they assert that S.B. 1 is facially invalid for preventing abortions in various hypothetical scenarios. But the Supreme Court already held that S.B. 1 "is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Id.* at 977. That disposes of this case.

Contrary to plaintiffs' assertion, moreover, S.B. 1 does not violate any rights secured by Article 1, Section 1. Our Supreme Court made clear that, in evaluating a Section 1 challenge, courts must look to the "'common understanding'" of those who drafted and ratified Section 1—not contemporary views on liberty. *Planned Parenthood*, 211 N.E.3d at 967, 977–78. And history demonstrates that the framers did not suppose Section 1 to permit abortions outside of the circumstances permitted in S.B. 1. In fact, the framers enacted more stringent protections for prenatal life.

Declaring S.B. 1 unconstitutional would require repudiating the very historical record the Supreme Court deems the standard for evaluating S.B. 1.

Rather than engage in the required historical analysis, plaintiffs lob accusations about how S.B. 1 supposedly prevents abortions they deem "necessary." By "necessary," however, they do not mean "medically required." Plaintiffs themselves admit that there are various ways to manage nearly every health condition that women experience during pregnancy, without pursuing abortion. Instead, plaintiffs consider abortion to be "necessary" whenever a woman prefers abortion to childbirth. As our Supreme Court held, nothing in Indiana's traditions justifies abortion on demand.

In the rare circumstances that abortions may be medically required to avert life-threatening situations or serious health risks, S.B. 1 allows them. Plaintiffs argue that those allowances are not enough because the penalties for violating S.B. 1 supposedly "chill" physician behavior. But plaintiffs have not brought a vagueness challenge to S.B. 1, which reuses language from prior statutes that plaintiffs and physicians have operated under for years. And plaintiffs offer no authority for the novel proposition that subjective allegations of "chill" render a statute invalid.

Nor does it violate Article 1, Section 1 for S.B. 1 to exclude mental health conditions from its exception for "serious health risks." There is no historical tradition permitting the use of force against another to achieve psychological relief. And plaintiffs' own expert admits abortion is not a direct treatment for mental conditions. Those conditions can and should be treated with psychiatric care.

The Constitution does not require abortions to be permitted at clinics either.

Nothing in Article 1, Section 1 prevents the General Assembly from requiring legal abortions to be performed at the facilities—hospitals and surgical centers—best able to care for women with serious health conditions. The Court should reject plaintiffs' latest attempt to read a broad right to abortion into the Indiana Constitution.

BACKGROUND

I. Factual Background

A. Fetal development during pregnancy

Any discussion of abortion must begin with a recognition of the State's "legitimate . . . interest in protecting prenatal life." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 979 (Ind.), *reh'g denied*, 214 N.E.3d 348 (Ind. 2023). Biologically, human life begins at fertilization. State Ex. 9, Wubbenhorst Decl. ¶ 24; State Ex. 19, Curlin Dep. 107:1–6. Every newly conceived human is "a member of the human family, a unique living being with human DNA distinct from his or her parents." Wubbenhorst Decl. ¶ 24. And unborn children from the earliest stages have "biological markers consistent with" "personhood." *Planned Parenthood*, 211 N.E.3d at 979.

For example, an unborn child's circulatory system develops early, and an unborn child develops its own heartbeat "around 22–23 days' gestation." Wubbenhorst Decl. ¶ 28. The heart is "fully formed" by around 9 to 10 weeks' gestation. *Id.* ¶ 29. By 10 weeks' gestation, "the GI tract, muscles, cardiovascular system, nervous system and urinary tract" are "already functional," and "most of the structures in the baby's body have formed, including the face, fingers, toes, legs and arms." *Id.* ¶ 30. At that

time, "the baby is able to touch his or her face, including sucking his or her thumb." *Id.* At 12 weeks' gestation, fingerprints begin to form and are complete at 19 weeks' gestation. *Id.* At this stage, the unborn child can feel pain too. *See id.* ¶¶ 34–43.

By 15 weeks' gestation—only 3 weeks into the second trimester—"all major organs are formed and functioning, including the liver, kidneys, pancreas, and brain." Wubbenhorst Decl. ¶¶ 31–32. The child in the womb "swallows," "urinates," and "'breathes,' filling her lungs with amniotic fluid and expelling it." *Id.* ¶ 32. "Although the child receives nutrients and oxygen through the umbilical cord, the digestive, urinary, and respiratory systems are preparing for extra-uterine life." *Id.* At this point, the child "looks unmistakably human," and "external genitalia are visible, allowing sonographers to inform families whether their baby is a son or daughter." *Id.* ¶¶ 31–32. The child is also "very active," "kicking and arm-waving." *Id.* ¶ 33.

B. Maternal physical and mental health during pregnancy

Although pregnancy affects a child's mother, pregnancy is "not a disease." Wubbenhorst Decl. ¶ 194. It is "a developmental stage in the continuum of human life." *Id.* Pregnant women's bodies undergo various changes, which include a "faster heartbeat," "changes in lung volume," and changes in "blood volume." *Id.* ¶ 100. These changes "are part of pregnancy" and do not require corrective interventions. *Id.* ¶¶ 98, 100. Indeed, because of these adaptations, "women who have given birth enjoy better health later in life compared with those who have not." *Id.* ¶ 98.

As during any stage of life, a woman may experience disease or complications while pregnant. Experts from both sides agree that the management of these health

conditions "depend[s] on the clinical scenario." State Ex. 17, Ralston Dep. 13:23–14:3; *see* State Ex. 2, Caldwell Dep. 72:13–73:25, 74:11–19, 83:22–25; State Ex. 16, Mittal Dep. 237:16–238:2; Wubbenhorst Decl. ¶ 180–87. Physicians treat patients, not categories of diseases. Wubbenhorst Decl. ¶ 186. So the available treatment options will depend on each patient's individual circumstances and condition. *See* Caldwell Dep. 77:20–23; Curlin Dep. 27:8–13. In any situation, there are "multiple factors that could influence" treatment. Caldwell Dep. 171:19–23; *see* Ralston Dep. 13:23–14:3.

For example, preeclampsia can present with different severity and features in different women, Wubbenhorst Decl. ¶ 138, and its particular features impact the "spectrum of [treatment] options." Pls. Ex. Ralston Decl. ¶ 21; *see* Caldwell Dep. 94:12–95:9. Responses may include expectant management, which "involves treatment of hypertension and metabolic problems, and prevention of seizures as well as assessment of fetal well-being (among other assessments)." Wubbenhorst Decl. ¶ 144. And in severe cases, the treatment options include "vaginal or cesarean delivery." *Id.* ¶ 146; *see* Caldwell Dep. 94:24–95:4. "The decision as to whether to manage a preeclamptic patient expectantly" or "to move toward delivery is nuanced," and "OB/GYNs are rigorously trained to care for patients with preeclampsia, to watch for the development of severe preeclampsia, and to intervene quickly to deliver the baby should a mother not respond to management of her blood pressure, or had clinical or laboratory findings that indicated severe, life-threatening metabolic problems." Wubbenhorst Decl. ¶¶ 145–46.

The "vast majority" of mental health conditions likewise "can be managed with

routine outpatient psychiatric care." State Ex. 8, Kheriaty Decl. ¶ 14; *see* Caldwell Dep. 136:22–24, 140:17–25 (acknowledging ways other than termination to manage conditions). "This may require changes to medications to lower the risk of medications causing harm to the fetus, or may entail increasing the frequency of psychotherapy, but these are routine adjustments in psychiatric practice and can be done without placing the patient's mental health at significant risk." Kheriaty Decl. ¶ 14. "[T]here is no psychological or emotional condition for which abortion is the medically indicated treatment." State Ex. 7, Curlin Decl. ¶ 63; *see* Wubbenhorst Decl. ¶ 121; State Ex. 21, Wubbenhorst Dep. 269:8–18. As even plaintiffs' expert admits, "I don't think of abortion as a direct treatment for mental health conditions." Mittal Dep. 30:17–23.

Whatever the patient's circumstances, abortion is not "safe." Wubbenhorst Decl. ¶¶ 73–96. Post-abortive women can suffer from a host of complications, including physical and emotional harms and death. *See* Wubbenhorst Decl. ¶¶ 93, 159; Kheriaty Decl. ¶¶ 17–23, 49–50; Caldwell Dep. 55:3–4. And elective abortion is never safe for prenatal life; it always destroys it. Wubbenhorst Decl. ¶¶ 22, 45–46.

II. Statutory and Regulatory Background

A. Indiana's history of abortion regulation prior to S.B. 1

"For all of Indiana's history, abortion has been the subject of state lawmaking, and to the extent federal courts interpreting the Federal Constitution have permitted, the legislature has generally prohibited abortions except for pregnancies that threaten a woman's life." *Planned Parenthood*, 211 N.E.3d at 962.

Indiana's prohibition on abortion originated with its adoption of common law. *Planned Parenthood*, 211N.E.3d at 962. In 1835, "the General Assembly passed its

own statute criminalizing abortion, making it a crime to 'wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or . . . use or employ any instrument or other means whatever, . . . to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman.'" *Id.* Shortly after the 1851 Constitution's adoption, "[t]he General Assembly expanded the law . . . by prohibiting a 'druggist, apothecary, physician, or other person selling medicine' from selling any 'medicine . . . known to be capable of producing abortion or miscarriage, with [the] intent to produce abortion.'" *Id.* In 1881, the General Assembly raised the penalty from a misdemeanor to a felony. 1881 Ind. Acts, ch. 37, p. 177, §§ 22–23. And "[i]n 1905, the legislature enacted a new criminal code and incorporated the 1881 statute." *Planned Parenthood*, 211 N.E.3d at 962–63.

Only after the U.S. Supreme Court declared there to be a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), did the Indiana General Assembly, "under protest," "revise[] the abortion laws only to comply with 'recent Supreme Court decisions.'" *Planned Parenthood*, 211 N.E.3d at 963. Its 1973 law allowed abortion at any point during pregnancy when, in a doctor's "professional, medical judgment," an "abortion is necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman." P.L. No. 322, § 2(c)(2), 1973 Ind. Acts 1743. In enacting that statute, however, the State "disclaim[ed] any 'constitutional right to abortion on demand' or approval of 'abortion, except to save the life of the mother.'" *Planned Parenthood*, 211 N.E.3d at 963.

During the period in which federal law limited state authority over abortion,

Indiana continued to regulate it to the extent permitted. *Planned Parenthood*, 211 N.E.3d at 963. Those changes included definitions for medical emergency warranting an abortion and criminal penalties for violating the abortion code. P.L. No. 187-1995, 1995 Ind. Acts 3327–29. Indiana also enacted a prohibition on "dismemberment abortion[s] unless reasonable medical judgment dictates that performing the dismemberment abortion is necessary to prevent any serious health risk to the mother or to save the mother's life." P.L. No. 93-2019, 2019 Ind. Acts 832 (codified at Ind. Code § 16-34-2-1(c)); *see* P.L. No. 93-2019, 2019 Ind. Acts 830–31 (codified at Ind. Code § 16-18-2-327.9) (adding definition of "[s]erious health risk"). The General Assembly permitted abortion when, in a doctor's "professional, medical judgment," an "abortion is necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman." P.L. No. 193-2011, 2011 Ind. Acts 2479.

B. With S.B. 1, Indiana strengthens protections for prenatal life

In 2022, the U.S. Supreme Court held that the federal constitution did not confer a right to abortion and returned to the States the "authority to regulate abortion." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292 (2022). The General Assembly responded with S.B. 1, making abortion a "criminal act" unless one of three exceptions applies. Ind. Code § 16-34-2-1(a).

First, S.B. 1 permits abortions "before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus" where (i) "reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or (ii) "the

fetus is diagnosed with a lethal fetal anomaly." Ind. Code § 16-34-2-1(a)(1)(A). A "serious health risk" is one "that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function," but "does not include psychological or emotional conditions." § 16-18-2-327.9. Only hospitals and ambulatory surgical centers may perform abortions under that exception. § 16-34-2-1(a)(1)(B).

Second, S.B. 1 permits abortions "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age and any time after" where "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Ind. Code § 16-34-2-1(a)(3). Because those abortions are performed later in the pregnancy, S.B. 1 imposes some additional requirements. Those include that the abortion be "performed in a hospital" and be "performed in compliance with" Indiana Code § 16-34-2-3. § 16-34-2-1(a)(3)(C)–(D). Indiana Code § 16-34-2-3, in turn, requires the presence of a second physician who is prepared to provide care for any "child born alive as a result of the abortion." § 16-34-2-3(b); *see* § 16-34-2-3(a), (c)–(d).

Third, S.B. 1 permits abortions "during the first ten (10) weeks of postfertilization age" in cases of rape or incest. Ind. Code § 16-34-2-1(a)(2). Only hospitals and ambulatory surgical centers may perform those abortions. § 16-34-2-1(a)(2)(C).

III. Procedural Background

A. Initial challenge

On August 31, 2022, plaintiffs challenged S.B. 1 and moved for a preliminary

injunction. Compl. (Aug. 31, 2022); Mot. for Prelim. Inj. (Aug. 31, 2022). The complaint alleged in relevant part that (1) S.B. 1 violated a right to abortion secured by Article 1, § 1 of the Indiana Constitution, and (2) S.B. 1 violated Article 1, § 23's Equal Privileges and Immunities Clause. Compl. ¶¶ 58–66.

This Court granted the motion for a preliminary injunction in part, enjoining S.B. 1's enforcement. Order (Sept. 22, 2022). The Court held that Article 1, Section 1 bestows a judicially enforceable right to make "decisions about whether to carry a pregnancy to term." *Id.* at 11. It, however, rejected the claim that Article 1, Section 23 prohibits Indiana from ending the licensure of abortion clinics. *Id.* at 12.

B. Indiana Supreme Court decision

The Indiana Supreme Court vacated the preliminary injunction. *Planned Parenthood*, 211 N.E.3d at 985. It concluded that Article 1, Section 1 protects certain fundamental rights. *Id.* at 968. To determine what Section 1 protects, courts must describe a putative right with an "appropriate level of particularity" and ask "whether the founding generation would have considered the right fundamental." *Id.* at 969. They "cannot supplant what the framers and ratifiers believed they were agreeing to with our own notions of which aspects of liberty ought to be off limits." *Id.* at 977.

Examining "Indiana's long history of generally prohibiting abortion as a criminal act," the Supreme Court held that it was the "common understanding among Article 1, Section 1's framers and ratifiers" that the General Assembly was "left . . . with legislative discretion to regulate or limit abortion." 211 N.E.3d at 978; *see id.* at

981. It explained that "the State's broad authority to protect the public's health, welfare, and safety extends to protecting prenatal life." *Id.* at 961. The Supreme Court also stated that Article 1, Section 1 generally permits persons to protect their "own life . . . against imminent death" and "against 'great bodily harm.'" *Id.* at 976. But the Court held that S.B. 1 "is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Id.* at 977. Any claim that the law infringes a right to abortion "necessary to protect [a woman's] life or to protect her from a serious health risk" in a "particular set of circumstances," the court explained, must be resolved in "an as-applied challenge." *Id.* at 976.

In vacating the preliminary injunction, the Supreme Court did not reach the "claim that Senate Bill 1's hospital requirements for performing abortions" violate "Article 1, Section 23's Equal Privileges and Immunities Clause." 211 N.E.3d at 984. It remanded for further proceedings consistent with its opinion. *Id.* at 985.

C. New challenge on remand

On November 9, 2023, plaintiffs filed an amended complaint alleging that S.B. 1's health or life exception and S.B. 1's hospital requirement violate Article 1, Section 1, and moved for a preliminary injunction. Am. Compl. ¶¶ 64–68. By order of the Court, the proceedings for a preliminary injunction were converted into proceedings on the merits. Order (Dec. 8, 2023). The Court has since dismissed Women's Med Group Professional Corporation as a plaintiff. *See* Plaintiffs' Mot. to Dismiss Women's Med Group Professional Corporation (Feb. 2, 2024); Order (Feb. 5, 2024).

PLAINTIFFS' CHALLENGE TO S.B. 1 LACKS MERIT

I. Plaintiffs Cannot Meet the Exacting Standards for a Facial Challenge

Precedent forecloses plaintiffs' allegation that S.B. 1 infringes an asserted right to protect against "serious health risks." Br. 24. Our Supreme Court has already held that "Senate Bill 1 is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 977 (Ind.), *reh'g denied*, 214 N.E.3d 348 (Ind. 2023). And plaintiffs provide no reason to revisit that holding. They cannot meet the standards for a facial challenge.

A. The Supreme Court's decision forecloses plaintiffs' most recent facial challenge to S.B. 1's exception for life and health

A facial challenge requires proof "there are *no* circumstances" in which the challenged portion of a statute "could ever be enforced consistent with Article 1, Section 1." *Planned Parenthood*, 211 N.E.3d at 975 (emphasis added). If there is "'at least one circumstance under which the statute can be constitutionally applied,' the challenge fails." *Id.* And applying that standard to S.B. 1, the Supreme Court not only rejected plaintiffs' argument that the Constitution protects abortion generally. *See id.* at 981. It also held that "Senate Bill 1 is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Id.* at 977.

True, the Supreme Court did "not foreclose future abortion litigation in Indiana." 211 N.E.3d at 984. Specifically, it did not decide plaintiffs' (now abandoned) equal-privileges-and-immunities challenge, or prejudge "the law's application in any particular set of circumstances." *Id.* at 976, 984. But the Supreme Court made clear

that a plaintiff must *either* bring an as-applied challenge to S.B. 1, meaning a challenge that S.B. 1 cannot be "applied to a[] particular set of facts," *or* meet the exacting standard for a facial challenge. *Id.* at 975–96, 984; *see State v. S.T.*, 82 N.E.3d 257, 259 (Ind. 2017) (as-applied challenge concerns "'the facts of the particular case'").

Plaintiffs chose the more difficult option: they brought another facial challenge. Plaintiffs do not challenge S.B. 1's application to a particular woman or pregnancy. Rather, they generically allege that S.B. 1's requirements that a condition endanger a woman's life or present a serious health risk and that an abortion be performed at a hospital or ambulatory surgical center are unconstitutional. Br. 22–32; Am. Compl. ¶¶ 66, 68. And plaintiffs seek relief that would "reach beyond the[ir] particular circumstances," *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), asking this Court to enjoin S.B. 1's enforcement against anyone performing actions falling into broad (and ambiguous) categories, *see* Br. 36–37; Am. Compl. Prayer for Relief. Plaintiffs therefore must show *every* abortion sought for *any* putative health risk, *anywhere*, is constitutionally protected. *See Planned Parenthood*, 211 N.E.3d at 975.

Plaintiffs cannot make that showing. In rejecting plaintiffs' prior challenge, the Supreme Court held that "Senate Bill 1 is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Id.* at 977. And it rejected plaintiffs' argument that Article 1, Section 1 protects abortion absent a threat to the women's "life" or a "serious health risk," explaining that the legislature has "broad legislative discretion to limit abortion" in all other circumstances. *Id.* at 976–77, 981. Plaintiffs seek to relitigate issues the Supreme Court already decided.

B. Plaintiffs' own admissions foreclose their facial challenge

Even if the Supreme Court's decision did not expressly foreclose plaintiffs' facial challenge, the challenge would still fail. To start, plaintiffs do not argue that *every* health condition falling outside S.B. 1's exception poses a threat to "life" or a "serious health risk" (within our Supreme Court's understanding of the term). Plaintiffs merely allege that S.B. 1's exception does not allow some number of abortions needed "to protect against serious health risks." Br. 28; *see id.* at 1–3, 25–27. And while plaintiffs mention general categories of health conditions, such as "hyperemesis," "cancer," or "diabetes," *id.* at 1–3, 25–27, neither plaintiffs nor their experts argue that these conditions *always* fall outside S.B. 1's exceptions, that they *always* pose a serious health risk, or that abortion is *always* necessary to address such a risk.

To the contrary, Caldwell admits that termination of pregnancy is medically indicated for only a few health conditions, Caldwell Dep. 93:7–20 (listing "hyperemesis," "preeclampsia," and "peripartum cardiomyopathy")—which in many circumstances would meet S.B. 1's exceptions for life and serious health risks. And she admits that abortion is not the only way to terminate a pregnancy or manage the condition. *See id.* at 84:6–24, 86:12–14 (hyperemesis gravidarum); *id.* at 94:24–95:9 (preeclampsia); *id.* at 96:6–11 (peripartum cardiomyopathy). Where a fetus is viable, early delivery is another option. *Id.* at 84:6–24, 86:12–14 (hyperemesis gravidarum); *id.* at 94:24–95:9 (preeclampsia); *id.* at 96:6–7 (peripartum cardiomyopathy). And before viability, conditions may be managed until viability. *See, e.g.*, *id.* at 87:2–4 ("most women that I see with [hyperemesis gravidarum] choose to continue the pregnancy").

For any given health condition, moreover, plaintiffs' experts admit there are different degrees of severity and hence different management options. *See* Caldwell Dep. 71:25–72:3; Ralston Dep. 106:15–17 ("I take care of women who have serious medical problems who want to continue their pregnancies, and that happens all the time."). For example, hyperemesis gravidarum varies in severity and can be managed in a range of ways, including "in an outpatient setting with oral anti-nausea medication," "fluid replacement, IV medications, electrolyte replacement," and "all sorts of different medications that can be tried," Caldwell Dep. 84:6–24, 86:12–14; *see* Pls. Ex. Caldwell Decl. ¶ 14; Ralston Dep. 82:6–83:4 (there are multiple "management option[s]" for hyperemesis gravidarum and it is "rare" for symptoms to be severe). And kidney disease may be managed by delivering a viable fetus early, "optimiz[ing] [patients'] medication management," or "mitigat[ing] other exacerbating factors," *id.* at 90:25–91:2, 6–9; *see* Ralston Dep. 94:17–95:3. The same is true for other conditions. *See, e.g.*, Ralston Dep. 123:25–124:2 ("[E]very single disease we've talked about . . . is a disease that we have management options during pregnancy."); *id.* at 85:21–24 ("treatment for deep vein thrombosis is dependent on a particular patient's clinical scenario" and "usually involves some form of anticoagulation"); *id.* at 106:12–13 (cardiac valve disease); *id.* at 108:18–20 (sleep apnea); *id.* at 58:13–18 (preeclampsia); Caldwell Dep. 100:1–10 (cancer); *id.* at 140:20–23 (diabetes).

Although plaintiffs fault S.B. 1 for excluding mental-health conditions, they do not claim that *every* mental-health condition qualifies as a "serious health risk" or threat to life either. They merely allege that mental-health issues "*can* pose serious

risks to a patient's health." Br. 29 (emphasis added). As with physical conditions, plaintiffs' expert admits that mental-health conditions vary widely in kind and severity: they can run the gamut from "minor depression" to more serious concerns. Mittal Dep. 72:5–6. And the treatments available are just as varied: mental health conditions can be treated with "medication, procedures, [and] behavioral interventions." Caldwell Dep. 140:19. In fact, plaintiffs' own expert "do[es]n't think of abortion as a direct treatment for mental health conditions." Mittal Dep. 30:22–23; *id.* at 142:15–17 ("I think that mental health treatment is always the appropriate treatment option for mental health care or mental health conditions."). Even for suicidal ideation the "first line" of care is "acute psychiatric treatment," not abortion. *Id.* at 183:15–16.

Plaintiffs' challenge to the hospital requirement likewise cannot succeed. In their amended complaint, plaintiffs abandoned their equal-privileges-and-immunities claim. They now allege only that the hospital restriction "burdens the constitutional right of Hoosiers who need abortions to protect against 'great bodily harm.'" Br. 30; *see* Am. Compl. ¶ 68. But plaintiffs do not—and cannot—allege that the hospital requirement *always* makes it impossible for Hoosiers to obtain an abortion needed to protect against great bodily harm. Plaintiffs merely argue that "many Hoosiers" may find hospital abortions too expensive. Br. 30. That is not enough.

Plaintiffs, moreover, concede that some abortions require "hospital-based care," such as when "a patient has any sort of health condition that could either complicate pregnancy . . . or that would make obtaining an outpatient abortion . . . less safe." Caldwell Dep. 51:14–19; *see* State Ex. 11, Dockray Dep. 23:6–9 ("It's not our

position that no abortion should be required to take place in a hospital."); *id.* at 140:24–141:2 (some providers direct pregnant women to hospitals because of certain "conditions"). As a result, plaintiffs cannot establish that "there are no circumstances" in which S.B. 1's requirements can be enforced consistent with Article 1, Section 1. *Planned Parenthood*, 211 N.E.3d at 975. Their facial challenge fails. *Id.* at 976.

II. S.B. 1's Protections for Prenatal Life and Maternal Health Do Not Infringe Any Rights Protected by Article 1, Section 1

Plaintiffs cannot show that S.B. 1's protections for prenatal life and maternal health violate Article 1, Section 1. Although plaintiffs argue that Section 1 guarantees a right to protect against "serious health risks" and that S.B. 1 violates that right, they make no attempt to discern what the term "serious health risks" actually means. Plaintiffs attack S.B. 1 based on their own personal views about abortion.

A. Plaintiffs make no attempt to show that S.B. 1 infringes liberty as understood by Article 1, Section 1's framers and ratifiers

S.B. 1, like all state statutes, comes "'clothed with the presumption of constitutionality'" until that presumption is "'clearly overcome.'" *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1273 (Ind. 2014). To overcome that presumption in an Article 1, Section 1 challenge, plaintiffs must demonstrate that a putative right is "'of such a quality that the founding generation would have considered it fundamental or 'natural.''" *Planned Parenthood*, 211 N.E.3d at 977 (quoting *Price v. State*, 622 N.E.2d 954, 959 n.4 (Ind. 1993)). Our Supreme Court has observed that Indiana's traditions generally permit persons to protect their "own life . . . against imminent

death" and "'great bodily harm,'" but has not elucidated this tradition's "precise contours." *Id.* at 976 (quoting *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021)).

Even in declining to articulate these precise contours, however, the Supreme Court made plain how courts should decide what Article 1, Section 1 protects. In applying Section 1, courts must seek to "uncover 'the common understanding of both those who framed' our Constitution 'and those who ratified it.'" *Id.* at 967. Judges "cannot supplant what the framers and ratifiers believed they were agreeing to with [their] own notions" of liberty. *Id.* at 977. Rather, courts must examine the "text in the context of the history surrounding its drafting and ratification" to "discern the contours of constitutionally protected liberty *as Section 1's framers and ratifiers understood them*." *Id.* at 967, 978 (emphasis added); *see id.* at 975; *Price*, 622 N.E.2d at 959 n.4; *Doe v. Town of Plainfield*, 893 N.E.2d 1124, 1131–32 (Ind. Ct. App. 2008).

Plaintiffs do not even attempt to undertake the analysis Section 1 requires. They invoke a general "'right of self-protection,'" arguing that S.B. 1 does not permit abortions in circumstances in which plaintiffs consider the health risks too high. Br. 23. But the question is not what plaintiffs or their experts think. *Planned Parenthood*, 211 N.E.3d at 977. The question is whether the "common understanding of Section 1 among those who framed and ratified it" prevents the General Assembly from enacting S.B. 1's protections for prenatal life and maternal health. *Id.* at 981. Plaintiffs, however, do not attempt to demonstrate that the founding generation would have understood there to be a right to an abortion outside of a hospital setting or based on mental health concerns. They offer no historical evidence whatsoever.

B. The best historical evidence—historical abortion regulations—shows there is no constitutional violation

Plaintiffs' refusal to examine history is no accident. As our Supreme Court recognized, Indiana has "generally prohibited abortions except for pregnancies that threaten a woman's life." *Planned Parenthood*, 211 N.E.3d at 962. In 1835, the General Assembly made it a crime to "willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or . . . use or employ any instrument or other means whatever, . . . to procure the miscarriage of any such woman, *unless the same shall have been necessary to preserve the life of such woman*." Act of Feb. 7, 1835, ch. XLVII, § 3, 1835 Ind. Acts 66, 66 (emphasis added). It did not mention health. Through legislation enacted in 1852, 1859, 1881, and 1905, the General Assembly revisited Indiana's prohibition on abortion. *See Planned Parenthood*, 211 N.E.3d at 962. And it continued to allow abortions only to save "a woman's life." *Id.*

During the period in which Indiana's historic abortion statutes were in effect, "[t]here were many abortion cases." *Planned Parenthood*, 211 N.E.3d at 963. "'[N]one of the resulting opinions even hinted at any concern that the statute violated'" any constitutional provision. *Id.* at 978. The very first constitutional challenge to Indiana's abortion statute reached the Indiana Supreme Court in 1972. *Id.* at 963. In that case, the Supreme Court held "that there was no federal constitutional right precluding the State from enacting its law prohibiting abortion *except when necessary to protect a woman's life*." *Id.* (emphasis added) (citing *Cheaney v. State*, 285 N.E.2d 265, 271–72 (1972)). Again, it did not hint at a constitutional problem with that limitation. And while the General Assembly later permitted more abortions to conform to federal

judicial mandates, it "disclaim[ed]" any constitutional right to abortion or "approval of 'abortion, *except to save the life of the mother*.'" *Id.* at 963 (emphasis added).

That "long history" indicates that S.B. 1 constitutionally balances concerns for prenatal life and maternal health. *Planned Parenthood*, 211 N.E.3d at 978. S.B. 1 permits abortions in more circumstances than were permitted throughout most of Indiana's history. S.B. 1 not only permits abortions necessary "to save the pregnant woman's life," but also permits abortions necessary "to prevent any serious health risk to the pregnant woman," abortions where the pregnancy arose from rape and incest, and abortions where there is a lethal fetal anomaly. Ind. Code §§ 16-34-2-1(a)(1)–(3). Thus, to declare S.B. 1 unconstitutional, the Court would have to declare *all* abortion regulations from 1836 to 1972 unconstitutional as well. But those regulations supply the best evidence for determining how those who drafted and ratified Article 1, Section 1 thought it applied in the abortion context. *See Planned Parenthood*, 211 N.E.3d at 977–78. Text and history require upholding S.B. 1.

C. General self-defense principles do not support a right to abortion outside the circumstances already permitted

That Indiana law authorizes "self-protection" in some circumstances, Br. 23, does not support a different conclusion. As our Supreme Court explained, it "do[es] not analyze" whether a right exists "in a colloquial sense." *Planned Parenthood*, 211 N.E.3d at 978. Rather, courts must describe a right at the "appropriate level of particularity" and "discern the contours of constitutionally protected liberty as Section 1's framers and ratifiers understood them." *Id.* at 969, 978; *see, e.g.*, *Doe*, 893 N.E.2d at 1131–32 (demanding evidence the founding generation specifically recognized a

"right to enter public parks for legitimate purposes").

Plaintiffs, however, present no evidence that Section 1's drafters and ratifiers understood self-defense to permit abortion outside the circumstances permitted by S.B. 1. They seize on the Supreme Court's references to protection against "'great bodily harm'" and "serious health risks." *Planned Parenthood*, 211 N.E.3d at 967–77. But plaintiffs make no attempt to understand what those terms meant to those who framed and ratified Article 1, Section 1—or the extent to which that generation thought that Section 1 constitutionalized self-defense principles from the common law or statute. Indeed, plaintiffs do not even attempt to discern what is encompassed by the term "great bodily harm" in the law today. They act as if any health risk—no matter how remote—or any increased cost justifies terminating prenatal life at the location of their choosing. No tradition supports such a capacious right.

Both historically and today, there were important limitations on self-defense. It generally requires a showing that the threatened danger was imminent, the response was proportional, and it was reasonable under the circumstances. *See Simmons v. State*, 506 N.E.2d 25, 28 (Ind. 1987); *Carbo, Inc. v. Lowe*, 521 N.E.2d 977, 979 (Ind. Ct. App. 1988). Those limitations foreclose plaintiffs' views on abortion.

Start with the imminence requirement. As a leading treatise explained only four years after Indiana adopted its 1851 Constitution, self-defense is only available where "the danger [is] actual and urgent." 1 Francis Wharton, *Treatise on the Criminal Law of the United States* ¶ 1020, at 554 (3rd ed. 1855). That means that neither

"contingent necessit[ies]" nor "as yet unexecuted machinations" suffice for self-defense. *Id.* It is consistent with that principle for S.B. 1 to require a showing that abortion is not merely desirable, but is "necessary" in a physician's "reasonable medical judgment" to save a life or avert a serious health risk. Ind. Code § 16-34-2-1(a).

By contrast, plaintiffs argue that many "contingent necessit[ies]" are sufficient. They want to pursue abortions in situations presenting a nebulously defined "risk," including where pregnancy "*could*"—not would—"require forgoing needed treatment," where pregnancy might pose "*future* health risk[s]," and where conditions "will remain *stable* during the pregnancy." Br. 3, 25, 36–37 (emphasis added); *see* Am. Compl. ¶¶ 41, 45. In fact, plaintiffs seem to treat *any* pregnancy as justifying an abortion. They assert that "it is always safer for a woman not to be pregnant." Caldwell Dep. 68:18–21. But Indiana courts reviewing self-defense claims have rejected such broad views of "imminent" danger. *See White v. State*, 726 N.E.2d 831, 834 (Ind. Ct. App. 2000). It is insufficient to show that the situation had been dangerous in the past or had the potential to become so—the person claiming self-defense must show that he reasonably perceived "impending danger" at the moment of action. *Id.*

Self-defense also requires that any response to danger is proportionate. Contemporaries of the founders understood that if an imminent danger existed, lethal force in self-defense was only appropriate if there was "no other possible or probable means of escaping the necessity" of the self-defense act. 1 Robert Desty, *Compendium of American Criminal Law* 358–59 (1882). Anyone asserting that they had acted in self-defense must "use no instrument and no power beyond what will simply prove

effectual." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 341–42 (4th ed. 1868). And today it remains axiomatic that any "force employed" in self-defense "must not be out of proportion" to the danger. *Carbo, Inc. v. Lowe*, 521 N.E.2d 977, 979 (Ind. Ct. App. 1988). That is why the Indiana Code requires a person invoking self-defense to show a threat of "death or great bodily harm." *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021); *see Planned Parenthood*, 211 N.E.3d at 976 (same).

Plaintiffs ignore that principle too. They fault S.B. 1's definition of "serious health risk" for requiring a "substantial and irreversible physical impairment of a major bodily function," Ind. Code § 16-18-2-327.9, arguing that abortion should be permitted for "reversible" conditions, "moderate" harms, and mental health conditions, Br. 26–27, 29 (emphasis omitted). But the plain meaning of "great bodily harm" excludes "slight" and "moderate" harms, *Froege v. State*, 233 N.E.2d 631, 636 (Ind. 1968), and requires the harm to be "not mental but corporeal," *Terre Haute Elec. Ry. Co. v. Lauer*, 52 N.E. 703, 706 (Ind. Ct. App. 1899). So there is no problem with S.B. 1 excluding lesser and mental risks from its definition, even if one assumes all self-defense law is constitutionally required. And if a condition is reversible, permanently ending prenatal life is a disproportionate response as well. Curlin Decl. ¶ 64.

Again, plaintiffs do not take traditional limitations on self-defense seriously. In response to potential health risks that may not even materialize, they offer only one solution: abortion. Br. 1. Caldwell admits that termination of pregnancy is medically indicated for only a few health conditions, Caldwell Dep. 93:7–20 (listing "hyperemesis," "preeclampsia," and "peripartum cardiomyopathy")—which at least in

many circumstances would fall within S.B. 1's exceptions for life and serious health risks. And she admits that abortion is not the only way to terminate a pregnancy or manage the condition. *See id.* at 84:6–24, 86:12–14 (hyperemesis gravidarum); *id.* at 94:24–95:9 (preeclampsia); *id.* at 96:6–11 (peripartum cardiomyopathy). At bottom, why Caldwell thinks abortions are "necessary" has little to do with averting grave bodily harm. Her definition of "necessity" depends on what the "patient's goal" is—to have a live baby or not. *Id.* at 66:3–67:23.

Moreover, for every condition, plaintiffs agree that there are ranges of severities, impacts, and treatment options. Caldwell Dep. 92:16–25; *see* pp. 4–6, *supra*. "[M]ultiple factors [are] almost always at play when considering a patient's clinical condition and what . . . options are available for management of their condition." Caldwell Dep. 77:20–23. For example, the treatment of anemia could range from "iron pills" to "remov[ing] [a woman's] uterus." *Id.* at 80:20–22. Obviously, however, ending prenatal life is not a proportionate response to a specific situation that could be managed by a vitamin supplement or another, less invasive course of action.

Mental-health challenges are no different. Even setting aside that mental health conditions did not traditionally justify using force against another, plaintiffs' own expert conceded that she "do[esn't] think of abortion as a direct treatment for mental health conditions." Mittal Dep. 30:22–23. Instead, "medications," "psychotherapy," and "[i]n very rare instances psychiatric hospitalization" treat mental health conditions. Kheriaty Decl. ¶ 14. So terminating prenatal life is not a proportionate response, especially where other treatments are available.

Self-defense also requires proof that the fear of danger was "reasonable." This includes "both [a] subjective belief that force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances." *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007). The common law (which Indiana adopted in 1807, *Planned Parenthood*, 211 N.E.3d at 962) rejected "'bare fear,'" "'unaccompanied by any overt act'" as sufficient to claim self-defense. Horrigan & Thompson, *Select American Cases on the Law of Self-Defence* 4 (1874). S.B. 1's incorporation of a "reasonable medical judgment" requirement accords with that limitation too. Ind. Code § 16-34-2-1(a). Plaintiffs' response is to critique S.B. 1 based on subjective fears. Br. 28–29. But that is an argument against traditional self-defense principles, not an argument that S.B. 1 is inconsistent with them.

There are other problems with plaintiffs' attempt to shoehorn a broad right to abortion into principles of self-defense. For one thing, self-defense recognizes the right to take action "against an aggressor." Prentiss Bishop, *Commentaries on the Criminal Law*, *supra*. It is generally "unavailable to a defendant who is the initial aggressor." *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999). Unborn children, however, are not aggressors. Plaintiffs' own examples illustrate the point. For example, plaintiffs want abortions where "treatment [for another health condition] would endanger the fetus" and where a woman is suffering from mental illness. Br. 12, 16. But to the extent there is any aggressor, it is the other health condition that is endangering the woman. The problem is clearer still when plaintiffs say that abortion is nec-

essary to prevent "intimate partner violence." Caldwell Dep. 136:8–11. There, the aggressor is the partner committing assault, not the baby.

The mismatch between traditional principles governing self-defense and abortion is why Indiana (and many other States) historically reserved abortion for situations in which a woman's life was threatened. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302–330 (2022) (cataloguing early state statutes). In cases involving two innocents, the common law and early American law generally limited any "necessity defense" to "cases where life was pitted against life." Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to A Life-or-Health-Preserving Abortion?*, 92 Miss. L.J. 271, 314 (2023). That limitation reflects the proportionality principle is even more stringent where there is no wrongdoer. *See id.* at 314–20. And while policymakers may choose to balance competing interests differently, plaintiffs cannot point to any original understanding that forecloses the balance S.B. 1 struck.

Plaintiffs' request for abortion on demand exceeds any tradition of self-defense in another way too. Self-defense of course means just that—acting in defense of oneself. Plaintiffs seek something more: a right of affirmative access to abortion outside a hospital or ambulatory surgical center. But the right to "us[e] reasonable force to defend oneself" from an aggressor is not same as "an affirmative right of access to particular medical" interventions. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710–11 & n.18 (D.C. Cir. 2007) (en banc); *see Washington v. Glucksberg*, 521 U.S. 702, 722–25 (1997) (distinguishing between a

right to refuse unwanted medical treatment and a purported right to physician assistance with suicide). And it is even further afield from any self-defense tradition to argue there is a right to obtain abortions at an outpatient clinic.

III. S.B. 1's Protections for Prenatal Life and Maternal Health Are Permissible Regulations of Any Asserted Right

Plaintiffs' argument that S.B. 1 violates a right to abortion to protect a woman's life or to protect her from a serious health risk runs into another barrier. Establishing a violation of Article 1, Section 1—a provision that protects life and liberty broadly—requires showing that S.B. 1 prevents that constitutional provision from "serv[ing] the purpose for which it was designed." *Price*, 622 N.E. 2d at 960–61 n.7. It is not enough to show that persons cannot "pursue their personal ends" in any way they like. *Id.* at 959. For although the legislature cannot "alienate" a constitutional right, it may nonetheless "qualify" it. *Id.* at 960. Plaintiffs cannot meet their burden, especially on a facial challenge where individual circumstances vary widely.

A. S.B. 1's exceptions for life and health are constitutional

As discussed above, S.B. 1 permits abortions where necessary to protect a woman's life or avert serious health risks. Ind. Code § 16-34-2-1(a). Its exceptions permit abortions in every situation in which abortion was permitted in Indiana for nearly 150 years and in other situations as well. S.B. 1's limitations do not exceed the limitations historically placed on self-defense. And the Supreme Court has already concluded that S.B. 1 "is not facially invalid as interfering with a woman's access to care that is necessary to protect her life or health." *Planned Parenthood*, 211 N.E.3d

at 977. Thus, even if there is some remote situation in which S.B. 1 purportedly conflicts with traditions of protecting against great bodily harm, it cannot be said that S.B. 1 "alienates" rather than "qualifies" any right. *Price*, 622 N.E. 2d at 960.

Although plaintiffs say that S.B. 1 "may" prevent abortions for "objectively serious health risks," they are vague as to the precise circumstances in which S.B. 1's exceptions for life and health purportedly do not allow abortions that meet the Supreme Court's understanding of "serious health risks." Br. 25–27. And their experts offer no clarity either, admitting clinical care is fact-intensive. *See* pp. 4–6, *supra*. Indeed, much of plaintiffs' critique rests on wordplay about what makes abortions "necessary." Br. 28. By "necessary," plaintiffs mean that S.B. 1 does not allow doctors to do whatever is "necessary" to "achiev[e] a patient's goal." Caldwell Dep. 66:17–67:23. But that is simply another way of saying plaintiffs disagree with the Supreme Court's rejection of abortion on demand. Plaintiffs cannot establish a constitutional violation by showing they cannot "pursue their personal ends" in any way they like. *Price*, 622 N.E. 2d at 959. Courts may evaluate "only the boundaries of legislative power, not the wisdom of legislative policy." *Planned Parenthood*, 211 N.E.3d at 984.

Unable to identify concrete conflicts, plaintiffs box with shadows. Citing unverified assertions in newspaper articles about doctors in other States, plaintiffs argue that "S.B. 1's threat of criminal liability[] and loss of licensure for physicians" causes doctors to "wait for [women's] conditions to deteriorate . . . before providing care." Br. 19, 24–25.[1] But doctors in other States are not operating under Indiana

[1] The "study" plaintiffs cite, Br. 27, likewise consists of uncorroborated, anonymously

law. Indiana permits abortion when "a serious *risk* of substantial and irreversible physical impairment" exists. Ind. Code § 16-18-2-327.9 (emphasis added). It does not require doctors to wait until patients *are* injured. Nor does the law prevent doctors from arresting a disease's progression. Out-of-state doctors' perverse refusal to provide any treatment to make a point and provide fodder for activists is the fault of those doctors, not of the law itself. Caldwell herself admits that doctors who refuse to provide any care act "against . . . medical ethics"; she would "never suggest that a patient should try to get sicker to get care." Caldwell Dep. 160:19–161:6.

S.B. 1 likewise does not forbid doctors from providing medical care that could increase risks to the fetus. S.B. 1 prohibits "abortion," which "means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus." Ind. Code § 16-18-2-1. As Caldwell admits, providing a needed x-ray to a woman is not an "abortion," even if there is some risk to the fetus. Caldwell Dep. 168:25–169:1, 169:23–24. Indeed, Indiana law expressly protects doctors who "in good faith provide[] medical treatment to a pregnant woman that results in the accidental or unintentional termination of the pregnancy," Ind. Code § 35-42-1-6(a)(2). As one Indiana hospital observed since S.B. 1, "[m]edically necessary care . . . should NOT be withheld from the patient simply because they are pregnant." State Ex. 22 at 3. Much of plaintiffs' position rests on speculation, hearsay, and misreading of the law.

Nor can plaintiffs succeed by claiming that S.B. 1's definition of a "serious health risk" is "uncertain" or "is not rooted in medical science," thereby "chill[ing]"

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submitted stories that pro-abortion authors solicited. Curlin Decl. ¶ 35.

conduct. Br. 23–24, 27. In their Amended Complaint, plaintiffs did not bring claims that S.B. 1 violates due process or is otherwise void for vagueness. (Those challenges were abandoned two years ago, after the State pointed out that the Due Course of Law Clause does not apply in the criminal context. *See McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975–76 (Ind. 2000).) They only alleged a violation of Article 1, Section 1. Am. Compl. ¶¶ 64–68. And plaintiffs do not even attempt to show how that constitutional provision prohibits laws that supposedly "chill" conduct.

A proper vagueness challenge would fail regardless. Traditional vagueness principles require a statute to provide only "'fair warning' as to what conduct will subject a person to liability." *Karlin v. Faust*, 188 F.3d 446, 458 (7th Cir. 1999); *see Morales v. Rust*, No. 23S-PL-371, --- N.E.3d ---, 2024 WL 967484, at *16 (Ind. Mar. 6, 2024). This does not mean that a law's meaning must be beyond debate. One party's "uncertain[ty]" about what a law means, even if there are multiple "permissible readings," cannot make a law unconstitutionally unclear. *Pulsifer v. United States*, 601 U.S. ---, 2024 WL 1120879, at *14 (Mar. 15, 2024). Vagueness doctrine recognizes there will be contested cases that require resolution through as-applied challenges. *See Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 603 (7th Cir. 2021). A statute survives a facial challenge if it "has a discernable core." *Id.* at 604; *see Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 540 (7th Cir. 2019).

S.B. 1's text has a discernable core. It prohibits abortion unless, in a doctor's "reasonable medical judgment," "a condition exists that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of

substantial and irreversible physical impairment of a major bodily function." Ind. Code § 16-18-2-327.9; *see* § 16-34-2-1(a). Although plaintiffs say that "major bodily function" is a "legal" term, Br. 27, they do not deny that some bodily functions are major. Nor do they deny that some impairments are irreversible. *See id.* Contrary to plaintiffs' suggestion, moreover, S.B. 1 does not require perfect perspicuity. It requires only "reasonable medical judgment"—something medical practitioners regularly employ. *See, e.g.*, Ind. Code § 34-18-2-1 (using term in standards for medical malpractice); Wubbenhorst Decl. ¶ 103; Curlin Decl. ¶ 25.

Past practice belies plaintiffs' self-serving statements about purported difficulties in understanding S.B. 1. S.B. 1's exception for life and serious health risks mirrors that in other statutes that predated its enactment. From 1993 to 2022, Indiana law permitted abortions post-viability if, "in the attending physicians' professional, medical judgment" the abortion was "necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman." P.L. 2-1993 (codified at Ind. Code § 16-34-2-1(3)(C) (1993)). Doctors were able to perform abortions under that standard. *See* Caldwell Dep. 40:3–18. Similarly, prior to S.B. 1, Indiana prohibited "dismemberment abortion[s] unless reasonable medical judgment dictates that performing the dismemberment abortion is necessary to prevent any serious health risk to the mother or to save the mother's life." P.L. 93-2019, 2019 Ind. Acts 832. Doctors, Caldwell included, performed many abortions under that exception too. Caldwell Dep. 38:5–7, 39:1–20. S.B. 1's requirements are nothing new.

Unsurprisingly, then, medical professionals have proven themselves able to

understand S.B. 1. Since S.B. 1 took effect, Caldwell has performed multiple abortions under it. Caldwell Dep. 114:3–115:5; 127:22–24. Indiana hospitals have developed guidance, procedures, and consultations to assist doctors. *See* State Ex. 14, Ferries-Rowe Dep. 31:22–32:18; State Ex. 3–6; State Ex. 12, Cox Dep. Vol. I 16:1–13, 19:10; State Ex. 22–30; State Ex. 18, Joffe Dep. 229:5–230:25 (hospital institutions should clarify how doctors should interpret the law). And in every situation in which Caldwell has performed an abortion permitted by S.B. 1, a review team unanimously deemed it proper. Caldwell Dep. 108:13–21, 113:13–20, 115:8–12; 121:24–122:8.

To the extent plaintiffs worry a future situation could arise that presents harder questions, that does not a vagueness problem make. *See Marion Cnty. Prosecutor*, 7 F.4th at 604. Edge cases can arise under almost any statute, civil or criminal. The proper solution, should an ambiguity arise, is for plaintiffs to bring an as-applied challenge so the courts can evaluate the case's specifics. Pointing to hypothetical situations does not demonstrate a statute is unduly vague. *See Duncan v. State*, 975 N.E.2d 838 (Ind. Ct. App. 2012); *Price v. State*, 911 N.E.2d 716 (Ind. Ct. App. 2009).

The only types of health condition that S.B. 1 categorically excludes from its definition of "serious health risks" are "psychological [and] emotional conditions." Ind. Code § 16-18-2-327.9. As discussed above, however, traditions of self-defense against bodily harm were not concerned with alleged psychological and emotional harms. *See* p. 24, *supra*. S.B. 1, moreover, permits all actual treatments for psychological and emotional conditions. Curlin Decl. ¶¶ 53, 60–61; Wubbenhorst Decl. ¶ 121; State Ex.

20, Kheriaty Dep. 66:2–20; *see* Caldwell Dep. 140:17–141:16, 143:21–144:2 (explaining various treatments for mental-health concerns); Mittal Dep. 173:15–17 (treatments for certain bipolar disorders "can be provided with monitoring and vigilance around the emergence of risk" to pregnant women). It only prohibits abortion, which plaintiffs' own expert does not "think of . . . as a direct treatment for mental health conditions." Mittal Dep. 30:17–23. Plaintiffs are simply wrong to argue there is no difference between physical and emotional conditions. *See* Curlin Decl. ¶¶ 24, 64.

A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104, 111 (Ind. 1996), does not suggest otherwise. That case concerned an issue of statutory construction, namely what constituted a "substantial and irreversible injury" under an informed-consent statute. *Id.* at 108. There, the Supreme Court surmised the term did not *exclude* mental health. *Id.* But "the legislature is not without recourse if it disagrees with a court's interpretation of a statute." *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 489 (Ind. 2001). And the legislature explicitly excluded mental conditions from its definition of "substantial and irreversible injury" in S.B. 1. Plaintiffs' argument that mental health should be included in a definition of serious health risks is a policy concern that must be raised before that body.

B. S.B. 1's hospital requirement is constitutional

Plaintiffs' arguments against the hospital requirement, Br. 30–31, suffer from the same flaws. Plaintiffs assert that abortions at hospitals cost more and could require women to travel. Br. 30; *see* State Ex. 1, Dudash Dep. 27:25–28:6. But plaintiffs have not asserted a freestanding right to abortions at hospitals. The Supreme Court has already held that "increased cost of care," "economic hardship[s]," and having to

travel do not materially burden any abortion right. *Clinic for Women, Inc., v. Brizzi*, 837 N.E.2d 973, 981 (Ind. 2005); *see State v. Econ. Freedom Fund*, 959 N.E.2d 794, 807 (Ind. 2011) (rejecting an "economic burden" argument). And the plaintiffs have not identified any woman who claims not to have received an abortion for serious health risk due to the requirement. Instead, they explain how they have funded abortions in hospitals (or out of state). Dockray Dep. 52:11–18; 182:5–12.

Even for those women seeking abortions under the life or health exception, plaintiffs themselves note that some must be treated in hospitals. Women who have "any sort of health condition that could . . . complicate pregnancy" require "hospital-based care." Caldwell Dep. 51:14–19. (Plaintiffs provide no evidence for their assertion, Br. 30, that some legal abortions could be performed at clinics.) There are other benefits to abortions at hospitals and surgical centers. Hospitals provide follow-up care. *See* Caldwell Dep. 55:24–56:20 ("the vast majority of patients that I care for at IU [Health], we see for follow-up two or three weeks after their procedure"); *id.* at 55:15–20 (at "Planned Parenthood . . . , we don't track our patients after they receive care"). And hospitals and surgical centers are better equipped to address complications arising from abortions and decrease the likelihood of injuries. *See* Wubbenhorst Decl. ¶ 78; State Ex. 13, Cox Dep. Vol. II 71:6–24; Ferries-Rowe Dep. 14:7–15:19. Indeed, many women who received abortions at clinics seek care for complications at hospitals. *See* State Ex. 15, Stover Dep. 117:5–9; State Ex. 31 at 7–8.

Plaintiffs have not argued that the Constitution protects a right to abortion in the case of rape, incest, or lethal fetal anomaly, so women seeking abortions under

those statutory exceptions are only entitled to them so far as the statute permits—in this instance, at a hospital or surgical center. *See State ex rel. Lake v. Bain*, 76 N.E. 2d 679, 680 (Ind. 1948) (when a "particular right is a creature of the legislature" it "must be exercised in conformity with the statute"). Finally, "[t]he increased burdens on the State associated with maintaining a separate licensing and inspection regime for abortion clinics is a legitimate and reasonable rationale for ending that regime." Order at 13 (Sept. 22, 2022); *see* Stover Dep. 122:10–13 (explaining costs).

IV. Plaintiffs Lack Justiciable Claims

Plaintiffs' inability to articulate the precise circumstances in which S.B. 1 allegedly prevents abortions protected by Article 1, Section 1 raises justiciability concerns. Standing "restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury." *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 (Ind. 1990). Regardless of whose constitutional rights plaintiffs are asserting, traditional standing principles require plaintiffs to demonstrate that they "have suffered, or are in imminent danger of suffering, 'a direct injury as a result of the complained-of conduct.'" *Planned Parenthood*, 211 N.E.3d at 966.

Here, however, plaintiffs do not identify an actual or imminent injury directly traceable to S.B. 1. Although plaintiffs abstractly assert that S.B. 1 may not allow some abortions necessary to avert life-threatening conditions or great bodily harm, plaintiffs do not identify any specific situation in which a conflict has supposedly arisen. *See* pp. 12–17, *supra*. They identify no facts that would allow the Court to conclude that any particular woman's condition threatens great bodily harm, yet she

does not qualify for an abortion under S.B. 1's exceptions. Instead, they offer only speculation about potential conflicts based on how unethical doctors may have behaved. *See* pp. 28–29, *supra*. Critically, however, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Courts cannot decide cases based on "'academic debate or mere abstract speculation.'" *Planned Parenthood*, 211 N.E.3d at 965–66.

To the extent plaintiffs are attempting to challenge S.B. 1 as applied to certain conditions or situations, the problems multiply. To be ripe, claims must present "defined issues" that "are based on actual facts rather than on abstract possibilities." *Ind. Dep't of Env't Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336 (Ind. 1994). "A claim is not ripe for adjudication if it rests upon contingent future events 'that may not occur as anticipated, or . . . may not occur at all.'" *Ind. Fam. Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1218 (Ind. Ct. App. 2020).

Again, however, plaintiffs do not identify any particular women seeking an abortion in specific circumstances. They instead assert a wide range of "physical or mental health risk[s]" for which they think abortion should be permitted. Am. Compl. ¶ 66; *see* pp. 12–17, *supra*. All sides acknowledge, however, that these conditions present with varying degrees of severity and can be treated or managed in multiple ways; there is no one-size-fits-all approach to a single "health condition." *See* pp. 4–6, *supra*. Plaintiffs have supplied only "abstract possibilities" and "contingent future events," not "defined issues" "based on actual facts." Their claims are not justiciable.

REMAINING INJUNCTION FACTORS

Considerations of irreparable harm, the equities, and public interest do not support an injunction. To obtain a permanent injunction, a party must do more than demonstrate standing to bring a claim or success on the merits. *See Ivankovic v. Ivankovic*, --- N.E.3d ---, 2024 WL 697495, at *2 (Ind. Ct. App. Feb. 21, 2024). A party must demonstrate that "the *movant's* remedies at law are inadequate." *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003) (emphasis added); *see Tilley v. Roberson*, 725 N.E.2d 150, 154 (Ind. Ct. App. 2000) ("Tilley had the burden of showing that *her* remedies at law were inadequate, thereby causing *her* to suffer irreparable harm." (emphasis added)). So plaintiffs cannot rely on alleged harms to third parties; any alleged harms must be to plaintiffs themselves.

The only alleged harm to plaintiffs themselves is a supposed conflict between S.B. 1's requirements and their "ethical duties." Br. 32. But physicians' ethical duties include following "standards of conduct and practice established by statute"—an obligation that encompasses S.B. 1. 844 Ind. Admin. Code 5-1-3; *see* Ind. Code § 25-22.5-2-7 (similar); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (observing that States have a "significant role" in determining what "'ethics of the medical profession'" should be). And as an ethicist explains, S.B. 1 comports with general ethical standards. *See* Curlin Decl. ¶¶ 13–65; State Ex. 10, Curlin Supplemental Decl. ¶¶ 27, 34. Regardless, All-Options faces no conflict because it does not provide abortions, and if the hospital requirement stands, Planned Parenthood faces no conflict either.

The balance of harms and public interest militate against a permanent injunction as well. "The laws promulgated by the General Assembly reflect its determination of what is in public interest." *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 121 (Ind. Ct. App. 2004). Enjoining S.B. 1's enforcement would irreparably injure the State's "legitimate"—indeed, "compelling," *Cheaney*, 285 N.E.2d at 270—"interest in protecting prenatal life." *Planned Parenthood*, 211 N.E.3d at 979. Quite literally, abortion permanently "destroys" prenatal life. *Dobbs*, 597 U.S. at 257. An injunction also would irreparably injure the State's and public's interest in enforcing democratically enacted laws and regulating the medical profession. *See id.* at 301.

An injunction would put women at risk too. Under S.B. 1, women can obtain abortions whenever needed to protect their life or to prevent a serious health risk. Ind. Code § 16-34-2-1(a). Although S.B. 1 requires abortions to be performed at a hospital or ambulatory surgical center, that requirement ensures that lawful abortions are performed at the facilities best equipped to address abortion complications and other health issues. *See* pp. 33–35, *supra*. Recall that plaintiffs' own theory requires any abortion to be sought for a "serious health risk." Br. 24. Women seeking abortions are thus more likely to require the greater care that hospitals and surgical centers can offer. Even plaintiffs concede that some women seeking abortions will need "hospital-based care." Caldwell Dep. 51:14–19; *see* Dockray Dep. 23:6–9, 141:13–18.

Abortions, moreover, are not "safe." *Contra* Br. 31. Not only do they always destroy prenatal life, but they often inflict serious physical and psychological harm on women, particularly when performed later in pregnancy. Wubbenhorst Decl.

¶¶ 93, 122–27; Kheriaty Decl. ¶¶ 24–37; *see* Mittal Dep. 202:7–15, 204:18–205:2.

THE REQUESTED INJUNCTION IS OVERBROAD AND VAGUE

Whatever else, an injunction should not issue as requested. Any injunction "must be narrowly tailored, and never more extensive in scope than is reasonably necessary to protect the interests of aggrieved parties." *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 600 (Ind. 2001). Plaintiffs, however, ask for relief that extends beyond the named plaintiffs, even though no class has been certified. Br. 36–37. "This offends the principle that relief should be no greater than necessary to protect the rights of the prevailing litigants." *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022).

Any injunction, moreover, cannot be granted if it "is more extensive than is reasonably necessary" or "unduly prevents" permissible action. *William J. Huff, II Revocable Tr. Decl., Dated June 28, 2011 v. Cain*, 120 N.E.3d 1029, 1036 (Ind. Ct. App. 2019). But the requested injunction is not limited to situations where abortion is supposedly "necessary to protect [a woman's] life or to protect her from a serious health risk." *Planned Parenthood*, 211 N.E. 3d at 962. Rather, it would permit abortions where abortion is not "necessary" and the health risk is not life-threatening or "serious"—such as where "continuing the pregnancy *could* require foregoing needed treatment," a condition is not life-threatening but might "*eventually* become" so, and where health risks could raise "*after* birth," and whenever "symptoms" are "extended," which could apparently cover any pregnancy. Br. 36–37 (emphasis added).

Plaintiffs' overreach is especially clear with respect to mental health and hospitals. They ask for an injunction that would permit abortions whenever women have "mental health conditions treated with medications that do not have an established

safety profile or that pose risks to the fetus." Br. 37. Nothing about that language requires a condition to be "serious" or "necessary"—and plaintiffs further ignore that "'great bodily harm'" excludes psychological effects. *Planned Parenthood,* 211 N.E.3d at 977. Plaintiffs likewise ignore those limitations in asking for "clinics" to "provide abortions." Br. 37. They do not limit the request to situations in which it is proven that women need an abortion for a "serious health risk" and cannot obtain one at a hospital or ambulatory surgical center. *Planned Parenthood,* 211 N.E.3d at 977.

The requested injunction is also "vague." *Blair v. Anderson*, 570 N.E.2d 1337, 1340 (Ind. Ct. App. 1991). Under Rule 65(D), an order "must be clear and certain so that there can be no question as to what [a] person is restrained from doing." *Martinal v. Lake O' the Woods Club, Inc.*, 225 N.E.2d 183, 184 (Ind. Ct. App. 1967). But plaintiffs' proposed injunction is framed at stratospheric levels of abstraction, raising innumerable questions about what specific circumstances it covers. For example, it provides no guidance as to what constitutes "extended and/or debilitating symptoms" (what symptoms? for how long? how severe?), or "conditions likely to worsen over the course of the pregnancy" (which conditions? how likely? how quickly?). And the lack of specificity is exacerbated by plaintiffs' admissions that conditions present in a wide variety of ways, and with differing severities, and that "multiple factors . . . could influence" treatment options. Caldwell Dep. 171:19–23; *see* pp. 12–17, *supra*.

At bottom, plaintiffs' difficulties in describing a tailored, specific injunction highlight the larger problem with their suit—it is another facial challenge. Having brought a facial challenge, plaintiffs must show there are "no circumstances in which

the law can be enforced consistent with Article 1, Section 1." *Planned Parenthood*, 211 N.E.3d at 965. It is not enough to hypothesize that circumstances could arise that could produce a constitutional violation. But all plaintiffs have are hypotheticals, leaving them unable to describe a specific, narrowly tailored injunction.

CONCLUSION

Plaintiffs' motion should be denied and judgment entered for defendants.

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I certify that on March 22, 2024, I electronically filed the foregoing document using the Indiana E-filing system ("IEFS"). I hereby certify that a copy of the foregoing was served on the following persons using the IEFS:

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