IN THE
COURT OF APPEALS OF INDIANA

No. 25A-PL-00782

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

REPLY BRIEF OF APPELLANT VOICES FOR LIFE, INC.

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The Response of the Plaintiffs/Appellees' (Plaintiffs) shows that this case is not really about protecting patient privacy, but rather, the Plaintiffs' desire for privacy from the public scrutiny made possible by review of Termination of Pregnancy Reports (TPRs). To that end, the Plaintiffs ask this Court to reclassify Termination of Pregnancy Reports as "patient medical records and charts" exempt from disclosure under Indiana's Access to Public Records Act (APRA). In seeking such relief, the Plaintiffs attempt to use the "patient medical records and charts" exemption to undermine the overarching duty to provide access to public records at the heart of APRA and the protection of unborn children furthered by the TPR requirement.

This Court must reject the Plaintiffs' effort to enlist the judicial power in their effort to undermine APRA and the commitment to life furthered by the TPR requirement. The Plaintiffs do not have standing to invoke this Court's power on their own behalf and the Plaintiffs cannot show the standing needed to seek declaratory relief on behalf of hypothetical patients who might be harmed if the IDOH releases TPRs as required by APRA. Because the Plaintiffs lack standing, there is no proper basis for the exercise of jurisdiction in this case and this Court cannot grant the relief requested without violating the separation of powers.

The court below erred when it found that the Plaintiffs had standing; and it erred when it held that the Plaintiffs were entitled to preliminary injunctive relief. The decision below should be reversed; and the case should be remanded with directions that the case be dismissed because the Plaintiffs fail to state a claim upon which relief may be granted by the judicial branch.[1]

[1] *See*, *Hoosier Contractors*, *LLC v. Gardner*, 212 N.E.3d 1234 (IN 2023)(noting motions to dismiss for lack of standing may be brought under Trial Rule 12(B)(6) for failure to state a claim upon which relief may be granted).

ARGUMENT

By way of reply, VFL highlights a few principles which further show that the Plaintiffs do not have standing and that this Court cannot grant the relief requested.[2] First, a party seeking to invoke the judicial power must show an injury to a "legally protected interest," that is, an interest that is legally recognized by the law. Second, the party cannot manufacture the injury they use to support standing. Third, a plaintiff must show standing for each claim they advance against each defendant and for each form of relief that they seek. Applying these principles to the Plaintiffs' Response shows that they do not have standing to advance their claims and this Court cannot provide the relief that they request. Each is discussed briefly below and then applied to the Plaintiffs' claims.

First, a party seeking declaratory relief must show the defendant's "actions infringed upon a legally protected interest possessed by [that party]." *Medical Licensing Bd. of Ind. v. Ind. State Chiropractors Ass'n Inc.*, 373 N.E.2d 1114, 1115 (Ind. Ct. App. 1978)(italics added). Two cases serve to illustrate the requirement that standing rest upon an injury to a "legally protected interest," or put another way, an injury that is "cognizable" under existing law. In *Chiropractors Ass'n*, *supra*, the Medical Licensing Board of Indiana enacted a regulation providing that certain medical procedures, *e.g.*, performing and interpreting cardiograms, did not constitute chiropractic practice. *Chiropractors Ass'n*, 373 N.E.2d at 1115. The Association brought suit arguing that the regulation "would emasculate the practice of chiropractic in Indiana," and impair the ability of the association to fulfill its statutory duty to provide continuing education." Id. This Court reasoned that "the question is whether any cognizable injury is inflicted upon a

[2] The Appellants' briefing thus far has shown that the Plaintiffs' efforts to establish detail suffer from numerous defects. VFL focuses on a few additional points implicated by the Plaintiffs' Response in order to avoid needless repetition of argument.

recognized legal right," by the regulation. Id. at 1116. It reversed the decision below for lack of a "demonstrable injury" and because "there has been no showing that the Board's actions infringed upon a legally protected interest possessed by the Associations." Id.

Another case which highlights the requirement that a plaintiff establish injury to a "legally protected interest" is *Save Our Schl. v. Fort Wayne Cmty. Schs.*, 951 N.E.2d 244 (Ind. Ct. App. 2011). In that case, Save Our School (SOS) brought suit alleging that Fort Wayne Community Schools (FWCS) violated the Education Clause of Indiana's Constitution when it decided to close Elmhurst High School, among other things. Id. at 247. After noting that the provision entrusted to the legislative branch the implementation of the constitutional requirement, the Court held that "SOS's claim that FWCS closed the 'wrong' school or should not have closed Elmhurst at all…is not cognizable under the Education Clause…" Id. at 248-249; see also, *Lake Cnty. Plan Commission v. Cnty. Council of Lake Cnty.*, 706 N.E.2d 601 (Ind. Ct. App. 1999)(to challenge zoning decision a person must "have a legal interest that will be enlarged or diminished by the result…."); *see also, Harmony Health Plan of Ind., Inc. v. Ind. Dep't. of Admin.*, 864 N.E.2d 1083, 1091-1092 (Ind. Ct. App. 2007)(rejecting request for declaratory relief from state's decision to award contract to provide Medicaid services after noting that "to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it that is derived from statute, legal rule, or mutually explicit understanding," challenge to contract decision holding that Harmony Health had "failed to establish rights," under deed, will, written contract, or otherwise.).

These cases show that a party seeking declaratory relief cannot manufacture a justiciable case simply by positing an interest and then positing an injury to that interest. Rather, the party

seeking judicial relief must establish a "cognizable injury is inflicted upon a recognized legal right," *Chiropractors Ass'n*, 373 N.E.2d at 1115.

Second, a party cannot manufacture the injury that they rely upon to establish standing. A key case on this point is *Clapper v. Amnesty Intern. USA*, 568 U.S. 398 (2013), in which the Plaintiffs claimed that they were injured because they were forced to take costly and burdensome measures to protect their communications with persons who might be surveilled under federal law. Id. at 401. In relevant part, the Court found that Plaintiffs' claim of injury based on the costs and burdens of the measures they took to avoid disclosure of their communications with persons who might be surveilled could not be used to support standing. As the Court put it, "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of a hypothetical future harm that is certainly not impending." Id. at 416 *See also, Murthy v. Missouri*, 603 U.S. 43 (2024) (rejecting claim that Plaintiffs could establish standing based on the self-censorship because the Plaintiffs had failed to show any of the platform censorship they complained of was fairly traceable to the government, and therefore, the self-censorship was a self-inflicted injury). Id. at 69-74.

Third, a party must show standing for each claim against each defendant and for each form of relief sought. The Supreme Court's decision in *Murthy v. Missouri*, 603 U.S. 43 (2024) highlights this final principle. In that case the plaintiffs claimed that government officials had violated their right to free speech by pressuring private platforms' internet platforms to censor and suppress speech about the Covid-19 virus that the government deemed "misinformation." Id. at 51-55. In relevant part, the plaintiffs sought injunctive relief barring the government from browbeating private platforms to suppress speech deemed "misinformation" by government officials. *Murthy*, 603 U.S. at 51-55. The plaintiffs argued that they needed injunctive relief

because they were self-censoring to avoid suppression of their speech. Id. at 58-59. The Court began its analysis of the claims by noting that "standing is not dispensed in gross….Plaintiffs must demonstrate standing for each claim they press against each defendant and for each form of relief they seek." Id. at 61.

In the portion of the *Murthy* decision most relevant here, the Court addressed claims advanced by a plaintiff named Hoft who sought injunctive relief restraining government officials from pressuring the private service providers to censor speech even though he (like the Plaintiffs in this case), could point to no past restrictions on their speech fairly traceable to the actions of government officials. *Murthy*, 603 U.S. at 69-70. The Court noted that the failure to show a past injury fairly traceable to the action of the government "substantially undermines [the Plaintiffs'] standing theory" as it related to prospective injunctive relief . Id. at 70. And it concluded that Hoft could not make the showing required for prospective relief because "Hoft must rely on a speculative chain of possibilities to establish a likelihood of future harm traceable [to the government]." Id.

The application of these principles to the Plaintiffs' claims shows that the Plaintiffs lack standing and that this Court cannot provide the relief requested as explained further below.

I. The Plaintiffs, As Doctors, Do Not Have Standing.

The Plaintiffs, as doctors, point to four injuries in an effort to establish standing but none of the injuries are legally sufficient. The Plaintiffs begin their argument by claiming that they suffer injury in the form of erosion of patient trust and goodwill, and the claimed loss of one patient. Response at 25-26. The apparent basis for these harms is that the Plaintiffs' "have to disclose that [they] are required by law to release their information and that…information may

become publicly available." Response at 19. Bernard claims she lost a patient as a result of her representation above. Id.

This claimed injury does not suffice to establish standing. First, the Plaintiffs manufacture their injury in an attempt to establish standing. Bernard's own testimony shows that she is misleading her patients by telling them that the TPR contains patient information. Response at 19. It does not. The TPR contains information about the procedure, but the information is not linked to the patient. Bernard's misleading characterization of her legal duty to file a TPR is a transparent effort to manufacture the injury she would use to establish standing. Standing cannot be premised on a manufactured injury. *See also*, *Clapper, v. Amnesty Intern. USA*, 568 U.S. 398 (2013)(Plaintiffs cannot base standing on self-inflicted injury not fairly traceable to defendant's actions); *Murthy v. Missouri*, 603 U.S. 43 (2024)(same).[3]

Second, the Plaintiffs do not show injury to a "legally protected interest." The Plaintiffs point to no law suggesting that they have a legally protected interest in treating patients who will only receive care from doctors who do not comply with Indiana law. The law recognizes no such interest; doing so would undermine the sovereign power of the state to regulate the practice of medicine. Cf. *Medical Licensing Bd. of Ind. v. Ind. State Chiropractors Ass'n Inc.*, 373 N.E.2d 1114, 1115 (Ind. Ct. App. 1978) (association showed no cognizable legal interest based on regulation defining chiropractic practice to exclude certain treatments); *Save Our Schl. v. Fort Wayne Cmty. Schs.*, 951 N.E.2d 244 (Ind. Ct. App. 2011)(Plaintiffs had no legally protected interest in attending the school closed by board).

[3] As VFL has pointed out, the subjective fears of patients that they will be identified from information derived from TPRs and combined without information for other sources, is insufficient to confer standing. See VFL Brief at 12 (*citing Hulse v. Ind. State Fair Board*, 94 N.E.3d 726, 731 (Ind. Ct. App. 2018) ("allegations of subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.")).

The Plaintiffs' claim they have standing because they fill out TPR forms and have a statutory right to intervene under APRA. Response at 27. But the Plaintiffs cannot establish standing on these grounds. The Plaintiffs point to no law showing that they have a legally protected interest in suppressing release of regulatory reports that are public records under APRA because they provided the information contained in the report. The intervention provision of APRA provides no basis for standing because "the legislature cannot expand…beyond constitutional limits the class of persons who possess standing." *See, Solarize Ind., Inc. v. Southern Ind. Gas and Elec. Co.,* 182 N.E.3d 212, 216 n.2 (Ind. 2022)(noting "the legislature cannot expand…beyond constitutional limits the class of persons who possess standing.") ; *see also*, *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439-440 (2017)(intervenors must have establish standing for each form of relief sought). Even if the Plaintiffs could show that they had a private right of action under APRA (they cannot), they would still need to establish standing. *See also*, *City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022)(noting that a statute conferring "domicile-standing" created a private right of action, it "does not confer standing because it lacks an injury requirement."). And the declaratory judgment act requires that the Plaintiffs to establish standing to secure declaratory relief. See, *Adams v. Hamilton County*, 225 N.E.3d 498, 504 (Ind. 2025)(noting that the Declaratory Judgment Act "does not open the courts to resolving theoretical cases; it still requires a justiciable controversy or question.").

The Plaintiffs cannot establish standing based on VFL's access to TPRs or unwanted publicity or harassment. Response at 27-28; id. at 17-19. VFL has a legally protected interest accessing public records under APRA, and in speaking about matters of public concern, here the termination of human life by elective abortions prohibited by Indiana law. *See, e.g., Kay v. Irish*

Rover, Inc., 252 N.E.3d 437 (Ind. Ct. App. 2025)(noting "public participation is fundamental to self-government, and thus protected by the Indiana and United States Constitutions."). In contrast, the Plaintiffs have no legally protected interest in concealing their practice of medicine, which is subject to regulation in the public interest or being subject to public scrutiny in the public interest under APRA. Indeed, the Plaintiffs have made themselves public figures by speaking about their abortion practice as the IDOH has pointed out. IDOH Reply at 16. The Appellants cannot be blamed if the Plaintiffs' efforts to gain notoriety have made them notorious to some unknown persons who are not before the court in this case. The Plaintiffs' injury is not an injury to a cognizable legal interest and also appears to be a manufactured (self-inflicted) harm.

The Plaintiffs cannot establish standing based upon the supposed ethical dilemma caused by completion of TPRs. [4] Response at 28. As noted above, Bernard's claim is based on her view that filing TPRs requires disclosure of patient medical record information. Response at 19. Because the TPR does not link information about the procedure performed to a specific patient, filing the TPR does not disclose patient information. As VFL has noted, the Plaintiffs whole argument implicitly acknowledges that TPRs are not patient medical records. The ethical dilemma Bernard posits is manufactured based on subjective fears the Plaintiffs conjure for their patients and (perhaps) themselves that are fantastical. This Court has recognized that such subjective fears are insufficient to confer standing. *See Hulse v. Ind. State Fair Board*, 94 N.E.3d 726, 731 (Ind. Ct. App. 2018) ("allegations of subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

[4] VFL notes that the Plaintiffs do not rest standing upon their absurd claim that the Medical Licensing Board will sanction them for complying with Indiana law.

Hulse reflects the broader principle that Plaintiffs cannot manufacture standing by means of a self-inflicted injury illustrated by *Clapper* and *Murthy*, *supra*.

The Plaintiffs, as doctors, cannot show that they have standing because they cannot show an injury to a legally protected interest, and the injuries they attempt to manufacture cannot be used as the basis for standing.

II. The Plaintiffs Do Not Have Standing To Seek Declaratory Relief For Hypothetical Patients Harmed By Actions Of Hypothetical Third Parties.

In their Response, the Plaintiffs do not claim standing based on the hypothetical injury to a hypothetical patient. VFL has explained why this is so.[5] This also shows that the Plaintiffs cannot seek declaratory relief concerning their hypothetical patient's rights under APRA.

This result follows from two principles. First, a party seeking a declaratory judgment from a court "must have standing...[and show] that their claims are ripe." *Holcomb v. Bray*, 187 N.E. 3d 1268, 1284-1285 (Ind. 2022). Second, "standing is not dispensed in gross….Plaintiffs must demonstrate standing for each claim they press against each defendant and for each form of relief they seek." *Murthy*, 603 U.S. at 6; *see also, Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439-440 (2017)(intervenors must establish standing for each form of relief sought). Even assuming the Plaintiffs, as doctors, had standing based on their injuries, they cannot show their hypothetical patients would have standing to seek declaratory relief concerning any hypothetical injury to them, and therefore, the Plaintiffs advance a request for declaratory relief on behalf of their hypothetical patients.

[5] See VFL Brief at 9-15 (addressing claims of harm based stated fear that it is based on a far-fetched idea that information from TPRs will be combined with information from other sources to create a collation of information akin to an actual patient medical record that will then be published by a third-party causing harm to a patient's right to privacy.).

III. This Court Would Violate The Separation of Power If It Granted Plaintiffs The Relief That They Request.

The Plaintiffs' inability to show standing also shows that the relief requested by the Plaintiffs calls for the exercise of legislative, not judicial, power. This Court must reject the Plaintiffs' requests.

A. This Court Cannot Construe The Patient Medical Records And Charts Exemption To Protect Doctor Privacy.

In one line of argument the Plaintiffs ask this Court to reclassify TPRs as "patient medical records and charts" in order to protect the harms they claim they suffer as doctors. See Plaintiffs' brief at pp. 29-31 (Sec. III. A. 1., arguing doctors have a private right of action under the Declaratory Judgment Act and a "legally cognizable interest in preventing release of TPRs under APRA."). Here, the Plaintiffs would have this Court engage in legislation by turning the APRA exemption for "patient medical records and charts," which is intended to protect patient privacy, into an exemption that protects their privacy by preventing public scrutiny of their activities facilitated by review of TPRs.

The Plaintiffs' claim that the APRA exemption for "patient medical records and charts" confers a legally cognizable right upon them, as doctors, is inconsistent with the plain language of the exemption. By its terms, the "patients medical records and charts" exemption from APRA, shows that it is intended to protect patient privacy. There is no mention of doctors or textual indicia that the provision is meant to protect the privacy of doctors providing care. The text provides no evidence that doctors are within the zone of interest which exemption is meant to protect.

The Supreme Court has observed that because the zone of interest test is rooted in the separation of powers, and therefore, it is "applicable to questions of standing under the Indiana constitution." *Shulze v. State*, 731 N.E.2d 1041, 1044-1045 (Ind. 2000). This Court has

recognized that when a party's injury does not fall within the zone of interest protected by the statute in question, the claim advanced under the statutory provision should be dismissed. *City of Evansville on Behalf of Dep't of Redev. v. Reising*, 547 N.E.2d 1106, 1113 (Ind. Ct. App. 1989)(holding that the plaintiffs claim must be dismissed because his desire to retain his property was not within the zone of interest protected by the statute upon which he based his claim.).

In essence, the Plaintiffs, as doctors, ask this court to rewrite the "patient medical records and charts" exemption in APRA so that it protects the privacy of doctors. The plain language of the exemption shows that it is designed to protect patient privacy, not the privacy of doctors practicing medicine in Indiana. Interpreting the patient medical record exemption as requested by the Plaintiffs would amount to an exercise of legislative power.

B. This Court Cannot Construe Termination of Pregnancy Reports As Patient Medical Records Or Charts.

The Plaintiffs also ask this court to reclassify TPRs, which the legislature defined as "reports," to be "patient medical records and charts" that are exempt from disclosure under APRA to protect patient privacy. See Plaintiffs' Brief at pp. 29-31 (Sec. III. A. 2. Arguing that the Termination of Pregnancy Reports must be classified as "patient medical records and charts"). The Plaintiffs seem to think that the legislature erred when it called TPRs "reports" or did a poor job when it anonymized the TPRs to protect patient privacy, and as a result, the reports should be reclassified as "patient medical records or charts" to get the job done well. VFL has demonstrated that when the statutes are properly interpreted, it is clear that TPRs are reports subject to disclosure under APRA, not "patient medical records and charts," exempt from such disclosure. See VFL Brief at 18-30. The idea that this Court should reclassify TPRs as patient medical records because the legislature did not go far enough when it anonymized the

information contained in TPRs is an invitation to rewrite the relevant statutory sections under the guise of interpretation.

In sum, the Plaintiffs, as doctors, cannot show the standing needed to advance their claims. Even if they could, the claims would have to be dismissed because they request relief that can only be provided by an exercise of legislative, not judicial, power. This Court must reject the Plaintiffs' request for relief because their arguments "seek[] implicitly to engage [this Court] in making societal and medical value judgments … [although courts] are neither equipped nor empowered to make such determinations." *Stetina v. State, ex. rel. Medical Licensing Bd. of Ind.*, 513 N.E.2d 1234, 1238 (Ind. Ct. App. 1987). As this Court has recognized, "[i]t would be an abuse of power…to second guess…clear legislative determination, so long as that determination abides within the framework of the constitution." Id. at 1239.

CONCLUSION

The Plaintiffs' lack of standing shows that this case is not capable of resolution by the judicial process, and further, that granting the relief requested would violate the separation of powers. The decision below should be reversed; and the case should be remanded with directions that the case be dismissed because the Plaintiffs fail to state a claim upon which relief may be granted by the judicial branch.

Respectfully submitted, this 28th day of July 2025.

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 3,678 words.

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

I certify that on July 28, 2025, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date the foregoing document was served upon the following person(s) via IEFS:

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