STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)	CIVIL DIVISION, ROOM 2
COUNTY OF MARION	)	CAUSE NO. 49D02-2405-MI-019876

VOICES FOR LIFE,	)
	)
Plaintiff,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF HEALTH, et al.,	)
	)
	)
Defendants.	)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY DR. CAITLIN BERNARD AND DR. CAROLINE ROUSE

Dr. Caitlin Bernard and Dr. Caroline Rouse (collectively, the "Doctors") seek to intervene in this lawsuit as defendants to prevent public disclosure of terminated pregnancy reports ("TPRs") containing detailed information about their abortion patients. As explained below, Indiana Code § 5-14-3-9(e) grants the Doctors an unconditional right to intervene in this lawsuit. In addition, the Doctors satisfy the alternative requirements for intervention established by Indiana Trial Rule 24.

STATEMENT OF FACTS

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

Dr. Bernard is an obstetrician-gynecologist ("OB-GYN") who is fellowship trained in Complex Family Planning. Decl. of Caitlin Bernard, M.D. ("Bernard Decl.") ¶ 1. Dr. Rouse is an OB-GYN who is fellowship trained in Maternal-Fetal Medicine. Decl. of Caroline E. Rouse, M.D. ("Rouse Decl.") ¶ 1. Both Doctors are licensed to practice medicine in Indiana; both serve on the faculty of the Indiana University School of Medicine; and both provide clinical care, including abortion care, in the Indiana University Health system. Bernard Decl. ¶¶ 2-4; Rouse

Decl. ¶¶ 2-4.

Indiana law requires the Doctors to submit a TPR to the Indiana Department of Health ("Health Department") in connection with every abortion they provide. I.C. § 16-34-2-5. The TPR must include the following thirty-one data points about each abortion patient:

> (1) The age of the patient.
>
> (2) Whether a waiver of consent under section 4 of this chapter was obtained.
>
> (3) Whether a waiver of notification under section 4 of this chapter was obtained.
>
> (4) The date and location, including the facility name and city or town, where the:
>
> > (A) pregnant woman (i) provided consent; and (ii) received all information required under section 1.1 of this chapter; and
> >
> > (B) abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.
>
> (5) The health care provider's full name and address, including the name of the physicians performing the abortion or providing, prescribing, administering, or dispensing the abortion inducing drug.
>
> (6) The city and county where the pregnancy termination occurred.
>
> (7) The age of the father, or the approximate age of the father if the father's age is unknown.
>
> (8) The patient's county and state of residence.
>
> (9) The marital status of the patient.
>
> (10) The educational level of the patient.
>
> (11) The race of the patient.
>
> (12) The ethnicity of the patient.
>
> (13) The number of the patient's previous live births.
>
> (14) The number of the patient's deceased children.
>
> (15) The number of the patient's spontaneous pregnancy terminations.
>
> (16) The number of the patient's previous induced terminations.
>
> (17) The date of the patient's last menses.
>
> (18) The physician's determination of the gestation of the fetus in weeks.
>
> (19) The reason for the abortion.
>
> (20) Whether the patient indicated that the patient was seeking an abortion as a

result of being:

(A) abused;

(B) coerced;

(C) harassed; or

(D) trafficked.

(21) The following information concerning the abortion or the provision, prescribing, administration, or dispensing of the abortion inducing drug:

(A) The postfertilization age of the fetus (in weeks).

(B) The manner in which the postfertilization age was determined.

(C) The gender of the fetus, if detectable.

(D) Whether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability.

(E) If after the earlier of the time the fetus obtains viability or the time the postfertilization age of the fetus is at least twenty (20) weeks, the medical reason for the performance of the abortion.

(22) For a surgical abortion, the medical procedure used for the abortion and, if the fetus had a postfertilization age of at least twenty (20) weeks:

(A) whether the procedure, in the reasonable judgment of the health care provider, gave the fetus the best opportunity to survive;

(B) the basis for the determination that the pregnant woman had a condition described in this chapter that required the abortion to avert the death of or serious impairment to the pregnant woman; and

(C) the name of the second doctor present, as required under IC 16-34-2-3(a)(3).

(23) For a nonsurgical abortion, the precise drugs provided, prescribed, administered, or dispensed, and the means of delivery of the drugs to the patient.

(24) For a nonsurgical abortion, that the manufacturer's instructions were provided to the patient and that the patient signed the patient agreement.

(25) For an abortion performed before twenty (20) weeks of postfertilization age of the fetus, the medical indication by diagnosis code for the fetus and the mother.

(26) The mother's obstetrical history, including dates of other abortions, if any.

(27) Any preexisting medical conditions of the patient that may complicate the abortion.

(28) The results of pathological examinations if performed.

(29) For a surgical abortion, whether the fetus was delivered alive, and if so,

> how long the fetus lived.
>
> (30) Records of all maternal deaths occurring at the location where the abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.
>
> (31) The date the form was transmitted to the state department and, if applicable, separately to the department of child services.

I.C. § 16-34-2-5(a).

"Each failure to complete or timely transmit a form . . . for each abortion performed or abortion inducing drug that was provided, prescribed, administered, or dispensed, is a Class B misdemeanor." *Id.* § 16-34-2-5(d). The Health Department must compile a public report on a quarterly basis summarizing aggregate data contained in the TPRs without including any patient identifying information. *Id.* § 16-34-2-5(e-f).

II. VFL's Requests for Public Disclosure of Terminated Pregnancy Reports

On October 16, 2023, Plaintiff Voices for Life ("VFL"), a private organization with an anti-abortion mission, submitted a request to the Health Department under Indiana's Access to Public Records Act ("APRA"), I.C. §§ 5-14-3-1 to 5-14-3-10, for all TPRs submitted in August 2023. Compl. ¶¶ 2, 14 & Ex. 1. That request encompasses TPRs submitted by the Doctors. *See* Bernard Decl. ¶ 5; Rouse Decl. ¶ 5. Citing an advisory opinion by the Public Access Counselor discussed below, *see infra* at 5-6, the Health Department denied VFL's public records request on January 12, 2024. Compl. ¶ 18 & Ex. 5.

On April 12, 2024, VFL requested that the Health Department provide it with all TPRs from August 2023 through November 2023. *Id.* ¶ 29 & Ex. 17. A week later, it requested all TPRs from December 2023 through March 2024. *Id.* ¶ 30 & Ex. 19. Both of these requests encompass TPRs submitted by the Doctors. *See* Bernard Decl. ¶ 5; Rouse Decl. ¶ 5. The Health Department denied each request on April 22, 2024. Compl. ¶¶ 29-30 & Exs. 18, 20.

VFL filed this lawsuit on May 1, 2024. *See* Compl. It is asking the Court, among other

things, to "[d]eclare that [the Health Department] is required to satisfy public requests for TPRs under APRA"; and "[o]rder the [Health Department] to provide full and complete access to Plaintiff's requests for TPRs." *Id.* at 7.

III. Conflicting Opinions by the Public Access Counselor and Attorney General

Indiana has a Public Access Counselor tasked with providing advice and assistance concerning the state's public access laws to members of the public and government officials. *See* I.C. §§ 5-14-4-1 to 5-14-4-14; *Indiana Public Access Counselor*, IN.gov, https://www.in.gov/pac/ (last visited June 10, 2024). While VFL's public records request was pending, the Health Department sought an informal advisory opinion from the Public Access Counselor on whether it is required to produce TPRs in response to requests made under APRA. The Public Access Counselor summarized the Health Department's inquiry as follows:

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

Public Access Counselor, *Opinion Letter 23-INF-15 on Terminated Pregnancy Reports*, 2 (Dec. 19, 2023), https://www.in.gov/pac/files/informal/23-INF-15.pdf (appended to Compl. as Ex. 6).

The Public Access Counselor concluded that the Health Department is not required to produce TPRs under APRA for two reasons. First, TPRs constitute patient medical records, and APRA exempts patient medical records from disclosure. *Id.* at 2 (citing I.C. § 5-14-3-4(a)(9)). Second, insofar as the statute governing TPRs requires the Health Department to produce a *public* report on a quarterly basis containing aggregate data, it implies that the individual TPRs are not intended to be made public. *Id.* The Public Access Counselor further explained that redaction is not a viable option for TPRs: "Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials. Here, however, the entirety of the

form is a medical record." *Id.* (citing *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2005)).

Four months later, the Attorney General issued an opinion reaching the opposite conclusion. Attorney General, Opinion Letter 2024-2 on Nondisclosure of Terminated Pregnancy *Reports*, 1 (Apr. 11, 2024), https://www.in.gov/attorneygeneral/about-the-office/advisory/opinions/ (appended to Compl. as Ex. 14) ("AG Opinion Letter"). The Attorney General maintained that TPRs do not constitute medical records within the meaning of APRA. *Id.* The Attorney General also maintained that denying public disclosure would frustrate the purpose of the TPR statute. *Id.* In his view, the legislature intended to authorize members of the public to act as private attorneys general in investigating potential violations of abortion law. *Id.* at 7-8. Subsequently, the Attorney General held a press conference touting his opinion, and he wrote letters to the Governor and key members of the Indiana legislature urging them to take retaliatory action against the Health Department and Public Access Counselor. Compl. at ¶¶ 26-27 & Exs. 15-16.

IV. The Medical Licensing Board's Decision in Dr. Bernard's Case

In 2023, the Medical Licensing Board of Indiana ("Medical Board") concluded that Dr. Bernard should be disciplined for disclosing certain information about an abortion patient to another physician and a reporter. Findings of Fact, Ultimate Findings of Fact, Conclusions of Law & Final Order, *In re Bernard*, No. 2022 MLB 0024 (Ind. Med. Licensing Bd. July 27, 2023), https://www.in.gov/apps/pla/litigation/viewer.aspx?id=22362 ("Bernard Decl. Ex. A"). According to the Medical Board, Dr. Bernard disclosed: "(1) Patient had been referred to her on or about June 27, 2022; (2) Patient was ten years old; (3) Patient was from Ohio; (4) she would be providing abortion care to Patient; and (5) Patient was six weeks and three days pregnant." *Id.* All of this information is included in the TPR concerning the patient at issue. *Supra* at 2-4.

The Medical Board found that Dr. Bernard's "disclosures to [the physician and reporter], when taken in their entirety, contained unique identifying characteristics regarding Patient," and concluded that they violated Dr. Bernard's obligations under the Health Insurance Portability and Accountability Act ("HIPAA"), 110 Stat. 1936 (1996), as amended, as well as related provisions of Indiana law. Bernard Decl. Ex. A at ¶ 45. Consequently, the Medical Board issued a letter of reprimand to Dr. Bernard and directed her to pay a $3,000 fine. *Id.* at 8-9. The letter of reprimand states, in part: "[Y]ou are expected to maintain the confidentiality of all knowledge and information regarding a patient and comply with all applicable elements of HIPAA and Indiana patient privacy protections afforded pursuant to 844 I.A.C. 5-2-2." *Id.* at 11.

ARGUMENT

I. Legal Standard for Intervention

The legal standard for intervention is set forth in Indiana Trial Rule 24. The first part of the rule governs intervention of right. It provides that:

> Upon timely motion anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to a property, fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

T.R. 24(A). "Indiana cases interpreting Indiana Trial Rule 24(A)(2) have adopted the three-part test followed by federal courts in interpretation of its double, Rule 24(a)(2) of the Federal Rules of Civil Procedure." *Westfield Ins. Co. v. Axsom*, 684 N.E.2d 241, 242 (Ind. Ct. App. 1997). "[T]his test requires that intervenors show (1) an interest in the subject of the action, (2) disposition of the action may as a practical matter impede protection of that interest, and (3) representation of the interest by existing parties is inadequate." *Id.* "A court must also consider the timeliness of the request in deciding whether or not to grant a motion to intervene." *Id.*

The second part of Indiana Trial Rule 24 governs permissive intervention. It provides in relevant part:

> Upon timely filing of his motion anyone may be permitted to intervene in an action: . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

T.R. 24(B)(2).

Here, the Doctors satisfy the requirements for intervention of right under Trial Rule 24(A)(1) because APRA grants them an unconditional right to intervene. *See* I.C. § 5-14-3-9(e). In addition, the Doctors satisfy the alternative requirements for intervention of right under Trial Rule 24(A)(2) and the requirements for permissive intervention under Trial Rule 24(B)(2).

II. APRA Authorizes the Doctors to Intervene of Right

In relevant part, APRA provides that:

> A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record. Whenever an action is filed under this subsection, the public agency must notify each person who supplied any part of the public record at issue:
>
> (1) that a request for release of the public record has been denied; and
>
> (2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the public access counselor.
>
> *Such persons are entitled to intervene in any litigation that results from the denial.*

I.C. § 5-14-3-9(e) (emphasis added). VFL cites this statutory provision as the basis for the Court's jurisdiction over its lawsuit. Compl. ¶ 6.

Although the Health Department has not yet provided the Doctors with the notice required by the statute, the Doctors submitted some of the TPRs at issue. Bernard Decl. ¶ 5;

Rouse Decl. ¶ 5. APRA therefore grants the Doctors an unconditional right to intervene in this lawsuit, satisfying the requirement for intervention of right under Trial Rule 24(A)(1). No further analysis is required.

III. Alternatively, the Doctors Satisfy the Requirements of Trial Rule 24(A)(2)

For completeness, the Doctors note that they also satisfy the requirements of Trial Rule 24(A)(2) because they have interests in the subject of the action; disposition of the action may as a practical matter impede their ability to protect those interests; and the existing parties fails to adequately represent their interests.

1. The Doctors Have Interests in the Subject of the Action

The Doctors have three interests in the subject of this lawsuit sufficient to support intervention of right. First, the Doctors have an interest in avoiding a conflict of legal duties. The Medical Board has ruled that publicly disclosing even a fraction of the information contained in TPR forms is grounds for professional discipline. *See supra* at 6-7. At the same time, the TPR statute makes failure to submit a complete TPR form for every abortion a crime. I.C. §§ 16-34-2-5(d). If VFL obtains the relief that it seeks in this lawsuit, the Doctors will have to choose between submitting TPR forms they know will be immediately disclosed to the public, contrary to the letter and spirit of the Medical Board's guidance, or facing criminal penalties for failing to submit the forms. The Doctors' interest in avoiding this Catch-22 is clear and compelling.

Second, the Doctors have an interest in protecting their patients' privacy. Both the Public Access Counselor and the Medical Board have concluded that public disclosure of the data contained in TPR forms could lead to identification of individual abortion patients. *See supra* at 5-7. The Doctors not only have legal and ethical obligations to protect their patients' privacy, but they recognize that failing to safeguard patient privacy may undermine the physician-patient

relationship and discourage patients from seeking medical care. Bernard Decl. ¶ 11-14; Rouse Decl. ¶ 11-14.

Third, the Doctors have an interest in preventing the Attorney General's erroneous interpretation of the TPR statute from becoming law. The Attorney General has taken the position that, in enacting the TPR statute, the legislature intended to authorize anti-abortion groups like VFL to act as private attorneys general, surveilling doctors who provide abortion care and acting in concert with the Attorney General's office to regulate them. AG Opinion Letter at 10. But the statute makes no mention of this, I.C. § 16-34-2-5, and Indiana's abortion laws are generally enforced through criminal proceedings brought by local prosecutors, *see* I.C. § 16-34-2-1(a) ("Abortion shall in all instances be a criminal act, except when performed under the following circumstances . . . ."); *id.* § 33-39-1-5(1) ("[P]rosecuting attorneys, within their respective jurisdictions, shall conduct all prosecutions for felonies, misdemeanors, or infractions . . . ."). VFL relies on and amplifies the Attorney General's position throughout its Complaint. *See, e.g.*, Compl. ¶¶ 25, 27, 36-39. As abortion providers, the Doctors have an interest in demonstrating to the Court why this position is incorrect and thereby avoiding unauthorized surveillance by a private organization with no relevant expertise and a stated mission "to end abortion." Bernard Decl. ¶ 11-14; Rouse Decl. ¶ 11-14. Unlike governmental law enforcement agencies, VFL is not a neutral public servant and is not required to operate within constitutional parameters.

2. Disposition of the Action May as a Practical Matter Impede Protection of the Doctors' Interests

APRA does not require the Health Department to notify the Doctors when someone makes a public records request for TPRs. *See* I.C. §§ 5-14-3-1 to 5-14-3-10. Notification is required only if the request is denied and litigation ensues. *See* I.C. § 5-14-3-9(e). Thus, if VFL were to prevail

in this lawsuit, the Doctors would have no notice of future requests to disclose TPRs, much less an opportunity to contest such requests. As a result, disposition of this lawsuit would, as a practical matter, impede the Doctors' ability to protect their interests. *See Vernon Fire & Cas. Ins. Co. v. Matney*, 351 N.E.2d 60, 64 (Ind. Ct. App. 1976) ("The rule . . . does not require the judgment be binding upon the party petitioning to intervene. It merely requires that the intervener be so situated that as a practical matter the disposition of the action may impede or impair his interests.").

3. Representation by Existing Parties is Inadequate to Protect the Doctors' Interests

The Doctors cannot rely on the existing Defendants—the Health Department and Health Commissioner in her official capacity—to represent their interests. Notably, Defendants do not share the Doctors' interests in harmonizing the Doctors' obligations under the TPR statute with the guidance issued by the Medical Board. Additionally, the Attorney General's office, which has taken a position on the issues in this case that is adverse to the Doctors' interests, *supra* at 6, may appear at a future stage of this litigation to represent Defendants. *See* I.C. § 4-6-2-1 ("The attorney general . . . shall defend all suits brought against the state officers in their official relations . . ."). And even if the Attorney General's office does not make an official appearance in this case, the Health Department's litigation positions may be impacted by the political pressure campaign that the Attorney General has mounted against it and the Public Access Counselor. *See supra* at 6.

IV. The Doctors Also Meet the Requirements for Permissive Intervention

The Court may exercise its discretion to permit the Doctors to intervene as long as their defense and the main action have questions of law or fact in common and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. T.R. 24(B)(2). Here, it is plain that the Doctors' defense and the main action have common questions of law and

fact. One common question is whether TPRs are subject to public records requests under APRA or instead constitute medical records that are exempt from disclosure. Another common question is whether, in enacting the TPR statute, the legislature intended to authorize anti-abortion organizations to engage in private surveillance of medical practitioners. For the reasons discussed below, intervention at this early stage of the proceedings will not cause undue delay or prejudice.

V. The Doctors' Application for Intervention is Timely

The Doctors' application for intervention is timely. Timeliness in intervention proceedings is largely left to the trial court's discretion. *Herdrich Petroleum Corp. v. Radford*, 773 N.E.2d 319, 325 (Ind. Ct. App. 2002). The requirement of timeliness is intended to ensure that "the original parties should not be prejudiced by an intervenor's failure to apply sooner, and that the orderly processes of the court are preserved." *Id.* (quoting *Bryant v. Lake Cnty. Tr. Co.*, 166 Ind. App. 92, 101 (1975)). In this case, Plaintiffs filed their Complaint just last month, on May 1, 2024. Defendants sought, and the Court granted, an automatic enlargement of time to respond to the Complaint to and including July 3, 2024. Order at 1 (June 3, 2024). Because this case is freshly filed and Defendants have not yet responded to the Complaint, there is no risk of delay that will prejudice the original parties or disrupt the orderly flow of the proceedings.

CONCLUSION

For the reasons set forth above, the Court should grant the Doctors' motion to intervene.

Dated: June 11, 2024

Respectfully submitted,

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**Pro hac vice* motion forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served through the court's e-filling system on this June 11, 2024 upon:

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