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Clerk
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| STATE OF INDIANA | ) | IN THE MARION SUPERIOR COURT |
| | ) SS: | |
| COUNTY OF MARION | ) | CAUSE NO. 49D01-2209-PL-031056 |
| ANONYMOUS PLAINTIFF 1, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CLARIFY PRELIMINARY INJUNCTION AND TO LIFT STAY**

More than seven months ago in December 2022, this Court issued a preliminary injunction prohibiting "the Defendants" from enforcing S.E.A. 1 against "the Plaintiffs." It described "Plaintiffs" as "five individuals and one organization." It did not certify a class before issuing the injunction or consider whether the proposed class could satisfy the requirements for injunctive relief. Rather, its preliminary injunction analysis focused Anonymous 1's, Anonymous 2's, Anonymous 3's, Anonymous 4's, Anonymous 5's, and Hoosier Jews for Choice's personal circumstances.

Now after an Indiana Supreme Court ruling that there is no constitutional right to abortion on demand, Plaintiffs ask this Court to "clarify" that the injunction covers a class not certified until more than six months after it issued—*and* abortion providers who are not parties to the case or members of the certified class. That amounts to a request to rewrite the injunction. The injunction does not cover class members or abortion providers, and when this Court issued the injunction before class certification in December 2022, it could not have granted class-wide relief. And this Court would not have had any reason to permit abortions to be performed at abortion clinics when

Plaintiffs have never asserted a religious objection to obtaining abortions at hospitals or ambulatory surgical centers—the only health facilities that can lawfully provide abortions for any reason. Plaintiffs are improperly seeking substantive modifications to an injunction currently on appeal.

If Plaintiffs believe additional injunctive relief is necessary, they must request a second preliminary injunction or follow the proper procedures for modifying the current one while jurisdiction over it lies with the Court of Appeals. Plaintiffs, however, have not done so. And their motion for "clarification" does not address the many problems with their proposed modifications to the injunction. The Court should reject Plaintiffs' attempt to modify its preliminary injunction under the guise of seeking "clarification" and decline to lift the stay for purposes of modifying it.

## BACKGROUND

S.E.A. 1 makes abortion a "criminal act" except when performed under a few, specific circumstances. Ind. Code § 16-34-2-1(a). Legal abortions must be performed at hospitals or ambulatory surgical centers. *Id.*

In September 2022, Anonymous 1, Anonymous 2, Anonymous 3, Anonymous 4, Anonymous 5, and Hoosier Jews for Choice filed an action to prevent enforcement of S.E.A. 1's abortion restrictions against them and a proposed class of women who may someday want abortions for religious reasons. Compl. Plaintiffs alleged that applying S.E.A. 1 to them violates Indiana's Religious Freedom Restoration Act (RFRA), Ind. Code § 34-13-9-8, because their religious beliefs "may" direct them to "obtain abortions for reasons not allowed by S.E.A. 1." Compl. ¶¶ 142–45. Plaintiffs filed separate motions for a preliminary injunction and class certification. Pls.' Mot. for Prelim. Inj.; Pls.' Mot. for Class Cert. "The parties agreed to postpone briefing on the motion for class certification" pending a decision on the "preliminary-injunction motion." Order Granting Pls.' Mot. for Prelim. Inj. 3 ("Preliminary Injunction Order").

On December 2, 2022, this Court granted Plaintiffs' motion for a preliminary injunction, enjoining "the Defendants and their officers from enforcing the provisions of S.E.A. 1 against the Plaintiffs." Preliminary Injunction Order 43. The Court, however, did not say the injunction applied to prospective class members. It observed that "[n]o class has been certified. Plaintiffs are five individuals and one organization." *Id.* at 3. And in explaining why it believed an injunction was necessary, the Court focused on S.E.A. 1's alleged impacts on the religious practices of Anonymous 1 to 5 and Hoosier Jews for Choice's members. *See id.* at 24–25, 27–31, 41–42. It did not address S.E.A. 1's impact on prospective class members. Defendants appealed the injunction.

Six months after granting the preliminary injunction, on June 6, 2023, the Court granted Plaintiffs' motion for class certification. Order Granting Pls.' Mot. to Certify Case as Class Action ("Class Certification Order"). The decision certified under Trial Rule 23(B)(2) a class of "[a]ll persons in Indiana whose religious beliefs direct them to obtain abortions in situations prohibited by Senate Enrolled Act No. 1(ss) who need, or will need, to obtain an abortion and who are not, or will not be, able to obtain an abortion because of the Act." *Id.* at 6, 28. The decision, however, did not state that injunctive relief had been or would be granted to class members. Defendants have asked the Court of Appeals to hear an interlocutory appeal of the class certification order.

On June 30, 2023, the Indiana Supreme Court issued a decision in a separate case vacating a preliminary injunction enjoining the defendants there from enforcing S.E.A. 1, including against abortion providers. *See Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Northwest, Haw., Alaska, Ind., Ky., Inc.*, --- N.E.3d ---, 2023 WL 4285163 (Ind. June 30, 2023). Recognizing the State's interest in "protecting prenatal life" and "broad authority to protect the

public's health, welfare, and safety," the decision held that the General Assembly has "broad legislative discretion for determining whether and the extent to which to prohibit abortions." *Id.* at *1; *see id.* at *16.

Plaintiffs in this case have filed a motion asking this Court to "clarify" its preliminary injunction, arguing that it should be extended to class members and "abortion providers." Pls.' Mot. to Clarify Prelim. Inj. 8 ("Mot."). They have also filed a motion to lift the stay temporarily for that purpose. Pls.' Mot. to Lift Stay.

## ARGUMENT

The Court should deny Plaintiffs' request to state that the preliminary injunction covers class members and abortion providers. By its terms, the injunction does not cover either group. Plaintiffs' request for "clarification" is a request to rewrite the injunction. This Court, however, lacks jurisdiction to modify the injunction while it is on appeal. If Plaintiffs want a preliminary injunction covering class members or abortion providers, they must obtain a second injunction. But they have not shown that a second, broader injunction would be appropriate.

### I. Plaintiffs' Motion for Clarification Improperly Asks This Court To Rewrite an Injunction It Does Not Have Jurisdiction To Modify

The pending appeal of the preliminary injunction divests this Court of jurisdiction to "alter or amend that order." *Coulson v. Ind. & Mich. Elec. Co.*, 471 N.E.2d 278, 279 (Ind. 1984); *see Schumacher v. Radiomaha, Inc.*, 619 N.E.2d 271, 273 (Ind. 1993). Plaintiffs do not contend otherwise. They claim to be merely seeking "clarification" of the preliminary injunction. Mot. 4. But their request for an order decreeing that the preliminary injunction extends to "members of the class" and "prevents the defendants from taking any adverse actions against abortion providers who deliver abortion services," Mot. 8, amounts to a request for modification.

### A. The preliminary injunction does not cover a later-certified class

By its terms, the preliminary injunction enjoins "the Defendants and their officers" from "enforcing the provisions of S.E.A. 1 against *the Plaintiffs*" only. Preliminary Injunction Order 43 (emphasis added). As this Court's December 2022 order granting the preliminary injunction recognizes, "Plaintiffs are five individuals and one organization." *Id.* at 3. The order nowhere states that "the Plaintiffs" includes what was in December 2022 nothing more than a proposed class.

The order's reasoning reflects its limited scope. In explaining the reasons for granting a preliminary injunction, the Court focused on S.E.A. 1's alleged impacts on the religious practices and lifestyles of Anonymous 1 to 5 and the members of Hoosier Jews for Choice. *See* Preliminary Injunction Order 24–25, 27–31, 41–42. The order nowhere undertakes the analysis necessary to grant injunctive relief to others. For example, the order does not discuss whether there is any evidence that S.E.A. 1 will burden the alleged religious practices of the proposed class, whether members of the proposed class have changed their birth control or sexual practices in response to S.E.A. 1, or whether they will suffer irreparable harm absent a preliminary injunction.

That is no accident. When the injunction issued in December 2022, "[n]o class ha[d] been certified. Preliminary Injunction Order 3. That means proposed class members were not parties, much less swept within the rubric of "the Plaintiffs." *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) (A "nonnamed class member is not a party" to a proposed class action "*before the class is certified*." (cleaned up) (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313–14 (2011))); *Taylor v. St. Vincent Salem Hosp., Inc.*, 180 N.E.3d 278, 286 (Ind. Ct. App. 2021). It thus would have been error to grant class-wide relief. As the Indiana Court of Appeals has repeatedly held, an injunction may "not be more extensive than is reasonably required to protect the interests *of the party* in whose favor it is granted." *Crawley v. Oak Bend Ests. Homeowners Ass'n, Inc.*, 753

N.E.2d 740, 744 (Ind. Ct. App. 2001) (emphasis added); *see Hess v. Bd. of Dirs. of Cordry-Sweetwater Conservancy Dist.*, 141 N.E.3d 889, 892 (Ind. Ct. App. 2020). It would "offend[]" that principle to grant an injunction covering members of a prospective class before class certification. *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022); *see Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) ("Without a properly certified class, a court cannot grant relief on a class-wide basis.").

Plaintiffs all but concede that class members were not included within the term "the Plaintiffs" when the injunction issued in December 2022. They urge that the injunction should be *deemed* to apply to the certified class" on the theory that "members of the *certified class are* plaintiffs." Mot. 4–5 (emphasis added). But later events cannot change the meaning of the order. Nor could class certification expand the preliminary injunction since this Court had already lost jurisdiction to "alter or amend that order" by virtue of an earlier-filed appeal. *Coulson*, 471 N.E.2d at 279. The question is what the injunction covered before class certification, not after it.

Plaintiffs' own filings contradict their argument that members of the proposed class were "plaintiffs" before class certification. Mot. 4. In the complaint, Plaintiffs identify the "Parties" to this action as Anonymous 1 to 5 and Hoosier Jews for Choice. Compl. ¶¶ 3–8. Although the complaint states that "the individual plaintiffs" would like to bring claims "on behalf of a class," *id.* ¶ 11, it does not refer to the proposed class as parties or "plaintiffs." Instead, it repeatedly distinguishes between "the plaintiffs and the putative class." *Id.* ¶ 145; *see also, e.g.*, *id.* ¶ 146 ("The plaintiffs and the putative class are being caused irreparable harm"); *id.* at 27 (describing the attorneys as "Attorneys for Plaintiffs and the Putative Class"). That distinction belies the notion that, when the injunction issued, "the Plaintiffs" included proposed class members.

In their motion, Plaintiffs invoke decisions in which courts issued injunctions expressly covering class members after certification. *See Miller v. Vilsack*, 4:21-cv-0595-O, 2021 WL

11115194, at *12 (N.D. Tex. July 1, 2021) (issuing injunction covering "any applicant who is a member of the Certified Classes"); *Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1047 (N.D. Cal. 2020) (issuing injunction covering "plaintiffs or any class member"); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 263 (S.D.N.Y. 2006) (issuing injunction covering "class members"); *see also Doster v. Kendall*, 48 F.4th 608, 611 (6th Cir. 2022) (observing the court issued separate preliminary injunctions covering plaintiffs and "members of the class").[1] But those express distinctions between plaintiffs and members of a certified class only highlight how injunctions issued before class certification do not automatically encompass members of a proposed class after certification—something more must happen, namely the issuance of a new injunction premised on separate class-specific balancing of equities.

Plaintiffs may wish that "the Court had certified the class prior to issuing the preliminary injunction." Mot. 5. "But wishing does not make it so." *Smith*, 564 U.S. at 315. And attempting to rewrite history would be prejudicial to the State. When a preliminary injunction covers a class, parties may challenge the injunction on the ground that class certification was improper. *See Doster v. Kendall*, 54 F.4th 398, 429–30 (6th Cir. 2022); *Wagner v. Taylor*, 836 F.2d 578, 585–86 (D.C. Cir. 1987). When the State appealed from the injunction here, however, this Court had not yet ruled on Plaintiffs' motion for class certification. So the State could not have challenged class certification. Only after this Court certified the class could the State appeal the class certification

[1] Plaintiffs mistakenly describe *B.E. v. Teeter*, No. C16-0227-JCC, 2016 WL 3939674 (W.D. Wash. July 21, 2016), as "apply[ing] the prior-issued preliminary injunction to the newly certified class." Mot. 6. In that case, which concerned a policy change to a state Medicaid program, the existing injunction already required the state agency to "return to" its previous policy. *B.E. v. Teeter*, No. C16-227-JCC, 2016 WL 3033500, at *6 (W.D. Wash. May 27, 2016). The class certification order did not expand that injunction. It merely rejected the argument that the injunction's broad scope rendered certification "unnecessary" because the agency had complied with the injunction by changing its policy for "all Medicaid recipients." 2016 WL 3939674, at *4–*5.

order. Yet Plaintiffs have opposed the State's effort to obtain appellate review of that order—a position that makes no sense if the preliminary injunction already covers the class. This situation illustrates precisely why any class-wide preliminary injunction must come by a separate order.

As a last resort, Plaintiffs argue that the State must "consider[] the preliminary injunction to apply to the class." Mot. 5. But the State has never stated that the preliminary injunction covers class members, and Plaintiffs quote no purported concession to that effect. All that Plaintiffs can point to is the State's argument that the Court of Appeals should hear an appeal from the class certification order alongside a pending appeal of the preliminary injunction order because those orders "overlap" and "interrelate." *Id.* That is hardly a "clear and unequivocal" admission that the preliminary injunction applies to members of a class that was not certified until months later. *Vigus v. Dinner Theater of Ind., L.P.*, 153 N.E.3d 1150, 1159 (Ind. Ct. App. 2020).

Nor is it remarkable that the State believes the orders present common issues. Trial Rule 23 requires courts to consider (among other things) whether the "representative parties" have claims that "are typical of the claims . . . of the class," whether the named plaintiffs are adequate representatives, and whether a court can provide "injunctive relief . . . with respect to the class as a whole." Ind. Trial R. 23(A)(3), (B). Thus, as the State argued to the Court of Appeals, the preliminary injunction and class certification orders both implicate issues related to ripeness, RFRA, and injunctive relief. *See* Corrected Mot. to Accept Jurisdiction and Hear Interlocutory Appeal Concerning Class Certification 5–9 in *The Individual Members of the Medical Licensing Bd. of Indiana v. Anonymous Plaintiffs 1–5*, No. 23A-PL-01313 (Ind. Ct. App.). But the State's position that it would be efficient to consider the orders together does not imply anything about their scope.

### B. The preliminary injunction does not protect abortion providers

Plaintiffs' invitation to state that the injunction "prevents the defendants from taking any adverse actions against abortion providers" who might serve Plaintiffs or class members, Mot. 8, is an even more obvious attempt at modification. Again, the injunction enjoins "the Defendants and their officers from enforcing the provisions of S.E.A. 1 against the Plaintiffs." Preliminary Injunction Order 43 (emphasis added). It does not say "against the Plaintiffs *and abortion providers*." Plaintiffs invoke the principle that a "court may impose equitable relief necessary to render complete relief to the plaintiff, even if that relief extends incidentally to nonparties." Mot. 7 (citation omitted). That argument confuses whether it would be proper to enjoin enforcement of S.E.A. 1 against abortion providers with whether the Court has already done so. It has not.

Similarly misplaced is Plaintiffs' argument that the injunction should protect abortion providers because "[t]he defendants" include persons "who have the power to discipline doctors" or prosecute them criminally. Mot. 7. Obviously Plaintiffs would need to name those persons as defendants to obtain a preliminary injunction that runs against them. *See* Ind. Trial R. 65(D). But the mere act of naming defendants who could take actions against physicians does not establish that they are currently enjoined from doing so. In urging the injunction should be expanded to cover abortion providers, Plaintiffs again confuse the injunction they want with the injunction they have.

Moreover, it would have been particularly odd for the injunction to cover "abortion providers" generally—a category that seemingly sweeps up abortion clinics—instead of hospitals and ambulatory surgical centers specifically. Plaintiffs have alleged that S.E.A. 1 burdens their religious beliefs because they may desire abortions "for reasons not allowed by S.E.A. 1." Compl. ¶ 142; *see id.* ¶¶ 73, 88, 127, 139; Preliminary Injunction Order 13, 15, 18–19, 43. But Plaintiffs have never asserted any religious objection to going to a hospital or ambulatory surgical center—

the only facilities that can lawfully perform abortions under any circumstance, *see* Ind. Code § 16-34-2-1(a)—for abortions.

Plaintiffs' attempt to expand the injunction under the guise of clarification is prejudicial. Defendants did not previously have an opportunity to brief whether any injunction may cover abortion providers since Plaintiffs have never previously requested that relief. If Defendants had notice Plaintiffs were seeking that relief in December 2022, Defendants could have explained why Plaintiffs cannot invoke their own putative religious practices to protect abortion providers who have no religious objection to complying with S.E.A. 1. And if this Court granted a preliminary injunction covering abortion providers, Defendants could have raised the issue in their pending appeal. By seeking to expand the injunction under the guise for clarification, however, Plaintiffs would deprive Defendants of their rights to oppose the relief sought and appeal. Any injunctive relief covering abortion providers must come through a new order expressly covering them.

## II. Plaintiffs Have Not Demonstrated an Entitlement to a Second Injunction

If Plaintiffs want a preliminary injunction covering class members or abortion providers, they must obtain another injunction. Plaintiffs' motions, however, do not explain why the entire class satisfies the requirements for injunctive relief. It treats the matter as a foregone conclusion, even though this Court's preliminary injunction order does not address whether *class members* have ripe claims, face a substantial burden to sincere religious practices, or will suffer irreparable harm absent an injunction. Plaintiffs' failure to address the preliminary injunction requirements as to class members is by itself a sufficient reason to deny additional relief. *See Ind. Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002) ("If the movant fails to prove any of these requirements, the trial court's grant of an injunction is an abuse of discretion.").

Additional problems plague Plaintiffs' request for an injunction prohibiting enforcement against unidentified abortion providers. First, the abortion providers (whoever they are) have not asserted that S.E.A. 1's restrictions would substantially burden their own alleged religious practices. Second, "individuals cannot use RFRA to compel the [State] to structure its relations with a third party in a certain way." *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 364 (3d Cir. 2017). RFRA is concerned with the "application of" the statute in question "to the person" challenging it. Ind. Code § 34-13-9-8(b); *see id.* § 34-13-9-10(a)(2). Plaintiffs cannot demonstrate that the State is burdening their religious beliefs in its interactions with them by pointing to state regulation of third parties who have no religious objection. Applying RFRA to actions that affect asserted religious exercises "only [in] an indirect" way "would radically" expand religious freedom claims. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (plurality op.).

Third, any injunction cannot be extended to cover abortion providers other than hospitals and ambulatory surgical centers. S.E.A. 1 imposes two distinct requirements relevant here: (1) it prohibits abortions unless exceptions for life, health, incest, rape, or lethal fetal anomalies apply, and (2) it requires lawful abortions to be performed at hospitals and ambulatory surgical centers. *See* Ind. Code § 16-34-2-1(a). In this case, Plaintiffs have alleged that S.E.A. 1 burdens their religious beliefs because they may desire abortions "for reasons not allowed by S.E.A. 1." Compl. ¶ 142; *see id.* ¶¶ 73, 88, 127, 139; Preliminary Injunction Order 13, 15, 18–19, 43. But Plaintiffs have never asserted any religious objection to going to a hospital or ambulatory surgical center for care. The requirement that abortions be performed at those facilities thus cannot be enjoined.

Fourth, the equities weigh against issuing an injunction that permits abortions at facilities other than hospitals and ambulatory surgical centers. Before S.E.A. 1, Indiana operated a separate licensing regime for abortion clinics. *See* Ind. Code § 16-21-2-2(4) (2021). S.E.A. 1, however,

repealed that licensing regime because it was no longer necessary given its new requirement that lawful abortions be performed at hospitals or ambulatory surgical centers. *See* 2022 Ind. Legis. Serv. 1st Sp. Sess. P.L. 179-2022, Sec. 9. And a court has already held that abortion clinics are not likely to succeed in a challenge to the prohibition against them performing abortions. *See* Order Granting Pls.' Mot. for Prelim. Inj. at 12–13, *Planned Parenthood Northwest, Haw., Alaska, Ind., Ky., Inc. v. Members of the Medical Licensing Bd. of Indiana*, No. 53C06-2208-PL-001756 (Ind. Cir. Ct.), *rev'd in part*, --- N.E.3d ---, 2023 WL 4285163 (Ind. June 30, 2023). Entering an injunction that allows for abortions outside hospitals and ambulatory surgical centers would raise difficult questions about what licensing requirements apply, potentially allowing unlicensed entities to perform abortions. The challenges with ensuring that providers meet basic health and safety requirements designed to protect patients counsels against entering any relief that would allow abortions to be performed outside hospitals and ambulatory surgical centers.

Finally, it would muddy the waters to say that any injunction covers "abortion providers" without specifying what that category covers (namely, hospitals and ambulatory surgical centers) and specifically enumerating the statutory language that cannot be enforced.

## CONCLUSION

Plaintiffs' motions should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 14, 2023, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on July 14, 2023, the foregoing document was served upon the following persons using the IEFS:

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