IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2407

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Plaintiff/Appellee,

v.

MARION COUNTY PROSECUTOR, *et al.*,

Defendants/Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:18-cv-01219-RLY-DLP,
The Honorable Richard L. Young, Judge

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS

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JURISDICTIONAL STATEMENT

Planned Parenthood of Indiana and Kentucky, Inc. (Planned Parenthood), an Indiana corporation with its principal place of business in Indiana, filed this action under 42 U.S.C. section 1983 for injunctive relief against Defendants, the Commissioner of the Indiana State Department of Health and the Marion, Lake, Monroe, and Tippecanoe County Prosecutors, and Members of the Indiana Medical Licensing Board (collectively, "the State"). It sought invalidation of multiple provisions of Senate Enrolled Act No. 340 ("SEA 340"), including Indiana Code section 16-34-2-4.7 (the "Reporting Requirement") and Indiana Code section 16-21-2-2.6 (the "Inspection Requirement"). Appellants' Appendix ("App.") 11. Planned Parenthood claimed these provisions are irrational in violation of the Fourteenth Amendment and that the Reporting Requirement is unconstitutionally vague. *Id.* The district court had subject-matter jurisdiction over this case under 28 U.S.C. sections 1331 and 1343.

The district court issued final judgment in favor of the plaintiffs with regard to the Reporting Requirement, but in favor of the Defendants with regard to the Inspection Requirement on July 14, 2020. Appellants' Required Short Appendix ("Short App.") 23–24. On July 15, 2020, Planned Parenthood filed a motion to alter or amend the judgment in order to get an injunction against the Reporting Requirement. App. 231–33. On July 28, 2020, the district court issued an amended final judgment providing:

> The court, having GRANTED in part and DENIED in part Plaintiff's Motion for Summary Judgment and having GRANTED in part and DENIED in part Defendants' Motion for Summary Judgment, now enters final judgment in favor of Plaintiff and against

> Defendants on Plaintiff's claim that Indiana Code § 16-34-2-4.7 is unconstitutionally vague and, finding that all the requirements are met, enters a PERMANENT INJUNCTION preventing enforcement of the statute. Accordingly, Defendants, and all their respective officers, agents, servants, employees, and persons acting in concert with them are PERMANENTLY ENJOINED from enforcing Indiana Code § 16-34-2-4.7.
>
> The court also enters final judgment in favor of Defendants and against Plaintiff on Defendants' claim that Indiana Code § 16-21-2-2.6 does not violate equal protection.

Short App. 25–26.

On July 30, 2020, Defendants timely filed a Notice of Appeal to the Seventh Circuit seeking review of the Amended Final Judgment Pursuant to Fed. R. Civ. Pro. 58 entered by the District Court on July 15, 2020. ECF No. 104. This is not an appeal from a decision by a magistrate judge. This Court has jurisdiction over this appeal of a final judgment by a district court under 28 U.S.C. section 1291.

STATEMENT OF THE ISSUE

May Indiana, consistent with Fourteenth Amendment vagueness doctrine, require doctors to report specified complications "arising from the induction or performance of an abortion"?

STATEMENT OF THE CASE

1. Concerned that researchers have insufficient and incomplete statistical data to study the safety of abortion procedures and improve the quality of abortions, the Indiana General Assembly passed SEA 340, which included a provision requiring

physicians, hospitals, and abortion clinics to report "each case in which the person treated a patient suffering from an abortion complication." Ind. Code § 16-34-2-4.7.[1]

Planned Parenthood physicians perform chemical abortions up to ten weeks gestation using mifepristone and misoprostol, both of which are subject to FDA regulations, including special Risk Evaluation and Mitigation Strategies, which limit the circumstances in which providers may deliver mifepristone to patients. *See Risk Evaluation and Mitigation Strategies,* FDA (Aug. 8, 2019), https://www.fda.gov/drugs/drug-safety-and-availability/risk-evaluation-and-mitigation-strategies-rems (FDA drug safety program for medications with serious safety concerns that aims to prevent, monitor, and manage serious risks to reduce the frequency and severity of the event).

Serious complications sometimes arise from the performance of chemical abortions, including, but not limited to, infection, excessive vaginal bleeding, failure to terminate pregnancy, incomplete abortion, and even death. App. 27–29, 129–130. When an incomplete abortion occurs (the most common complication), the standard of care requires a suction dilation and curettage to remove the remaining tissue from the uterus, most commonly conducted in a surgical facility. *Id.* at 162–63.

Planned Parenthood also offers surgical abortions by aspiration. ECF No. 74 at 7. Aspiration abortion utilizes suction to remove the fetus from the uterus. App. 128. An abortion provider dilates the patient's uterus, inserts a suction tube through the cervix and into the uterus, activates a vacuum pump connected to the suction

[1] While Planned Parenthood also challenged a separate requirement mandating annual inspections of abortion clinics, that requirement is not at issue in this appeal.

tube, and removes the fetus, placenta, and umbilical cord. *Id.* Possible complications of aspiration abortion include uterine perforation, cervical laceration, infection, excessive vaginal bleeding, pulmonary embolism, deep vein thrombosis, cardiac arrest, respiratory arrest, renal failure, shock, amniotic fluid embolism, coma, and in some cases, even death. *Id.* at 27–29, 130–31. Aspiration abortion can also result in an allergic reaction from anesthesia (if used) or hemolytic reaction if the patient needs to receive a blood transfusion due to excessive bleeding. *Id.* at 27–29, 33–34.

Both chemical and aspiration abortions "can also have adverse consequences for a woman's psychological health." *Id.* at 27. Data from twenty-two studies show that abortion is "associated with moderate to highly increased risks of psychological problems subsequent to the procedure." *Id.* at 97. "[W]omen who had undergone an abortion experienced an 81% increased risk of mental health problems, and nearly 10% of all incidents of mental health issues were directly attributable to abortion," including increased anxiety, depression, alcohol use, marijuana use, suicide, and suicidal behaviors. *Id.*

2. Under the Reporting Requirement as originally enacted, physicians, hospitals, and abortion clinics had to report "abortion complications," defined to include "any adverse physical or psychological condition arising from the induction or performance of an abortion." Ind. Code § 16-34-2-4.7 (amended eff. July 1, 2019). The statute went on to list twenty-six specific conditions that constituted reportable complications, but did not expressly say that the list was exclusive of other complications.

Failure to report an abortion complication was a Class B misdemeanor. *Id.* §§ 16-34-2-4.7(b), 16-34-2-4.7(j).

3. On April 23, 2018, Planned Parenthood filed this lawsuit and sought a preliminary injunction to enjoin the implementation of the Reporting Requirement on the grounds that the definition of "abortion requirement" is unconstitutionally vague and violates due process and equal protection rights. App. 11. The district court entered a preliminary injunction against the Reporting Requirement on June 28, 2018. App. 118. It held that the statutory definition of abortion complications was unconstitutionally vague because, while it listed specific reportable conditions, the "twenty-six examples are a non-exhaustive list." *Id.* at 111–14. The court explained that "the twenty-six enumerated conditions are so broad or vague that they do not remedy the uncertainty of the general definition of 'abortion complication.'" *Id.* at 113.

4. In response to the preliminary injunction, the General Assembly enacted House Enrolled Act 1211 in 2019, which narrowed the definition of "abortion complication." Rather than require a report of "*any* adverse physical or psychological condition arising from the induction or performance of an abortion," it limited the requirement to a tailored list of twenty-five enumerated complications. *Id.* § 16-34-2-4.7 (amended eff. July 1, 2019) (emphasis added). The statute now reads, in relevant part:

> As used in this section, "abortion complication" means only the following physical and psychological conditions arising from the induction or performance of an abortion:
>
> (1) Uterine perforation.
> (2) Cervical laceration.

> (3) Infection.
> (4) Vaginal bleeding that qualifies as a Grade 2 or higher adverse event according to the Common Terminology Criteria for Adverse Events (CTCAE).
> (5) Pulmonary embolism.
> (6) Deep vein thrombosis.
> (7) Failure to terminate the pregnancy.
> (8) Incomplete abortion (retained tissue).
> (9) Pelvic inflammatory disease.
> (10) Missed ectopic pregnancy.
> (11) Cardiac arrest.
> (12) Respiratory arrest.
> (13) Renal failure.
> (14) Shock.
> (15) Amniotic fluid embolism.
> (16) Coma.
> (17) Placenta previa in subsequent pregnancies.
> (18) Pre-term delivery in subsequent pregnancies.
> (19) Free fluid in the abdomen.
> (20) Hemolytic reaction due to the administration of ABO-incompatible blood or blood products.
> (21) Hypoglycemia occurring while the patient is being treated at the abortion facility.
> (22) Allergic reaction to anesthesia or abortion inducing drugs.
> (23) Psychological complications, including depression, suicidal ideation, anxiety, and sleeping disorders.
> (24) Death.
> (25) Any other adverse event as defined by criteria in the Food and Drug Administration Safety Information and Adverse Event Reporting Program.

Id. § 16-34-2-4.7(a). Failure to report one of these complications remains a Class B misdemeanor. *Id.* § 16-34-2-4.7(j).

Under the terms of the statute, the Department must make the data collected under the Reporting Requirement available to women and researchers. The Department "shall compile a public report summarizing the information collected under this section," annually, which "must include statistics for the previous calendar year." *Id.*

§ 16-34-2-4.7(g). It shall also "summarize the aggregate data . . . and submit the data . . . to the United States Centers for Disease Control and Prevention for its inclusion in the annual Vital Statistics Report." *Id.* § 16-34-2-4.7(h).

5. At the summary judgment stage, Planned Parenthood contended that, first, the Reporting Requirement is unconstitutionally vague. In particular, it contended (1) the overarching text requiring a report of complications "arising from" an abortion provides no meaningful guidance on what complications must be reported; (2) that "psychological complications" in condition 23 has no ascertainable meaning; and (3) "other adverse event" in condition 25 lacks specificity. ECF No. 74 at 21–23. Planned Parenthood also alleged that the Reporting Requirement violated equal protection and due process rights because the collection of abortion procedure complication data is singled out from other medical procedures which may result in similar complications, and the gathered data is "meaningless in a vacuum" without comparable data, such as from childbirth. *Id.* at 29.

In response, the State argued in its cross-motion for summary judgment, first, that properly read, the Reporting Requirement has a "readily appreciable core of conduct." *United States v. Cook* (*Cook I*), 914 F.3d 545, 551 (7th Cir. 2019). It includes a *mens rea* requirement and demands no greater precision than any other criminal statute. Moreover, "arising from" is language commonly used in both federal and state statutes and has been upheld against allegations of vagueness. Second, the specific provisions Planned Parenthood contends are vague are not, and moreover, are severable and consequently have no bearing on the validity of the requirement to report

the remaining complications. Lastly, the Reporting Requirement does not violate substantive due process rights or equal protection. The Reporting Requirement is rationally related to the State's compelling interest in protecting the health and safety of women. Furthermore, the Reporting Requirement does not single out abortion providers for special treatment, and regardless, the statute's distinction between abortion and other medical procedures is legitimate.

In its Entry on Cross-Motions for Summary Judgment, the district court ruled that the language of the Reporting Requirement was unconstitutionally vague, specifically "arising from the induction or performance of an abortion." Short App. 11. The court did not consider, however, whether the Reporting Requirement violated due process or equal protection rights. *Id.* at 17.

The district court entered its Final Judgment holding Indiana Code section 16-34-2-4.7 unconstitutional but, at first, did not enter the final injunctive relief requested by Planned Parenthood. *Id.* at 21. Upon Planned Parenthood's motion, the district court amended its final order to enjoin Indiana Code section 16-34-2-4.7 permanently. *Id.* at 25–26.

SUMMARY OF THE ARGUMENT

Requiring abortion providers to report specific complications "arising from the induction or performance of an abortion" prescribes a "readily appreciable core of conduct," and, therefore, cannot be facially invalidated as unconstitutionally vague. *United States v. Cook* (*Cook II*), No. 18-1343, 2020 WL 4782067, at *4 (7th Cir. Aug. 17, 2020). Planned Parenthood admits that it knows how to apply the statute in most

situations, while positing hypothetical scenarios where the statute's application may be less clear. The ability to hypothesize marginally more difficult applications, however, is insufficient to render the statute unconstitutionally vague on its face, especially in a pre-enforcement challenge.

Any remaining concerns regarding the causal relationship between an enumerated medical condition and an abortion procedure are remedied by precedents holding that whether a medical outcome "arises from" a particular cause must be determined by reasonable medical judgment. Notably, state and federal statutes—even criminal statutes, and even statutes governing abortion procedures—commonly use the words "arising from" to denote a causal relationship that is the condition of some obligation; yet, the district court has cited no case holding that "arising from" is unconstitutionally vague in any other context.

Moreover, neither "psychological complications" nor "adverse event," as used in the Reporting Requirement, is unconstitutionally vague. "Adverse event" is defined by federal law and the relevant psychological complications are listed in the statute itself. In any event, either specific provision may be severed, as Indiana has a statutory presumption in favor of severability. Ind. Code § 1-1-1-8(b). Here, the complications listed in the Reporting Requirement are entirely independent of each other, and severing an unconstitutional complication would not interfere with the purpose of the statute.

Lastly, while the district court did not reach the issue, the Reporting Requirement is rationally related to an important government interest and therefore does

not violate either substantive due process or equal protection. The Supreme Court has repeatedly recognized that the State has a "compelling interest in 'protecting the woman's own health and safety.'" *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)). The Reporting Requirement furthers that interest by providing more comprehensive data on the rate of complications for abortion as performed in Indiana. Moreover, the Supreme Court and Seventh Circuit have repeatedly confirmed the legitimacy of regulating abortion differently from other medical procedures, so the Reporting Requirement does not violate equal protection.

For these reasons, this Court should reverse the judgment of the district court.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of summary judgment de novo." *Tripp v. Scholz*, 872 F.3d 857, 862 (7th Cir. 2017). "Summary judgment is appropriate if the movant 'shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1060 (7th Cir. 2014) (quoting Fed. R. Civ. P. 56(a))). "Where, as here, the parties file cross-motions for summary judgment, all reasonable inferences are drawn in favor of the party against whom the motion at issue was made." *Id.* (citing *Dunnet Bay Constr. Co. v. Borggren*, 799 F.3d 676, 688 (7th Cir. 2015)).

ARGUMENT

I. "Arising from . . . an Abortion" Adequately Describes Causation as Determined by Reasonable Medical Judgment

A statute is unconstitutionally vague if "it fails to provide 'fair warning' as to what conduct will subject a person to liability" or it fails to "contain an explicit and ascertainable standard" in order to prevent "arbitrary and discriminatory" enforcement. *Karlin v. Foust*, 188 F.3d 446, 458–59 (7th Cir. 1999). Critically, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

A. Indiana's Reporting Requirement is hardly unusual

Reporting statutes are not new, unexplored territory. Many criminal statutes require individuals and organizations to report adverse events in many different circumstances—such as child abuse, assault, or wounds from gunshots or other weapons—and thereby require the reporter to discern some causal relationship (all emphases added):

- **Arizona:** "Any person who reasonably believes that a minor is or has been a victim of physical injury, abuse, child abuse a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means or that is not explained by the available medical history" must report this information to a peace officer. Ariz. Rev. Stat. Ann. § 13-3620(A). If the failure to report involves a reportable offense, the person is guilty of a class 6 felony. *Id.* § 13-3620(O).

- **California:** A health practitioner who treats "a person suffering from any wound or other physical injury inflicted upon the person where the injury is the *result of* assaultive or abusive conduct" must file a report and failure to do so is a misdemeanor offense. Cal. Penal Code §§ 11160(a)(2), 11162.
- **Florida:** A person "who is required to report known or suspected child abuse, abandonment, or neglect and who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, commits a felony in the third degree." Fla. Stat. Ann. § 39.502(1).
- **Georgia**: "Any person who makes a clinical diagnosis or laboratory confirmation of or who reasonably suspects the presence or occurrence of the following diseases syndromes, or conditions in animals shall" make a report. Ga. Code Ann. § 4-4-6(b)(1). The failure to report any disease, syndrome, or condition is a misdemeanor offense. *Id.* § 4-4-6(b)(5).
- **Indiana:** A physician who fails to report "a bullet wound, gunshot wound, or any other injury *arising from* or caused by the discharge of a firearm" or a wound which likely or may result in death and is "actually or apparently inflicted by a knife, ice pick, or other sharp pointed instrument" commits a Class A misdemeanor. Ind. Code § 35-47-7-1. A person "who believes or has reason to believe that an endangered adult or person of any age who has a mental or physical disability is the victim of

battery, neglect, or exploitation" and knowingly fails to report commits a Class B misdemeanor. Ind. Code § 35-46-1-13.

- **Kansas:** A physician's failure to report treatment of "any bullet wound, gunshot wound, powder burn or other injury *arising from* or caused by the discharge of a firearm" or any wound which "is apparently inflicted by a knife, ice pick, or other sharp or pointed instrument" results in a class C misdemeanor. Kan. Stat. Ann. § 21-6319.
- **Kentucky:** Any person who knows or has reasonable cause to believe that a child is a victim of dependency, neglect, abuse, human trafficking, or female genital mutilation, and fails to file a report, is guilty of a Class B misdemeanor for the first offense, Class A misdemeanor for the second offense, and Class D felony for each subsequent offense. Ky. Rev. Stat. Ann. §§ 620.030(1)–(4), (8).
- **Michigan:** A person who is required to report "an instance of suspected child abuse or neglect and knowingly fails to do so is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." Mich. Comp. Laws § 722.633(2).
- **Ohio:** A physician's negligent failure to report treatment of "a burn injury that is inflicted by an explosion or other incendiary device or that shows evidence of having been inflicted in a violent, malicious, or criminal manner" is guilty of a minor misdemeanor and a physician's who

knowingly failed to report is guilty of a misdemeanor of the second degree. Ohio Rev. Code Ann. §§ 2921.22(E), (K)(1), (K)(2).

Even in the abortion context, eight other States require the reporting of abortion complications using statutory text similar to what Indiana uses—and certainly no more precise—to denote the required causal relationship, as follows (all emphases added):

- **Arizona**: A health professional must file a report if a woman is "in need of medical care because of a complication or complications *resulting from* having undergone an abortion or attempted abortion." Ariz. Rev. Stat. Ann. § 36-2162.
- **Michigan**: A physician must file a report if the patient "suffers a physical complication or death that is a primary, secondary, or tertiary *result of* an abortion." Mich. Comp. Laws § 333.2837.
- **Minnesota**: A physician "who knowingly encounters an illness or injury that, in the physician's medical judgment, *is related to* an induced abortion" must submit an abortion complication report. Minn. Stat. § 145.4132.
- **Mississippi**: A physician must file a written report if a patient "requires medical treatment or suffers death that the attending physician has a reasonable basis to believe is a primary, secondary, or tertiary *result of* an induced abortion." Miss. Code Ann. § 41-41-77.

- **North Dakota**: "If a physician provides an abortion-inducing drug to another for the purpose of inducing an abortion and the physician knows that the individual experiences during or after the use an adverse event, the physician shall provide a written report of the adverse event within thirty days of the event." N.D. Cent. Code § 14-02.1-07.
- **Oklahoma**: A physician that "encounters an illness or injury that a reasonably knowledgeable physician would judge *as related to* an induced abortion" must submit a report. Okla. Stat. tit. 63, §§ 1-738i–1-738q.
- **Pennsylvania**: A physician who provides medical care to a woman "because of a complication or complications *resulting*, in the good faith of judgment of the physician, *from* having undergone an abortion" must file a report with the department. 18 Pa. Cons. Stat. § 3214(h).
- **Texas**: A physician must submit "a report on each *abortion complication* diagnosed or treated by that physician not later than the end of the third business day after the date on which the complication is diagnosed or treated." Tex. Health & Safety Code Ann. § 171.006.

Indiana's Reporting Requirement is, therefore, not unusual or particularly suspect under vagueness doctrine.

B. An ample core of complications fall within "arising from . . . an abortion," making a facial challenge inappropriate

The Indiana Reporting Requirement's use of "arising from" to denote causation contains an ascertainable standard that provides guidance to physicians and abortion centers through twenty-five enumerated conditions. In the vast majority of cases, the

"arising from" standard will not cause physicians to wonder whether to report one of the enumerated conditions, and that is all that is required to survive a facial vagueness challenge.

As this Court recently reaffirmed, the Seventh Circuit has identified three categories of statutes for purposes of a vagueness challenge: (1) statutes that "implicate[] activities protected by the First Amendment," *Cook II*, 2020 WL 4782067, at *3 n.4, (2) statutes that "simply ha[ve] no core and lack[] any ascertainable standard for inclusion and exclusion," *id.* at 3, and (3) statutes that have a "readily appreciable core of conduct," but "posits uncertainty as to whether the statute might apply to certain hypothetical facts." *Id.* at *6. Only the first two categories of statute may be challenged facially (the third category permits only as-applied challenges), and Planned Parenthood does not contend the First Amendment is implicated.

So, the big question in this case is whether the Reporting Requirement falls into the second ("no core") category. This category identifies a statute as vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). The district court held that this description fits the Reporting Requirement, where, in the court's view, the "conduct intended to be covered by the statute itself is subject to uncertainty." Short App. 7–8. It stated that "[q]uestions of causation are at the heart of Planned Parenthood's challenge to the statute, and the statute fails to establish clear standards for whether certain conduct falls within its ambit." *Id.*

But a readily appreciable core of conduct subject to the Reporting Requirement *does* exist: the report and disclosure of a complication or adverse event, delimited by twenty-five enumerated conditions, arising from—*i.e.,* caused by—the performance of an abortion procedure. Even Planned Parenthood agrees that several of the complications listed in the statute can be easily connected with abortion including "infection, significant bleeding beyond what is expected and normal, an incomplete abortion (meaning that the uterus has retained the products of conception or an ongoing pregnancy), and, in the case of surgical abortions, infection, significant bleeding, retained tissue, and uterine perforation or cervical laceration." ECF No. 74 at 9–10.

In addition, the State's expert Dr. Christina Francis explained how each reportable complication might result from abortion and testified that conditions observed in the midst of an abortion such as a missed ectopic pregnancy, allergic reaction to abortion-inducing drugs, hemolytic reaction from incompatible blood, cardiac arrest, respiratory arrest, renal failure, shock, coma or death of the woman (to name a few) may obviously "arise from" the abortion and be reportable. *See* App. 27–28, 31, 34. What's more, complications arising well after the abortion, such as psychological complications, are likely to be discovered by psychiatrists or other physicians who work elsewhere, and they will be the ones who must assess whether those complications arose from the abortion and must be reported. So even if Planned Parenthood's physicians would hypothetically disagree with that assessment, they would not be exposed to legal liability.

In the same way, complications like "placenta previa" and "pre-term delivery," which Planned Parenthood claims do not "constitute complications of abortion," ECF No. 74 at 22, do not pose a vagueness problem, because, if Planned Parenthood is correct that they never occur after an abortion (or if its physicians never encounter them even if they do occur), then Planned Parenthood need never report them. Or if, in particular situations, its physicians are uncertain about whether a sufficient causal connection exists, they can be sure about discharging their statutory obligations by filing the report.

At the very least, any uncertainty about whether some specified conditions are reportable in some circumstances is an insufficient basis to declare the whole statute facially invalid. That is, the statute provides certainty "as to the essence of what [it] forbids," and is not, on its face, constitutionally vague. *See Cook II*, 2020 WL 4782067, at *6. The district court relied on an older iteration of *Cook* that was vacated by the Supreme Court. *United States v. Cook* (*Cook I*), 914 F.3d 545 (7th Cir. 2019), *vacated by* 140 S. Ct. 41 (2019). But just last month, this Court reaffirmed that even though "it may sometimes be difficult to determine if an individual's" conduct falls within the statute, such uncertainty "does not signify that the statute is impermissibly vague." *Cook II*, 2020 WL 4782067, at *6.

In the district court's view, the Reporting Requirement is vague because, unlike the statute in *Cook*, it "ha[d] not been previously interpreted to provide greater specificity." Short App. 9. First, however, Indiana case law has already given additional guidance that "arising from" should be understood as "connoting the source,

relating back to and tying up with the origin, basis or cause." *Coplen v. Omni Rests., Inc.*, 636 N.E.2d 1285, 1287 (Ind. Ct. App. 1994) (citing *Whitley v. White,* 140 S.W.2d 157, 162 (Tenn. 1940)). Under *Coplen*, a complication would "arise from" an abortion procedure if the complication "relat[es] back to and t[ies] up with the origin, basis or cause"—in this instance, the abortion procedure. *See Coplen*, 636 N.E.2d at 1285. So, if a physician observed a complication that would not have arisen (nor worsened) but for the performance of an abortion procedure, then such complication must be reported. The mere possibility of difficult judgment calls in marginal situations is not fatal to the statute.

Second, this Court, in *Trustees of Indiana University v. Curry,* 918 F.3d 537, 540 (7th Cir. 2019), expressly rejected the idea that a statute with some marginal uncertainty can be upheld only if state courts have already provided an interpretation resolving that uncertainty. There, this Court upheld a statute that prohibited "transfer" of fetal tissue, despite "some uncertainty at the margins" as to the meaning of "transfer." *Id.* This Court rejected as "fundamentally inconsistent with the Supreme Court's approach" the argument that some uncertainty renders a statute vague, observing that, otherwise, "every time a court needs to decide a tough question about just how far a statute reaches, it should declare the law unconstitutional." *Id.* at 541. Rather, "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the statutory margin." *Id.*

Critically, this Court in *Indiana University* said that, rather than pursue a facial declaration of invalidity, anyone regulated by a statute with marginal uncertainty who is worried about possible applications should file a declaratory judgment action for a definitive interpretation by the state courts. *Id.* Planned Parenthood could follow that route here. It understands what "arising from means" for the vast majority of common adverse events enumerated by the statute. If it is uncertain about others, such as "[h]ypoglycemia occurring while the patient is being treated at the abortion facility," it can file a declaratory judgment action in state court asking for a judicial interpretation of the statute. The drastic remedy of facially invalidating a state statute capable of many agreed-upon applications is unnecessary.

C. "Arising from" must inherently be informed by reasonable medical judgment, which further remedies any uncertainty

The "arising from" standard is necessarily based on the physician's reasonable medical judgment. This standard may be read into the statute based on analogous Indiana reporting statutes. The Indiana Supreme Court has said that, absent some indication that the legislature intended for a criminal statute to impose strict liability, courts should presume "a culpable mental state is an intended element in criminal offenses for which the culpability is not specified by statute" and that looking at "similar or related statutes" is one factor in determining the appropriate standard. *State v. Keihn*, 542 N.E.2d 963, 967 (Ind. 1989). For instance, an analogous Indiana reporting statute imposes a duty to report child abuse and neglect if an individual "has reason to believe that a child is a victim." Ind. Code § 31-33-5-1. Indiana courts

have said that "'Reason to believe,' for purpose of the reporting statutes, 'means evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.'" *Sprunger v. Egli*, 44 N.E.3d 690, 693 (Ind. Ct. App. 2015).

The Reporting Requirement at issue here is similarly susceptible of construction that takes into account the background and training of the reporter for purposes of understanding what must be reported—namely that whether causation exists between the abortion and the complication depends on the "reasonable medical judgment" of the physician in charge. Other abortion statutes contain a similar standard. *See* Ind. Code § 16-34-2-1 (the physician's determinations of whether to perform an abortion is based on *professional, medical judgment*) (emphasis added); Ind. Code § 16-34-2-0.5 ("[T]he physician shall terminate the patient's pregnancy in a manner that, in a physician's *reasonable medical judgment*, would result in the best opportunity for the fetus to survive.") (emphasis added); Ind. Code § 16-18-2-327.9 (A "serious health risk" is defined as a *reasonable medical judgment,* a condition exists that has complicated the mother's medical condition and requires an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function) (emphasis added). Under *Keihn*, the Reporting Requirement should be understood to contain an analogous requirement that causation is determined by reasonable medical judgment.

Here, the district court "decline[d] the state's invitation to read into the statute" the "reasonable medical judgment" standard. Short App. 15. In doing so, however, the district court improperly refused to apply Indiana law of statutory construction, *see U.S. Fire Ins. Co. v. Barker Car Rental*, 132 F.3d 1153, 1156 (7th Cir. 1997) ("[W]e must apply the same rules of statutory construction that the [state] Supreme Court . . . would apply if it were faced with the same task."). It also misunderstood how an implicit requirement of reasonable medical judgment addresses any lingering concern over ambiguity.

Critically, the district court improperly distinguished, for purposes of applying *Keihn*, between a formal *mens rea* requirement at the point of criminal action or omission and a standard for determining whether an abortion complication qualifies under the statute. Short App. 14–15. It explained that "[r]easonable medical judgment is not a *mens rea* because its inclusion in the statute would not demonstrate that an individual had the required mental state at the time of committing the statute's *actus reus*: failing to report an abortion complication." *Id.* No such distinction exists. "Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to *every material element* of the prohibited conduct." Ind. Code § 35-41-2-2 (emphasis added). Consequently, a *mens rea* requirement that a physician exercise reasonable medical judgment would apply not only to the physician's failure to report, but also to the physician's initial determination of whether a particular complication "arose from" an abortion.

And, plainly, whether limiting application of a statute with reference to "reasonable medical judgment" can fairly be described as a *mens rea* requirement is irrelevant for vagueness purposes. A statute, after all, may impose strict liability so long as it forbids conduct in reasonably clear terms. *See Stepniewski v. Gagnon*, 732 F.2d 567, 570 (7th Cir. 1984) (citing *Lambert v. California*, 355 U.S. 225, 228 (1957)) ("The Supreme Court has recognized . . . that strict liability criminal offenses are not necessarily unconstitutional.").

Indeed, in *Karlin v. Faust*, this Court upheld against a vagueness challenge a Wisconsin requirement that abortion physicians exercise "'reasonable medical judgment' [to determine] that an immediate abortion is necessary," 188 F.3d 446, 456 (1999), *and* a separate imposition of strict liability for failure to carry out an informed consent requirement. *Id.* at 468. The court observed that "physicians are accustomed to having their medical decisions adjudged under an objective standard" and "this same objectivity . . . provides an adequate safeguard against any risk of arbitrary and unfair enforcement." *Id.* It explained that "reasonable medical judgment" does not require absolute medical certainty: "In any given medical situation there is likely to be a number of reasonable medical options and disagreement between doctors over the appropriate course of action does not, of course, render one option reasonable and another unreasonable." *Id.* at 464. This objective standard did not render the statute vague. *Id.* at 465.

Moreover, in *Karlin*, the Court dismissed the plaintiffs' argument that the physicians would be unable to determine whether the given descriptions were sufficiently

adequate or accurate to avoid liability without a good faith standard or scienter requirement. *Id.* at 471. The Court explained that as long as the basis for the physician's determination "is the physician's best medical judgment based on the physician's training and experience, as opposed to some bad faith attempt to circumvent [the] informed consent requirements," *id.* at 472, the physician need not fear criminal prosecution "even if another physician disagrees with the existence of or extent of the risk of psychological trauma." *Id.*

Here, similarly, if a physician fails to report, the physician faces no risk of prosecution if the assessment of causation is based on reasonable medical judgment. The district court surmised that "[a]ny time a patient presents with one or more of the enumerated 'complications,' a physician or other medical provider must determine, without any statutory standard, whether it arose from the abortion procedure." Short App. 9. Physicians and medical professionals, however, do not examine a patient's complications unguided. They rely upon knowledge, skill, experience, training, and education. As in *Karlin*, this medical background is sufficient for physicians to ascertain a "readily appreciable core of conduct." *See Cook II*, 2020 WL 4782067, at *4.

Furthermore, the informed consent exception at issue in *Karlin* did not permit those charged with enforcement to bring arbitrary actions: "[E]nforcement actions can properly be brought only when it is reasonably believed that a physician made an objectively unreasonable decision." 188 F.3d at 465. *See Kolender v. Lawson*, 461 U.S.

352, 357–58 (1983) (a statute which imposes penal liability is unconstitutionally vague only if it fails to provide "minimal guidelines to govern law enforcement").

The district court's principal objection to this point appears to have been its view that, while Indiana law permits courts to infer *mens rea* requirements in statutes governing medical procedures, "reasonable medical judgment" does not qualify as a *mens rea* requirement. As discussed, however, that is an improper reading of Indiana precedent and fails to apply Indiana law. But more fundamentally, it constitutes an excessively formalistic understanding of *mens rea*. Whether a complication is reportable depends on the exercise of reasonable medical judgment, which is something the physician must formulate mentally. It is, therefore, not meaningfully different from *mens rea* standards Indiana courts have inferred in other criminal statutes. Other than improving the odds of a finding of unconstitutional vagueness, it is hard to see what might be gained from refusing to infer such a standard here. Indeed, it is hard to understand how a prosecutor making a case for failing to report would establish causation *except* by offering expert testimony as to what a person exercising reasonable medical judgment would have concluded.

Accordingly, the district court erred as a matter of law in refusing to give the statute a reasonable construction that would save it from a vagueness challenge. *See United States v. Harriss*, 347 U.S. 612, 618 (1954) ("And if [a] general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.").

D. "Arising from" is a common way for statutes to denote causation

Furthermore, the phrase "arising from," which implies causation, is commonly used in both federal and state statutes. *See, e.g.*, 18 U.S.C. § 1531(a) (exempting from criminal liability physicians who perform partial-birth abortions to save the life of a mother who has "a life-endangering physical condition caused by or *arising from* the pregnancy itself" (emphasis added)); Ind. Code § 35-47-7-1 (creating a Class A misdemeanor for failure to report "a bullet wound, gunshot wound, powder burn, or any other injury *arising from* or caused by the discharge of a firearm" (emphasis added)); R.I. Gen. Laws § 28-34-2(26), (30)–(35) (allowing workers compensation benefits for a "disability *arising from*" particular conditions" (emphasis added)); Tex. Transp. Code Ann. § 91.034(a) (giving the Texas Department of Transportation the authority to develop property for the purpose of mitigating an "adverse environmental effect *arising from* the construction, maintenance, or operation of a rail facility" (emphasis added)); W. Va. Code § 46A-2-119(1) (subjecting sellers to liability for "claims and defenses *arising from* sales" (emphasis added)).

Federal courts have upheld the use of the phrase "arising from" against allegations of vagueness. *See, e.g.*, *CF&I Steel Corp. v. United Mine Workers of Am.*, 507 F.2d 170, 173 (10th Cir. 1974) (holding that there is "no incapacitating vagueness" in a decree applicable to "disputes *arising from* employee suspensions, employee discharges and work assignments" (emphasis added)); *Gambino v. Music Television, Inc.*, 932 F. Supp. 1399, 1401 (M.D. Fla. 1996) (holding that "[t]here is no vagueness

or ambiguity" in a statement disclaiming "all claims or liabilities of any kind *arising from* my participation in this event" (emphasis added)).

In contrast, the district court cited no cases where a court held that the phrase "arising from" was unconstitutionally vague. "Arising from" is normally a sufficient connotation of causation to prompt criminally enforceable obligations, and nothing about the abortion-complication context demands anything more specific. If the federal partial-birth abortion statute can require a physician about to perform an intact dilation and extraction to determine whether "a life-endangering physical condition" exists that was "caused by or *arising from* the pregnancy itself," Indiana can require that physician to report, say, uterine perforation, infection, cervical laceration, or excessive bleeding "arising from" the abortion that follows.

II. The Two Targeted Individual Complications Are Not Vague

Although the district court did not reach Planned Parenthood's argument that two of the statute's listed complications—"psychological complication" and "any other adverse event as defined by criteria provided in the Food and Drug Administration Safety Information and Adverse Event Reporting Program"—were unconstitutionally vague, the State provides this argument in support of those complications in the event this Court considers Planned Parenthood's alternative arguments.

A. "Psychological complication" is not vague

First, Planned Parenthood's medical director, Dr. Stutsman, testified in this case that he is "certainly aware of what a 'psychological complication' is." App. 21. Planned Parenthood attempted to explain away the concession by contending that under the prior version of the statute, which included "emotional" complications,

could include "depression, suicidal ideation, anxiety, and sleeping disorders." ECF No. 86 at 20 n.12. Yet if Dr. Stutsman was previously capable of comprehending the term "psychological complication" in light of the terms "depression, suicidal ideation, anxiety, and sleeping disorders," his understanding of the term "psychological complication" endures. Regardless, Dr. Stutsman has not stated that he does not now understand the term in light of the statute's amended construction.

Moreover, the term "psychological complication" must be read in context with the specific examples which follow, to wit, "depression, suicidal ideation, anxiety, and sleeping disorders." Ind. Code § 16-34-2-4.7(a)(23). Under the canon of *noscitur a sociis*, "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). "[T]he fact that 'several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.'" *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 496 (7th Cir. 2012) (quoting *Beecham v. United States*, 511 U.S. 368, 371 (1994)). Here, "psychological complications" is followed by "including depression, suicidal ideation, anxiety, and sleeping disorders." Ind. Code § 16-34-2-4.7(a)(23). States have commonly utilized the illustration of a general principle by suggested examples in statutory construction. "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

In *United States v. Johnson*, this Court interpreted a provision of the federal Animal Enterprise Terrorism Act that "prohibit[s] damaging 'any real or personal

property (including animals or records) used by an animal enterprise.'" 875 F.3d 360, 366 (7th Cir. 2017). The court said that because "the phrase 'any real or personal property' is immediately followed by the phrase '(including animals or records),'" personal property must mean tangible items, like animals or records, rather than intangibles such as lost profits. *Id.*

The Reporting Requirement includes a similar construction. "Psychological complications" is given more precise meaning by the illustration that follows. Depression, anxiety, and sleeping disorders are all diagnosable psychological disorders included in the DSM-5. App. 211–12, 214. Although not a separately listed disorder, suicidal ideation is a common symptom of many psychiatric disorders and clearly defined in the DSM-5. *Id.* at 229. Thus, under the canon of *noscitur a sociis*, other reportable psychological conditions would be similarly known psychological disorders and not a momentary or temporary feeling of sadness or uneasiness.

Planned Parenthood has dismissed this argument on the grounds that depression and anxiety are not diagnosable disorders, but are instead *symptoms* of depressive disorder or anxiety disorder. But anxiety and depressive disorders are commonly referred to by the names of "depression" and "anxiety." *See* Ranna Parekh, M.D., M.P.H., *What Is Depression?,* American Psychiatric Association (Jan. 2017), https://www.psychiatry.org/patients-families/depression/what-is-depression; *Anxiety*, Lexico, https://www.lexico.com/en/definition/anxiety. Hence, a physician exercising his or her reasonable medical judgment could ascertain that depression and anxiety refer to depressive disorder and anxiety disorder, respectively.

B. "Any other adverse event as defined by criteria provided in the Food and Drug Administration Safety Information and Adverse Event Reporting Program" is quite specific

Next, the court should reject the claim that the phrase "[a]ny other adverse event as defined by criteria provided in the Food and Drug Administration Safety Information and Adverse Event Reporting Program" is constitutionally unsound. FDA regulations define "adverse event" as "any untoward medical occurrence associated with the use of a drug in humans, whether or not considered drug related." 21 C.F.R. § 312.32(a). The definition of "adverse event" is not inherently limited to the purpose underlying the FDA enactment, but rather it applies in occurrences where it is "associated with the use of a drug in humans." *Id.* If a drug is administered during the performance of either a chemical or aspiration abortion, then any complications arising from the use must be reported.

Planned Parenthood contends the term is "broad enough to include expected soreness or bleeding following a surgical procedure or expected nausea or fatigue following a medication abortion." ECF No. 74 at 28. However, by Planned Parenthood's admission, these examples are not untoward complications, but rather unpleasant and expected side effects. Thus, mere minor soreness or grogginess following a surgical abortion would not qualify as an adverse event under the FDA criteria. Adverse events, not minor side effects, which arise from either chemical or medical abortions, as well as the administration of a drug for purposes such as sedation, would be included within the confines of this complication.

In any event, Planned Parenthood acknowledges, with seeming acceptance, three other types of events that federal law requires to be reported: (1) "any suspected

adverse reaction that is both serious and unexpected," 21 C.F.R. § 312.32(c)(1)(i); (2) "any clinically important increase in the rate of a serious suspected adverse reaction," *id.* § 312.32(c)(1)(iv); and (3) "any unexpected fatal or life-threatening suspected adverse reaction," *id.* § 312.32(c)(2). ECF No. 74 at 26. These reportable complications are each defined in terms of an "adverse event." *See* 21 C.F.R. § 312.32(a). If the federal government may constitutionally rely on such a definition, so may the State.

C. Any vagueness with specific conditions can be remedied by severing them from the statute

Lastly, if these specific complications are somehow vague on their own they are severable from the remainder of the reporting statute. Whether an unconstitutional portion of a state law can be severed is a question of state law, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196–97 (1983), and in general courts should presume that unconstitutional statutory provisions are severable so that courts "avoid judicial policymaking or *de facto* judicial legislation in determining just how must of the remainder of a statute should be invalidated." *Barr v. Am. Ass'n of Pol. Consultants, Inc,* 140 S. Ct. 2335, 2351 (2020); *see also, e.g., Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2209 (2020) (surviving provisions would remain fully operative without the offending restriction and may be severed); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484 (2018) (provisions were unable to withstand severance as it "would forbid the advertising of an activity that was legal under federal and state law. . . something that Congress has rarely done").

Indiana has a statutory presumption in favor of severability. Ind. Code § 1-1-1-8(b). A provision is presumed severable from the remainder of the statute unless:

(1) "the remainder is so essentially and inseparably connected with, and so dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application;" or (2) "the remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application." *Id.*

With respect to the two specific reportable complications that Planned Parenthood challenges, neither condition for defeating severability exists. The enumerated complications in the Reporting Requirement may exist independent of one another. Additionally, if this Court determines that "psychological complications" or "adverse event" are vague and, therefore, unconstitutional, the holding would not impair the validity of the remaining complications. Moreover, the purpose of the Reporting Requirement is to provide women and researchers data concerning complications which may arise from an abortion and, subsequently, the frequency of those complications. If some listed complications are deemed unconstitutionally vague, the remainder of the Reporting Requirement should remain intact to best serve the underlying purpose—providing data to study the safety of abortion procedures and improve the quality of abortions.

III. The Reporting Requirement Is Rationally Related to the State's Legitimate Interest in Women's Health and Safety

Although the lower court did not reach Planned Parenthood's argument that the Reporting Requirement violates substantive due process and equal protection, the State includes its defense here in the event this Court reaches the issue.

The Reporting Requirement is rationally related to an important government interest and therefore does not violate substantive due process. Planned Parenthood has not alleged that a fundamental right is at stake here; it instead has relied on the "residual substantive limit on government action which prohibits arbitrary deprivations of liberty by government." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). Therefore, rational-basis review applies. *See* ECF No. 74 at 27–29 (applying rational basis test). "[O]rdinary rational basis review" is a "deferential test" for which "a state law need only be 'rationally related to legitimate government interests.'" *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1781–82 (2019) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

The Supreme Court has repeatedly recognized that the State has a "compelling interest in 'protecting the woman's own health and safety." *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)). The Reporting Requirement furthers that interest by providing more comprehensive data on the rate of complications for abortion procedures performed in Indiana where that data has otherwise been insufficient and incomplete. Without the Reporting Requirement, complications and side effects may not be traced back to the abortion therefore sacrificing the ability to have complete and comprehensive data to discover key issues, such as racial disparities in treatment or the relationship between an abortion provider's volume and the likelihood of an adverse outcome. Furthermore, the Reporting Requirement mandates an annual report summarizing the data collected which a

woman may use to better understand the choices she may confront regarding a medical procedure. A woman considering an abortion has an interest in knowing *all* possible complications that may occur if she undertakes the procedure, including those resulting from anesthesia or other injections made necessary by the procedure.

Planned Parenthood opines that without substantial data gathered on natural births, the data on abortion complications would be inadequate and provide no meaningful comparison. However, the General Assembly may take steps in constructing legislation that appropriately addresses the concern and need not construct the statute in its entirety at once to address all conceivable issues. Under rational-basis review, the State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955).

Moreover, the Supreme Court has specifically held that "[a]bortion is inherently different," *Harris v. McRae*, 448 U.S. 297, 325 (1980), and that the State may "express[] a preference for childbirth over abortion," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992). Planned Parenthood has presented no evidence that "the true purpose of the Statute is to peddle the false narrative that abortion is dangerous." ECF No. 74 at 29. Regardless, supposed legislative motives are irrelevant—"[a]ll it takes to defeat the plaintiffs 'claim is a conceivable rational basis for the difference in treatment." *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013) (emphasis in original).

Planned Parenthood has further contended that the Reporting Requirement is not rationally related to the purpose of mapping and gathering data on serious events occurring to patients who undergo an abortion procedure because the requirement may cause duplicative reporting by multiple providers for the same patient for the same complication or "reporting of events . . . even though they are caused by something other than the abortion itself." ECF No. 74 at 27–28.

First, even if one complication may qualify under one or more provision of the statute, or if two doctors treat the same condition, Indiana is permitted to try one approach, review its success, and then reevaluate. A statute need not be "perfectly tailored" to survive rational basis review. *See Box*, 139 S. Ct. at 1782. The reports themselves will be accurate if the doctors treating the complications actually report the problems they have observed. The mere existence of such a possibility does not disqualify the statute from meeting rational basis review nor inherently imply the data is statistically meaningless. In fact, as the State's expert Dr. Christina Francis testified, "abortion complications are notoriously difficult to track" because "women often are not treated for abortion complications by the same doctor that performed the abortion." App. 25–26. Without the Reporting Requirement, complications and side effects may never be traced back to the abortion. The additional information collected will allow researchers "to perform a basic analysis on the complications identified." *Id.* at 29.

Second, the Reporting Requirement demands only the reports of "physical or psychological conditions *arising from* the induction or performance of an *abortion*."

Ind. Code § 16-34-2-4.7(a) (emphasis added). Physicians and abortion clinics need only report the complications which arose from the abortion procedure itself and need not report complications which provide no causal connection.

Indiana is not alone in imposing a reporting obligation regarding abortion complications. Of the eight States which require the reporting of abortion complications, only two have been challenged: North Dakota's and Pennsylvania's. The North Dakota statute was upheld on vagueness grounds in *Leigh v. Olson*, 497 F. Supp. 1340, 1350–51 (D.N.D. 1980). Even more on point, the Pennsylvania statute was challenged at the district court level by the plaintiffs in *Casey*. The district court upheld the statute both at preliminary injunction and summary judgment, specifically rejecting the plaintiff's arguments that the reports would "yield scientifically inaccurate data." *Planned Parenthood of Se. Pa. v. Casey*, 686 F. Supp. 1089, 1131 (E.D. Penn. 1988) ("It is not for this court to criticize the Commonwealth's failure to implement a perfect system for collection of data."); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1393 (E.D. Penn. 1990) ("While the data gathered by these reports may not perfectly reflect all medical complications, I am not persuaded that the information is statistically meaningless.").

Because the Reporting Requirement is rationally related to the legitimate state interest in ensuring the safety of abortion, it does not violate substantive due process.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 9,063 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which sent notification of such filing to the following:

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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:18-cv-01219-RLY-DLP
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, MARION COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD,	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This cause appears before the court on cross-motions for summary judgment. (Filing No. 73; Filing No. 77). At issue is the constitutionality of two abortion-related Indiana statutes. Planned Parenthood of Indiana and Kentucky, Inc. alleges Indiana Code § 16-34-2-4.7 (the "Complications Statute") is unconstitutionally vague and violates both equal protection and due process. Planned Parenthood also brings an equal protection challenge to Indiana Code § 16-21-2-2.6 (the "Inspection Statute"). The State defends the constitutionality of both statutes and asks the court to enter summary judgment in its favor.

For the reasons articulated below, the court concludes the Complications Statute is unconstitutionally vague. Because the Complications Statue is void, the court does not address Planned Parenthood's equal protection and due process challenges. But the court agrees with the State that the Inspection Statute does not violate equal protection. Accordingly, Planned Parenthood's Motion for Summary Judgment is **GRANTED in part** and **DENIED in part,** and the State's Motion for Summary Judgment is **GRANTED in part** and **DENIED in part.**

I. Factual Background

Planned Parenthood currently operates 17 health centers in Indiana. (Filing No. 73-2, Declaration of Christine Charbonneau, ¶ 3). Thousands of women, men, and teens receive reproductive health services and comprehensive sex education at these facilities. (*Id.* ¶ 4). Abortion is among the various services offered by Planned Parenthood. Surgical abortions are performed at three health centers in Indiana: Indianapolis, Bloomington, and Merrillville. (*Id.* ¶ 5). Patients undergoing a surgical abortion at one of these Planned Parenthood facilities do not receive general anesthesia, although sedatives may be administered upon request. (*Id.* ¶ 6). After the procedure is completed, the patient is monitored for a period before leaving the clinic. (*Id.*). Non-surgical abortion—also referred to as medication abortion—is available at the same three facilities, as well as another facility located in Lafayette. (*Id.* ¶¶ 7-8). Both surgical and non-surgical abortions are performed by physicians licensed by the Indiana Medical Licensing Board. (*Id.* ¶ 10).

Abortion clinics, birthing centers, ambulatory surgical centers, and hospitals must be licensed by the Department of Health, and these licenses are effective for one year. *See* 410 Ind. Admin. Code § 26-2-1(c) (abortion clinics); *Id.* § 27-2-1(b) (birthing centers); *Id.* § 15-2.3-1(a) (ambulatory surgical centers); *Id.* § 15-1.3-1(a) (hospitals). Prior to the issuance of an initial license, these entities must be inspected by the Department of Health. (Filing No. 73-1, Matthew Foster Deposition ("Foster Dep.") at 27). While Indiana law specifies when abortion clinics and birthing centers must undergo subsequent licensing surveys, it does not specify how frequently hospitals and ambulatory surgical centers must be surveyed.[1] (*Id.* at 28). Federal law dictates the minimum frequency of inspections for hospitals and ambulatory surgical centers. (Filing No. 72, Stipulation, ¶ 2). Under federal law, the State must inspect hospitals at least once every five years and ambulatory surgical centers every six years, (Filing No. 72-1, Table of Survey Frequencies and Priorities ("Table") at 71, 74), although in practice, the State inspects hospitals and ambulatory surgical centers on a roughly annual basis.[2] (Foster Dep. at 28).

[1] The Department of Health must conduct a licensing inspection of birthing centers at least once every two years. 410 Ind. Admin. Code § 27-3-2. Prior to the passage of the Inspection Statute, abortion clinics were subject to similar inspection requirements. *Id.* § 26-3-2 (superseded by emergency rule, eff. Apr. 10, 2019).

[2] From 2013 to mid-October 2018, Indiana hospitals underwent licensing survey inspections once every 15.3 months. (Filing No. 73, Ex. 8, Exhibit Summary Chart Concerning Licensing Inspections). During that same period, ambulatory surgical centers were inspected once every 16.3 months and birthing centers approximately every 24.4 months. (*Id.*). Prior to 2018, the state conducted licensing survey inspections of abortion clinics once every 22 months. (*Id.*). Sometime in 2018, the decision was made to inspect every abortion clinic again, even though they had been inspected the year before. (Foster Dep. at 42-43).

Hospitals and ambulatory surgical centers have the option of joining a private accrediting organization which will perform the required federal survey. (*Id.* at 61-63). Under Indiana law, the Health Department must grant licenses to all entities who pass the survey and are members of an accrediting organization. Ind. Code § 16-21-2-13(b)(2). Federal law only requires the State to inspect a 1% targeted sample of member hospitals and 5-10% of ambulatory surgical centers each year. (Table at 70, 74). There is no similar accrediting organization for abortion clinics. (Foster Dep. at 63).

II. Procedural and Statutory Background

In 2018, the Indiana General Assembly passed Senate Enrolled Act No. 340, which included the two provisions at issue here. Concerned with what it felt to be insufficient data regarding the safety of abortion procedures, the General Assembly included a provision which required physicians, hospitals, and abortion clinics to report certain "abortion complications." Ind. Code § 16-34-2-4.7 (amended eff. July 1, 2019). Under that section, an abortion complication was defined as "any adverse physical or psychological condition arising from the induction or performance of an abortion." *Id.* The second provision mandated annual inspection of abortion clinics. *Id.* § 16-21-2-2.6.

Planned Parenthood filed a preliminary injunction seeking to enjoin the implementation of the reporting requirement on the grounds that the definition of "abortion complication" was unconstitutionally vague: the definition included—without limitation—"*any* adverse physical or psychological condition arising from the induction or performance of an abortion." *Id.* § 16-34-2-4.7(a) (amended eff. July 1, 2019)

(emphasis added). The court agreed and granted the injunction. (Filing No. 30, Findings of Fact and Conclusions of Law).

In response, the General Assembly enacted House Enrolled Act 1211 in 2019, which amended the reporting requirement but left the inspection requirement undisturbed. The Complications Statute now reads:

> As used in this section, "abortion complication" means only the following physical or psychological conditions arising from the induction or performance of an abortion:
>
> (1) Uterine perforation.
> (2) Cervical laceration.
> (3) Infection.
> (4) Vaginal bleeding that qualifies as a Grade 2 or higher adverse event according to the Common Terminology Criteria for Adverse Events (CTCAE).
> (5) Pulmonary embolism.
> (6) Deep vein thrombosis.
> (7) Failure to terminate the pregnancy.
> (8) Incomplete abortion (retained tissue).
> (9) Pelvic inflammatory disease.
> (10) Missed ectopic pregnancy.
> (11) Cardiac arrest.
> (12) Respiratory arrest.
> (13) Renal failure.
> (14) Shock.
> (15) Amniotic fluid embolism.
> (16) Coma.
> (17) Placenta previa in subsequent pregnancies.
> (18) Pre-term delivery in subsequent pregnancies.
> (19) Free fluid in the abdomen.
> (20) Hemolytic reaction due to the administration of ABO-incompatible blood or blood products.
> (21) Hypoglycemia occurring while the patient is being treated at the abortion facility.
> (22) Allergic reaction to anesthesia or abortion inducing drugs.
> (23) Psychological complications, including depression, suicidal ideation, anxiety, and sleeping disorders.

(24) Death.
(25) Any other adverse event as defined by criteria in the Food and Drug Administration Safety Information and Adverse Event Reporting Program.

Ind. Code. § 16-34-2-4.7(a). The rest of the statute remained substantively unchanged. The statute requires physicians, hospitals, and abortion clinics to report to the Indiana State Department of Health each case in which the person or entity treated a woman suffering from an abortion complication. *Id.* § 16-34-2-4.7(b). The complications must be submitted every year to the Department on a form developed by the Department. *Id.* § 16-34-2-4.7(c), (d). Not later than June 30 of each year, the Department must summarize the information collected from the previous year and submit the findings to the United States Centers for Disease Control and Prevention for inclusion in its annual Vital Statistics Report. *Id.* § 16-34-2-4.7(g), (h). Each failure to report an abortion complication is a Class B misdemeanor. *Id.* § 16-34-2-4.7(j).

The Inspection Statute directs the Department of Health to inspect abortion clinics on an annual basis. *Id.* § 16-21-2-2.6. The Department may also conduct complaint inspections as needed. *Id.* Prior to the enactment of Senate Enrolled Act 340, Indiana law provided that the Department "*may* inspect an abortion clinic at least one (1) time per calendar year and may conduct a complaint inspection as needed." *Id.* (amended eff. July 1, 2018) (emphasis added). The Inspection Statute's annual inspection requirement only applies to abortion clinics.

III. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

IV. Planned Parenthood's Vagueness Challenge to the Complications Statute

Planned Parenthood argues the Complications Statute is unconstitutionally vague in two respects. First, it asserts the phrase "arising from the induction or performance of an abortion" is vague and provides no meaningful guidance on when "complications" must be reported. Second, Planned Parenthood identifies two specific enumerated complications as vague: "psychological complications" and "other adverse events." Planned Parenthood brings a facial vagueness challenge to the Complications Statute. As a threshold matter, the court must consider whether Planned Parenthood is entitled to do so.

A. Facial Challenge to the Complications Statute

The Seventh Circuit has identified three categories of statutes for purposes of a vagueness challenge: (1) statutes that implicate activities protected by the First Amendment, *United States v. Cook*, 914 F.3d 545, 550 (7th Cir. 2019); (2) statutes that "simply ha[ve] no core and lack[] any ascertainable standard for inclusion and exclusion" (internal quotations omitted), *id.*; and (3) statutes that have a "readily appreciable core of

conduct that the statute reaches," but that leave "uncertainty as to whether the statute might apply to certain hypothetical facts," *id.* at 553-54.[3] Plaintiffs challenging statutes that fall within the second category may bring a facial challenge, while statutes that fall within the third category are limited to as-applied challenges. *Id.* at 550.

The court finds that the Complications Statute falls within the second category. The conduct intended to be covered by the statute is itself subject to uncertainty. Questions of causation are at the heart of Planned Parenthood's challenge to the statute, and the statute fails to establish clear standards for whether certain conduct falls within its ambit.

The State argues that the analysis in *Cook* should lead the court to a finding that the Complications Statute has a readily appreciable core of conduct, and the only question is how the statute may apply to specific facts. In *Cook*, the Seventh Circuit considered a facial challenge to a federal statute that prohibited an unlawful user of a controlled substance from possessing a firearm. *Id.* at 549. The court held that Cook was not entitled to bring a facial challenge to the statute because there is a "readily appreciable core of conduct prohibited by the statute," *id.* at 551, and his conduct "undoubtedly falls within the obvious core of conduct proscribed by the statute," *id.* at 554-55. But in making this determination, the court found guidance in case law as to what that "core of conduct" included. The court looked to *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), for additional "gloss on the statute" to evaluate Cook's

[3] The parties agree that Planned Parenthood is not challenging the statute under the First Amendment.

vagueness claim. *Cook*, 914 F.3d at 551. *Yancy* construed the term "unlawful user" to mean one who regularly or habitually ingests controlled substances in a manner other than as prescribed by a physician. *Id.* (citing *Yancy*, 621 F.3d at 682). With that definition in mind, the *Cook* court could easily find that "there can be no doubt as to the core of conduct that the statute (as construed by *Yancey*) proscribes: the possession of a firearm by an individual engaged in the regular, non-prescribed use of a controlled substance." 914 F.3d at 551.

But the Complications Statute is not subject to the same construction. Unlike the challenged statute in *Cook*, the language in the Complications Statute has not been previously interpreted to provide greater specificity. The question of causation—whether a complication arose from an abortion—is at the heart of Planned Parenthood's challenge. Any time a patient presents with one or more of the enumerated "complications," a physician or other medical provider must determine, without any statutory standard, whether it arose from the abortion procedure. This is not the narrowly defined core of conduct presented in *Cook*: if someone regularly uses marijuana or another controlled substance other than as directed by a physician, that person may not possess a firearm so long as the use persists. Under the Complications Statute, physicians are left to guess whether the statute reaches their decision to report or not to report. "Such a standardless statute poses a trap for the person acting in good faith, who is given no guidepost by which he can divine what sort of conduct is prohibited." *Cook*, 914 F.3d at 550. Because the statute has no core and lacks any ascertainable standard for inclusion and exclusion, Planned Parenthood may bring a facial challenge to the statute.

B. Vagueness Overview

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). "The void for vagueness doctrine rests on the basic due process principle that a law is unconstitutional if its prohibitions are not clearly defined." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). In *Grayned v. City of Rockford*, the Supreme Court explained the principles underlying the doctrine:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. 104, 108-09 (1972) (footnotes omitted). But courts have cautioned that these principles should not be mechanically applied, as "the degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Courts are more tolerant of statutes with civil rather than criminal penalties because "the consequences of imprecision are qualitatively less severe." *Id.* at 499; *see also Whatley v. Zatecky*, 833 F.3d 762, 777 (7th Cir. 2016) ("And so statutes involving business regulations or other civil matters need not be as precise as those which impose

criminal penalties or those that may infringe on constitutional rights."). Penal statutes must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Seventh Circuit has also recognized that sanctions against an individual's license implicate vagueness concerns.[4] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d 929, 949 (S.D. Ind. 2017) (citing *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1129-30 (7th Cir. 1984); *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1123-24 (7th Cir. 1983)).

C. The Phrase "arising from the induction or performance of an abortion" Is Unconstitutionally Vague

The Complications Statute defines "abortion complication" as "only the following physical or psychological conditions *arising from* the induction or performance of an abortion." Ind. Code. § 16-34-2-4.7(a) (emphasis added). Planned Parenthood contends that this language is vague for two reasons. First, the language is not clear as to the extent to which a complication must be caused by the abortion itself. Second, the statute requires a degree of certainty as to causation that does not exist.

The court agrees. The statute simply lacks any standard to guide physicians in determining whether a condition qualifies as an abortion complication for purposes of reporting. The indeterminacy of the statute's requirements denies fair notice to

[4] The Indiana Medical Licensing Board has the authority to discipline any physician who "knowingly violated any state statute or rule, or federal statute or regulation, regulating the profession in question." Ind. Code. § 25-1-9-4(a)(3).

physicians and invites arbitrary enforcement by prosecutors. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes. And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.") (citations omitted).

The language of the statute does not make clear whether the duty to report covers conditions exclusively caused by the abortion procedure, conditions that are only slightly caused or exacerbated by the abortion procedure, or something in between. The language also fails to indicate whether a complication must only be reported if the physician is 100 percent certain it was caused by the abortion, or if the obligation to report includes complications that the physician thinks are more likely than not attributable to the abortion procedure.

Consider a physician who treats a woman who previously obtained an abortion and is experiencing depression. Under the statute, the physician must decide whether the patient's depression arose from the abortion procedure. But the statute provides no guidance as to how the physician—who is not a licensed psychiatrist or clinical psychologist—must make that determination. It is not clear whether the physician must categorically rule out other possible causes of the depression before reporting, or if it is simply enough to say that the patient's depression could possibly be attributed to the abortion.

Alternatively, take the case of a woman who had an abortion and subsequently experiences a pre-term birth. Under the statute, pre-term delivery in a subsequent pregnancy must be reported if it arose from an abortion procedure. The litigants' experts disagree as to whether there is any causal connection between abortions and pre-term delivery in subsequent pregnancies. (*Compare* Filing No. 16-5, Declaration of Sabrina Holmquist, ¶ 44 (stating studies regarding the effect of an abortion procedure on pre-term delivery in subsequent pregnancies are inconsistent; while some studies have found an association between second trimester abortion and subsequent pre-term delivery, causation has never been shown. This association has not been shown for first trimester or medication abortion.), *with* Filing No. 24-1, Declaration of Christina Francis, ¶ 20 (stating a review of the literature shows that abortion often leads to complications with subsequent pregnancies, mainly pre-term delivery.)). The State, through its experts, has made its position known. But the statute fails to give the treating physician any guidance in determining when a pre-term delivery must be reported as an abortion complication. As a result, physicians may feel obligated to report *any* pre-term delivery if the woman previously had an abortion, despite the dispute over whether there is any causal relationship at all. These scenarios are particularly troubling given the potential criminal and professional implications of not reporting. The result, of course, is that physicians and other providers may overreport the enumerated complications, making abortion appear less safe than it really is.

Not to worry, the State says: we can avoid these concerns by simply reading a *mens rea* requirement into the statute. *See State v. Keihn*, 542 N.E.2d 963, 967 (Ind.

1989) (finding a presumption in Indiana law that criminal statutes require proof of *mens rea*.). According to the State, a condition must be reported as an abortion complication if, in the physician's reasonable medical judgment, it arose from the abortion procedure. For support, the State directs the court to the Seventh Circuit's decision in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999). In *Karlin*, the Seventh Circuit rejected a vagueness challenge to a Wisconsin law requiring physicians to exercise "reasonable medical judgment" to determine whether a medical emergency existed before performing an abortion. *Id.* at 468.[5] The court concluded that an objective standard in this context is not per se unconstitutionally vague; the "reasonable medical judgment" standard provides physicians fair warning as to what conduct is expected of them to avoid liability; and that the standard could adequately guide those responsible for enforcing the statute. *Id*.

The difficulty with the State's argument is that what the State asks the court to read into the statute is not a *mens rea* requirement, but rather a standard to govern the determination of whether a condition qualifies as an abortion complication.[6] That is something else entirely. Reasonable medical judgment is not a *mens rea* because its

[5] The statute defined a "medical emergency" as: "[A] condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." Wis. Stat. § 253.10(2)(d).

[6] The court notes that the statute in fact lacks both a standard to guide the determination of what qualifies as an abortion complication under subsection (a) and a *mens rea* requirement to define the mental state required to commit the criminal act under subsection (j). Subsection (j) reads: "each failure to report an abortion complication as required under this section is a class B misdemeanor." Ind. Code § 16-34-2-4.7(j). It does not provide that the failure must have been done "knowingly" or "recklessly," for example.

inclusion in the statute would not demonstrate that an individual had the required mental state at the time of committing the statute's *actus reus*: failing to report an abortion complication. If a true *mens rea* were read into the statute—such as "knowingly" or "recklessly"—it would not save the statute because it could not be read into subsection (a), which contains the challenged language. Rather, it would be read into subsection (j), which contains the criminal act: failure to report an abortion complication. But the statute is not unconstitutionally vague because subsection (j) lacks a *mens rea* requirement. It is unconstitutionally vague because the statute fails to provide any standard to precisely define the contours of the underlying act—determining whether a complication arises from an abortion procedure—that ultimately leads to the prohibited activity: failing to report an abortion complication.

The court declines the State's invitation to read into the statute a standard that the General Assembly left out. The presumption that criminal statutes require proof of *mens rea* does not mean the court can import a *standard* into the statute. The State has not cited to a case where a court has read a reasonable medical judgment standard into a statute, and the court is unaware of such a case. Instead, the State cites to a case where a statute included the reasonable medical judgment standard in the text and imposed only civil penalties for any violation. But that is not this case, and the State's reliance on *Karlin* is inapposite.

First, the statute in *Karlin* contained an *explicit* standard; the Complications Statute contains *no* standard. As the court in *Karlin* noted, "to avoid a finding of vagueness in the abortion context, a statute that imposes liability for violations of its

provisions must provide an explicit standard for those who enforce or apply the statutes provisions so as to prevent them from engaging in arbitrary and discriminatory enforcement." 188 F.3d at 465. Planned Parenthood does not argue that a reasonable medical judgment standard—if included in the language of the statute—is itself unconstitutional. Rather, the core of Planned Parenthood's argument is that the General Assembly failed to provide *any* standard in the statute.

Karlin is not on point for a second reason. The statute at issue in that case involved civil penalties; it did not impose criminal liability. Violations under that statute resulted in civil liability, a penalty constituting monetary forfeiture, and professional discipline. *Id.* at 466. Under the Complications Statute, each failure to report an abortion complication is a Class B misdemeanor. While the Seventh Circuit in *Karlin* could find the Wisconsin statute sufficiently precise to survive a vagueness challenge, that statute included an explicit standard and imposed only civil penalties. The Complications Statute lacks both features.

"Perhaps the most basic of due process's customary protections is the demand of fair notice." *Dimaya*, 138 S. Ct. at 1225 (Gorsuch, J., concurring). By suggesting the court read in a standard that appears nowhere in the statute, the State asks the court to disregard due process's requirement that criminal laws give ordinary people fair notice of the proscribed conduct. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *Kolender*, 461 U.S. at 357-58. When a physician looks at the text of the statute, how is she to know that a court has read in a requirement that she must use her reasonable medical judgment in determining whether a condition arises from an abortion? She

might guess that that is the applicable standard. But guesswork in the face of criminal liability is surely not permitted by due process, and the court will not place physicians and other practitioners in that position.

When the legislature passes a vague law, courts are not to step in and fashion a new, clearer law. *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). Instead, the court must "treat the law as a nullity and invite the [the legislature] to try again." *Id.* The phrase "arising from the induction or performance of an abortion" does not provide ordinary people with fair notice of what the law demands of them. The statute provides no standard by which practitioners must guide their decision making, and it provides no standard to limit arbitrary prosecution. Therefore, the court concludes that the phrase "arising from the induction or performance of an abortion" is unconstitutionally vague. Because that phrase controls the statute, the court does not reach Planned Parenthood's second vagueness challenge to specific enumerated complications.

V. Planned Parenthood's Equal Protection Challenge to the Inspection Statute

The court now turns to Planned Parenthood's challenge to the constitutionality of the Inspection Statute on equal protection grounds.

"The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' which essentially is a direction that all persons similarly situated should be treated alike." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) (citations omitted). The Supreme Court "has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal

Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (quoting *Heller v. Doe*, 509 U.S. 302, 319-20 (1993). While "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), statutory classifications, even those subject to rational basis review, are not wholly outside judicial oversight. *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014). Under rational basis review, "courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination." *Id.*

In this case, the Inspection Statute passes constitutional muster so long as the State can demonstrate a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. The state legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S 483, 489 (1955). Indeed, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970). Because the State has offered at least a plausible explanation for the decision to subject abortion clinics to stricter inspection requirements, the court concludes the Inspection Statute does not violate equal protection.

According to the State, the annual inspection requirement furthers the State's compelling interest in protecting women's health and fetal life by ensuring abortion

clinics follow applicable health and safety regulations and informed consent requirements Moreover, the State points to the experience with Dr. Ulrich Klopfer, a former Indiana abortion provider who lost his abortion clinic and medical license for numerous violations, as a specific reason for the General Assembly's decision to impose additional inspection requirements.[7] While the State acknowledges that Klopfer's violations were discovered after a complaint was filed against him, the State argues that the violations might have been discovered earlier if the clinic had been subject to annual inspections. Matt Foster, the assistant commissioner for the Consumer Services and Health Care Regulation Commission at the Department of Health, cited the experience with Dr. Klopfer as motivation for the decision to increase the frequency of inspections: "we need to get into these places more frequently, because we don't want, ever, to have another Women's Pavilion on our hands." (Foster Dep. at 66-67).[8]

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[7] Dr. Klopfer's facility, Women's Pavilion of South Bend, was not a Planned Parenthood-affiliated facility. The clinic surrendered its license after the Department of Health conducted an inspection following a complaint. (Foster Dep. at 44). After an inspection of the facility in October 2014 yielded a "50- or 60-page report" outlining various violations, Dr. Klopfer failed to submit an acceptable plan of correction. (*Id.* at 65). The State denied his application for renewal of a license in June 2015. (*Id.* at 66). The hearing on the denial was scheduled for November 2015, but Dr. Klopfer opted to voluntarily surrender his license. (*Id.*).

[8] The court notes the instances cited by Planned Parenthood of other licensed facilities facing similar licensing actions. At least one ambulatory surgical center surrendered its license after an action to revoke its action was started. (Foster Dep. at 54). One or two revocation actions were also initiated against hospitals or surgical centers, though none resulted in the loss of a license. (Stipulation ¶ 1). The actions were resolved through agreed orders which set out what the facilities must do to remedy the violations, and the Department of Health monitored the efforts of each facility and confirmed that the violations were resolved. (*Id.*). But, as noted *supra*, the legislature is not required to choose between addressing every aspect of a problem or not addressing the problem at all. *Dandridge*, 397 U.S. at 486-87. Unlike the situation with Dr. Klopfer, these facilities resolved their license disputes by complying with plans to address the violations. The legislature here has offered a rational reason for addressing abortion clinics first.

Planned Parenthood resists this conclusion on the grounds that it is fundamentally irrational to subject abortion clinics to more stringent inspection requirements than other facilities that perform abortions, such as hospitals and ambulatory surgical centers. If the State were really interested in protecting women's health and fetal life, then it is irrational to not hold all facilities that perform abortion to the same standard. Planned Parenthood cites *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 64 F. Supp. 3d 1235 (S.D. Ind. 2014) ("*PPINK I*") to support its claim that subjecting abortion clinics to more stringent inspection requirements than other health facilities violates equal protection. In that case, the court invalidated on equal protection grounds a statute prohibiting waiver of physical plant requirements for abortion clinics, but not for hospitals and ambulatory surgical centers. The court held that "the State has presented no rational basis for this unequal treatment" because hospitals and ambulatory surgical centers also performed abortions. *Id.* at 1259-60. The court reasoned that because the generally applicable waiver rule already prohibited granting a waiver that would adversely affect the health and safety of patients, the abortion clinic waiver provision could not be justified on health grounds. *Id.* at 1259. The court also rejected the State's argument that the legislature may require abortion clinics to be minimally prepared to treat abortion complications surgically because the waiver provision did not apply to all medical facilities that performed abortions. *Id.* Hospitals and ambulatory surgical centers were free to obtain a waiver, even though they also performed abortions. *Id.* at 1259-60.

This case presents a different set of facts than those at issue in *PPINK I*. Abortion clinics, hospitals, and ambulatory surgical centers were not differently situated for purposes of the State's proffered rationales in *PPINK I*—the woman's health and safety and minimum surgical capability requirements. Here, by contrast, the State has pointed to a critical difference between abortion clinics and hospitals and ambulatory surgical centers, and it is that difference on which the State justifies its differing treatment. Hospitals and ambulatory surgical centers may join an accrediting agency which will complete the federally required inspections. Under state law, the State must issue a license to any of these member entities that pass the inspection, even though these facilities may perform abortions. Ind. Code § 16-21-2-13(b)(2). There is no similar arrangement for abortion clinics. If abortion clinics are to be inspected—and they must be—that responsibility falls to the State. Because the State has offered a rational reason for the decision to subject abortion clinics to stricter inspection requirements, the court concludes the Inspection Statute does not violate equal protection.

VI. Conclusion

For the reasons set forth herein, the court **GRANTS in part** and **DENIES in part** Planned Parenthood's Motion for Summary Judgment (Filing No. 73). The court grants its motion on its claim that Indiana Code § 16-34-2-4.7 is unconstitutionally vague. The court **DENIES** Planned Parenthood's request for summary judgment on its claim that Indiana Code § 16-21-2-2.6 violates equal protection. The court **GRANTS in part** and **DENIES in part** the State's Motion for Summary Judgment (Filing No. 77). The court **GRANTS** the State's motion on its claim that Indiana Code § 16-21-2-2.6 does not

violate equal protection. The court **DENIES** the State's request for summary judgment on its claim that Indiana Code § 16-34-2-4.7 is not unconstitutionally vague.

SO ORDERED this 8th day of July 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:18-cv-01219-RLY-DLP
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, MARION COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD,	)	
Defendants.	)	

FINAL JUDGMENT

The court, having **GRANTED in part** and **DENIED in part** Plaintiff's Motion for Summary Judgment and having **GRANTED in part** and **DENIED in part** Defendant's Motion for Summary Judgment, now enters final judgment in favor of Plaintiff and against Defendant on Plaintiff's claim that Indiana Code § 16-34-2-4.7 is unconstitutionally vague, and enters final judgment in favor of Defendant and against Plaintiff on Defendant's claim that Indiana Code § 16-21-2-2.6 does not violate equal protection.

SO ORDERED this 14th day of July 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Roger Sharpe, Clerk,
United States District Court

Deputy Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., Plaintiff, v. COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, MARION COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD, Defendants.	)	No. 1:18-cv-01219-RLY-DLP

AMENDED FINAL JUDGMENT

The court, having **GRANTED in part** and **DENIED in part** Plaintiff's Motion for Summary Judgment and having **GRANTED in part** and **DENIED in part** Defendants' Motion for Summary Judgment, now enters final judgment in favor of Plaintiff and against Defendants on Plaintiff's claim that Indiana Code § 16-34-2-4.7 is unconstitutionally vague and, finding that all the requirements are met, enters a **PERMANENT INJUNCTION** preventing enforcement of the statute. Accordingly, Defendants, and all their respective officers, agents, servants, employees, and persons acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Code § 16-34-2-4.7.

The court also enters final judgment in favor of Defendants and against Plaintiff on Defendants' claim that Indiana Code § 16-21-2-2.6 does not violate equal protection.

SO ORDERED this 28th day of July 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Roger Sharpe, Clerk,
United States District Court

Dina M. Dafle
By: Deputy Clerk