

INDIANA COMMERCIAL COURT

STATE OF INDIANA)
) SS:
COUNTY OF MARION) CAUSE NO. _____

CAITLIN BERNARD, M.D., on her own behalf)
and on behalf of her patients; AMY CALDWELL,)
M.D., on her own behalf and on behalf of her)
patients,)
)

Plaintiffs,)
)

v.)
)

TODD ROKITA, in his official capacity as)
Attorney General of the State of Indiana; SCOTT)
BARNHART, in his official capacity as Chief)
Counsel and Director of the Consumer Protection)
Division of the Office of the Attorney General of)
the State of Indiana,)
)

Defendants.)
)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Caitlin Bernard, M.D., on her own behalf and on behalf of her patients; and Amy Caldwell, M.D., on her own behalf and on behalf of her patients (collectively, “Plaintiffs”), bring this Complaint against Todd Rokita, in his official capacity as Attorney General of the State of Indiana; and Scott Barnhart, in his official capacity as Chief Counsel and Director of the Consumer Protection Division of the Office of the Attorney General of the State of Indiana (collectively, “Defendants”), and in support thereof state the following:

INTRODUCTION

1. This is an action for declaratory and injunctive relief to prevent Defendants from exceeding their authority under Indiana law by flouting the Indiana General Assembly’s carefully

crafted structure for regulating physicians and other licensed professionals. Unless this Court intervenes, Defendants will continue to unlawfully harass physicians and patients who are engaged in completely legal conduct and even though neither the physicians nor patients have any complaints about their relationship. Defendants' current targets are physicians who provide medical care, including abortion services permitted under Indiana law. But there is no reason to believe Defendants will stop there. All licensed professionals face the exact same dangers as Plaintiffs. Accordingly, only judicial relief that enforces the existing statutory scheme can prevent the unlawful expansion of the Defendants' investigatory authority over regulated professionals and ensure that Indiana's licensed physicians can practice medicine and prosper in the free market without the fear of unchecked prosecutorial oversight.

2. Indiana law provides a process for individuals to file consumer complaints regarding practitioners of certain regulated professions, including physicians. The Attorney General's office, through its Consumer Protection Division, has statutory authority to investigate certain consumer complaints regarding most licensed professionals.

3. But to protect licensed professionals from unnecessary and improper harassment by the government and foster Indiana's business environment, the Indiana General Assembly made sure to limit the Attorney General's ability to conduct investigations. The General Assembly accomplished this goal by prohibiting investigations of licensed professionals until after the Attorney General has made an assessment that a consumer complaint has "merit."

4. The General Assembly did not stop there. The relevant statutes not only require the Attorney General to first determine that a consumer complaint has merit, but also unambiguously demonstrate that the Attorney General has no power to "investigate" frivolous complaints by also mandating that a consumer complaint must relate to the complainant's

relationship to, or transaction with, the subject of the complaint, or, at the very least, be based on the complainant's personal knowledge relating to the relevant transaction. Complainants therefore must affirm, under penalty of perjury, that the consumer complaint's representations are true. Even then, the General Assembly further restricted the Attorney General's authority by limiting investigations only to those areas in which there appears to be a violation of statutes governing the regulated occupation.

5. The General Assembly sensibly imposed one additional constraint on the Attorney General's authority to conduct investigations of consumer complaints: with limited exceptions, the General Assembly mandated that the Attorney General must keep consumer complaints and information about them confidential. Public disclosure of consumer complaints by the Attorney General has the potential to tarnish the reputation of Indiana's licensed professionals and to destroy businesses. This is true even if the investigation ultimately goes nowhere. Indeed, the General Assembly recognized that the Attorney General's public disclosure of an investigation might receive considerable publicity, causing untold damage to a licensed professional's business. But, with confidentiality retained, the business interests and reputations of Indiana's licensed professionals will be protected if the investigation goes nowhere or is found to have been unfounded in the first place.

6. Together, the requirements that the Attorney General must find a consumer complaint has merit before launching an investigation and that investigations once started must be narrowly focused and kept confidential reflect the General Assembly's desire to permit lawful investigations into legitimate consumer complaints while protecting the reputations and livelihoods of licensed professionals.

7. The Attorney General has wholly ignored the General Assembly's fine-tuned structure for handling consumer complaints regarding licensed professionals and has engaged in precisely the type of overbearing, harassing conduct that the General Assembly sought to prohibit. The Attorney General has completely ignored the requirement to determine that consumer complaints have "merit" before he can investigate and has instead used facially invalid consumer complaints to justify multiple, duplicative, and overbroad investigations into law-abiding physicians—investigations which are intended neither to identify violations of law nor to resolve disputes between regulated professionals and bona fide consumers. And, the Attorney General has violated the unambiguous statutory mandate that he keep investigations confidential. This conduct violates numerous Indiana statutes that permit the Attorney General to investigate only potentially meritorious complaints containing allegations disclosing an apparent violation of law by a regulated professional and to keep such investigations confidential.

8. On their face, the consumer complaints giving rise to these investigations are frivolous and do not meet the statutory standards. Instead, the complaints were submitted by individuals who have no relationship with the targeted physicians or their patients, who lack any personal knowledge of the alleged circumstances giving rise to the complaints, and who have not even provided all the information required on the consumer complaint forms. These consumer complaints could not be affirmed under penalty of perjury even under the most generous of readings, even though the complainants purported to do so. Defendants could not make the merit determination needed to permit investigations of these consumer complaints.

9. Compounding the improper nature of the Attorney General's investigations, he has issued subpoenas seeking the confidential medical records of individuals who did not themselves file complaints about their physicians and who by all accounts are perfectly satisfied with the

medical care they received. The Attorney General's unilateral decision to seek the entire medical file for these individuals based on third-party consumer complaints that are facially false and implausible, and which the Attorney General actually knows are unfounded, highlights why the General Assembly imposed limits on the Attorney General's ability to investigate consumer complaints.

10. Plaintiffs seek declaratory and injunctive relief to halt Defendants' actions that exceed their statutorily limited investigatory authority and prevent future statutory violations.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this matter pursuant to the Indiana Constitution, Article 7, section 8, and Indiana Code § 33-28-1-2.

12. Plaintiffs' claims for declaratory and injunctive relief are authorized by Indiana Code § 34-14-1-1, as well as the general equitable powers of this Court.

13. Venue is proper in Marion County under Indiana Trial Rule 75(A)(5), because the principal office of Defendants is located in Marion County.

THE PARTIES

A. Plaintiffs.

14. Dr. Caitlin Bernard is an OB/GYN physician licensed to practice medicine in the State of Indiana. Dr. Bernard is employed by IU Health Physicians and by the Indiana University School of Medicine.

15. Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in the State of Indiana. Dr. Caldwell is employed by IU Health Physicians and by the Indiana University School of Medicine.

16. Plaintiffs bring this action on behalf of themselves and current and future physicians who participate in activities that could subject them to similar improper investigations by the Attorney General.

17. To the extent Plaintiffs seek relief on behalf of their patients, Plaintiffs have standing to protect their patients' statutory and constitutional rights to privacy in their medical information because Plaintiffs can establish an injury, close relationships with their patients, and hindrances on their patients' ability to protect their own interests. *See Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 870, 873 (Ind. Ct. App. 2006) (finding that Planned Parenthood of Indiana had "standing to assert a Fourteenth Amendment informational privacy claim on behalf of its patients"). Additionally, Plaintiffs' patients will suffer injuries to their privacy rights without an injunction preventing Defendants' unlawful conduct. Plaintiffs have sufficiently close relationships with their patients, *see Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("[T]he physician is uniquely qualified to litigate the constitutionality of the State's interference" with a patient's rights), and Plaintiffs' patients are hindered from protecting their own interests because the investigations into their records are supposed to be confidential, Ind. Code § 25-1-7-10, since they cannot protect their own interests absent notice from Defendants that their confidential files are subject to unauthorized disclosure.

B. Defendants.

18. Todd Rokita is the Attorney General of the State of Indiana. He is sued in his official capacity.

19. Scott Barnhart is the Chief Counsel and Director (the "Director") of the Consumer Protection Division of the Office of the Attorney General of the State of Indiana (the "Division"). He is sued in his official capacity.

FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS

A. The Indiana Code Permits the Attorney General to Investigate Consumer Complaints Involving Licensed Medical Professionals Subject to Several Statutory Constraints.

20. The Indiana Code allows consumers to file complaints regarding licensed professionals engaged in certain regulated occupations. Ind. Code § 25-1-7 *et seq.* The Code carefully regulates the process for handling these complaints.

21. The Attorney General's Office is statutorily limited to receiving, investigating, and prosecuting consumer complaints concerning regulated occupations "under the conditions specified in this chapter." Ind. Code § 25-1-7-2. Because the Attorney General is a statutory officer, he may "exercis[e] only the authority granted by statute," and any receipt, investigation, or prosecution of consumer complaints concerning a regulated occupation that does not conform to Chapter 7 is necessarily invalid and ultra vires. *State ex rel. Steers v. Holovachka*, 142 N.E.2d 593, 602 (Ind. 1957).

22. The Indiana Code expressly limits the Attorney General's authority to investigate complaints about licensed physicians.

23. For certain types of consumer complaints, the General Assembly has conferred the Medical Licensing Board with exclusive jurisdiction to investigate a range of complaints brought against physicians. *See* Ind. Code § 25-22.5-2-8.

24. Relevant here, the General Assembly also conferred authority on the Attorney General to conduct investigations of certain consumer complaints about licensed physicians, but only subject to certain specified constraints. Complaints must be filed with the Director of the Consumer Protection Division within the Office of the Attorney General, and the Director is charged with evaluating consumer complaints for the Attorney General. *See* Ind. Code §§ 25-1-7-4; 25-1-7-5.

25. First, the Director must “make an initial determination as to the *merit* of each complaint.” Ind. Code § 25-1-7-5(b)(1) (emphasis added).

26. Second, only “*a complaint having merit* shall be submitted to the board having jurisdiction over the licensee’s regulated occupation.” *Id.* (emphasis added).

27. Third, even when a complaint has merit, the investigation “shall be limited to those areas in which there appears to be a violation of statutes governing the regulated occupation.” Ind. Code § 25-1-7-5(b)(4).

28. The statutory framework demonstrates that a consumer complaint’s merit must be evaluated in light of certain fundamental requirements. For example, the consumer complaint statutes presume that the complainant engaged in a transaction with the person who is the subject of the complaint and that the complainant has personal knowledge regarding the consumer complaint they are submitting. Moreover, the Attorney General’s Consumer Complaint Form seeks information such as the date and place of the *transaction*, and asks the consumer questions such as: “What was the very first contact *between you and the Individual/Business?*” and “How did *you* Pay?” *See Consumer Complaint*, OFF. IND. ATT’Y GEN., available at <https://www.in.gov/attorneygeneral/consumer-protection-division/files/Printable-Consumer-Complaint-Form.pdf> (emphases added). The statutory structure also requires the complainant to assert some relationship to transactions that took place in Indiana.

29. To assure that a complaint is based on personal knowledge, the Attorney General’s Consumer Complaint Form requires the complainant to affirm, under penalty of perjury, that the representations in the complaint are true. *Id.*

30. The personal knowledge requirement for consumer complaints parallels requirements for petitions leading to a Civil Investigative Demand (“CID”) and other investigatory

subpoenas. As the Indiana Supreme Court held in the context of determining whether a CID is proper, consumer complaints must be reviewed with the “thoughtfulness and care the statute requires.” *Nu-Sash of Indianapolis, Inc. v. Carter*, 887 N.E.2d 92, 97 (Ind. 2008). Such a requirement “affords all citizens some protection against ‘fishing expeditions’ or retaliatory or abusive CIDs that are unrelated to legitimate investigations, and imposes a mild deterrent to arbitrary use of government authority.” *Id.* at 96.

B. The Facially Invalid “Consumer” Complaints.

31. On July 1, 2022, the Indianapolis Star reported that Dr. Bernard provided care to a 10-year-old patient who had been referred by a child abuse doctor in Ohio. Shari Rudavsky & Rachel Fradette, *Patients head to Indiana for abortion services as other states restrict care*, INDIANAPOLIS STAR (July 1, 2022), <https://www.indystar.com/story/news/health/2022/07/01/Indiana-abortion-law-roe-vwade-overturned-travel/7779936001/>. Other stories soon reported that the patient had been raped. *See, e.g.,* Andrew Stanton, ‘She’s 10’: Child Rape Victim’s Abortion Denial Sparks Outrage on Twitter, NEWSWEEK (July 2, 2022), <https://www.newsweek.com/shes-10-child-rape-victims-abortion-denial-sparks-outrage-twitter-1721248>; Kylie Cheung, *A 10-Year-Old Girl in Ohio Was Forced to Travel to Indiana for an Abortion*, JEZEBEL (July 2, 2022), <https://jezebel.com/a-10-year-old-girl-in-ohio-was-forced-to-travel-to-indi-1849136765>.

32. On July 2, 2022, after providing abortion care to this patient, Dr. Bernard complied with all reporting requirements under Indiana law. As required by Ind. Code § 16-34-2-5(b), Dr. Bernard timely submitted a Termination of Pregnancy Report (“TPR”), which is required for every abortion performed in the state. The TPR requires the physician to provide a broad range of information about the patient, including among many other items, the age and marital status of the

patient, the reason for the abortion, and whether the patient was seeking an abortion as the result of being abused, coerced, harassed, or trafficked. Ind. Code § 16-34-2-5(a). The TPR and accompanying communications submitted by Dr. Bernard included information confirming that Dr. Bernard had performed the abortion on a minor and was cooperating with authorities investigating the rape of her patient.

33. Abortion providers are always subject to intense scrutiny and political pressure. The scrutiny here was particularly intense because the events took place in the weeks following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, in which the Court overturned *Roe v. Wade*.

34. Between July 8, 2022 and July 12, 2022, seven individuals filed consumer complaints against Dr. Bernard.

35. These consumer complaints all were submitted by individuals who saw news stories or social media posts concerning Dr. Bernard's patient and at a time when a news outlet was asserting that Dr. Bernard was an activist and baselessly questioning whether she had reported child abuse to the police.

36. The consumer complaints were submitted by individuals who lack any connection with Plaintiffs, their patients, or, in many instances, the State of Indiana. None of the individuals who filed consumer complaints focused on care that they personally received from Plaintiffs.

37. The consumer complaints were submitted by individuals who did not claim to have engaged in, or made any attempt to engage in, a transaction in Indiana, let alone a transaction with Drs. Bernard or Caldwell. Indeed, most of the complaints were submitted by individuals who did not claim to reside in Indiana.

38. The face of the consumer complaints showed the allegations to be based on rumor, hearsay, or speculation. Thus, the complaints failed to satisfy the requirements of a valid affirmation. The Consumer Complaint Form requires that the complainant affirm under penalties for perjury that the representations in the complaint are true, requiring the complainant to have personal knowledge of its allegations. But the consumer complaints that gave rise to the “investigation” of Dr. Bernard were filed by individuals who patently lacked any personal knowledge of the allegations contained therein, and who therefore could not verify the accuracy of those allegations under penalty of perjury.

39. For example, one complainant did not claim to have received any care from Dr. Bernard and instead asserted, without foundation, that Dr. Bernard did not comply with Indiana’s reporting law:

Section 5 Transaction/Incident Details – attach additional pages if necessary
<small>Please remember to attach a copy of all documentation involved (order blank, warranty, credit card receipt and statement, invoice, contract or written agreement, advertisement, cancelled check, correspondence etc). Please print clearly or type. Do Not include your Social Security Number.</small>
<small>If you answered "Yes" to 4-E or 4-F above please include in the transaction/incident details below when you complained and what action was taken.</small>
Miss Berhard kept knowledge of the rape of a 10 year old from authorities

The complainant offered no further explanation or any details that would give rise to a reasonable belief that the assertion was accurate.

40. That complaint further reflected a lack of personal knowledge of Dr. Bernard by entering plainly false contact information:

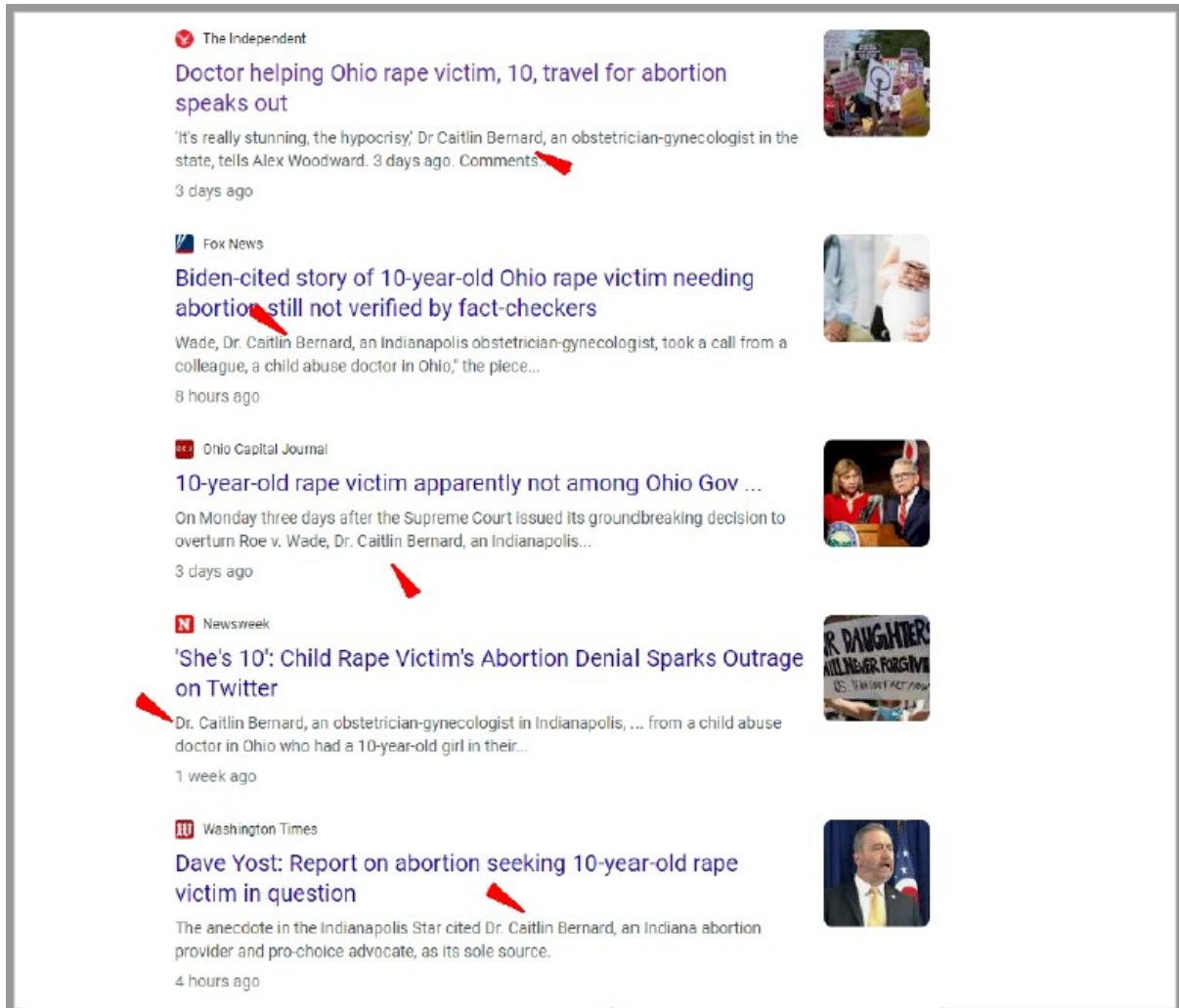
Section 2: Who is the Complaint Against?			
Individual/Business Dr Caitlin Bernard		Name of Individual/Representative you dealt with	
Street Address U of I		City Indianapolis	State IN
County	Daytime Phone 555555555	Zip Code 00000	
		Email Address	

41. Likewise, another complainant admitted that the consumer complaint was filed in response to something the complainant saw on television and that they were not even a resident of Indiana. The complainant also did not claim to have received any services from Dr. Bernard and instead complained that Dr. Bernard had harmed the image of Ohio, where the complainant resided:

Section 5 Transaction/Incident Details – <i>attach additional pages if necessary</i>
<p>Please remember to attach a copy of all documentation involved (order blank, warranty, credit card receipt and statement, invoice, contract or written agreement, advertisement, cancelled check, correspondence etc). Please print clearly or type. Do Not Include your Social Security Number.</p> <p>If you answered "Yes" to 4-E or 4-F above please include in the transaction/incident details below when you complained and what action was taken.</p> <p>Dr. Caitlin Bernard appeared on numerous Television shows and news media regarding the pregnancy of a 10 year old Ohio girl that was forced to cross over to Indiana to have an abortion. Since this time the story is being questioned and the Ohio State Attorney General Yost has stated his office has no record of any of these happenings.</p> <p>As a citizen of Ohio I feel that this misinformation (aka LIE) harmed my State's image AND is a malicious act intended to harm people such as myself that hold a pro-life position. I have personally experienced hostility against me with specific mention of Dr. Bernard's interviews and her claim of a 10 year old Ohio girl being forced to have an abortion in Bernard's Indiana clinic.</p> <p>If I am continued to be harrassed in this manner I will be filing a personal injury case against Dr. Bernard.</p> <p>Examples of her comments made to the media include: https://www.msnbc.com/the-last-word/watch/-we-need-to-provide-this-care-doctor-blasts-gop-abortion-bans-143560261745</p>

Again, the complaint offered no details that would give rise to a reasonable belief that the complainant had accurate information, much less first-hand knowledge, regarding Dr. Bernard.

42. Instead, the complaint attached what appears to be the results of an internet search engine:



43. Another consumer complaint made clear that the complainant had no personal knowledge of Dr. Bernard other than what was reported in the news:

3-D: What was the very first contact between you and the Individual/Business?

<input type="checkbox"/> I telephoned the individual/business	<input type="checkbox"/> I received information in the mail	<input type="checkbox"/> I responded to a printed advertisement
<input type="checkbox"/> I responded to a TV/radio ad	<input type="checkbox"/> I went to the location of the business	<input checked="" type="checkbox"/> Other, describe below
<input type="checkbox"/> A person came to my home	<input type="checkbox"/> I received a phone call from the business	Reported in the US Media and President of the United States
<input type="checkbox"/> I received information by email	<input type="checkbox"/> I responded to an offer on the Internet	

44. These consumer complaints were facially invalid and no reasonable prosecutor could determine they have merit. On information and belief, neither the Attorney General nor the Director made a determination that these complaints had merit.

45. Even if the complaints were not facially invalid, there were simple steps available to the Attorney General and the Director to help determine whether the complaints had merit. Had the Attorney General taken reasonable steps to evaluate the consumer complaints, through the Director or otherwise, on the basis of publicly available information, he would have seen that Dr. Bernard dutifully reported the incident and worked with law enforcement officials. The Attorney General took no such steps.

46. Instead, on July 12, 2022, the Attorney General's Office, through the Director, sent letters notifying Dr. Bernard that, pursuant to Title 25 of the Indiana Code, it had opened investigations into five of these consumer complaints.

47. On July 13, 2022, local and national media outlets reported that the rapist of the 10-year-old patient who received abortion services in Indiana was arraigned in Ohio. *See* Bethany Bruner, et al., *Arrest made in rape of Ohio girl that led to Indiana abortion drawing international attention*, COLUMBUS DISPATCH (July 13, 2022), <https://www.dispatch.com/story/news/2022/07/13/columbus-man-charged-rape-10-year-old-led-abortion-in-indiana/10046625002/>; Elahe Izadi, *How local journalists proved a 10-year-old's abortion wasn't a hoax*, WASH. POST, <https://www.washingtonpost.com/media/2022/07/28/ohio-abortion-journalism/>.

48. By July 14, 2022, reporters obtained the TPR that Dr. Bernard had timely submitted to the state through a public records request, and made that TPR public. *See, e.g.*, Matt Christy, *Abortion report confirms Indiana doctor followed law after AG vowed investigation*, FOX59 (July 14, 2022), <https://fox59.com/indiana-news/abortion-report-confirms-indiana-doctor-followed-law-after-ag-vowed-investigation/>. The TPR included information confirming that Dr. Bernard had appropriately reported the abortion itself and was cooperating with authorities investigating

the rape of her patient. Because the TPR is a public record that the Attorney General’s Office may freely access, Ind. Code § 5-14-3-3, the Attorney General and Director had access to actual information that confirmed all consumer complaints against Dr. Bernard based on her alleged failure to report the rape were meritless.

49. Nevertheless, on July 14, 2022, the same day the TPR was made public, the Attorney General’s Office, through the Director, sent a letter notifying Dr. Bernard that it had opened an investigation into an additional consumer complaint.

50. This complaint contained similar defects to those present in the earlier consumer complaints. Specifically, the consumer complaint stated that the complainant, a non-Indiana resident, had *no direct contact* with Dr. Bernard:

3-D: What was the very first contact between you and the Individual/Business?		
<input type="checkbox"/> I telephoned the individual/business	<input type="checkbox"/> I received information in the mail	<input type="checkbox"/> I responded to a printed advertisement
<input type="checkbox"/> I responded to a TV/radio ad	<input type="checkbox"/> I went to the location of the business	<input checked="" type="checkbox"/> Other, describe below
<input type="checkbox"/> A person came to my home	<input type="checkbox"/> I received a phone call from the business	<input type="checkbox"/> No direct contact
<input type="checkbox"/> I received information by email	<input type="checkbox"/> I responded to an offer on the Internet	

Further, the complaint explained that it was based on “news stories” that purportedly stated “Dr. Bernard has failed to report sexual abuse in a child.”

51. In light of these patent defects, no reasonable Attorney General or his staff would have used this consumer complaint as a pretext to open another “investigation” into Dr. Bernard. On information and belief, neither the Attorney General nor the Director, nor any person on their staff, determined that the complaint had merit before initiating an investigation.

52. The Attorney General, through the Director, also opened duplicative investigations. For example, on August 7, 2022, the Attorney General notified Dr. Bernard that he had initiated an investigation into yet another consumer complaint, even though that complaint was just as facially frivolous as the multiple complaints the Attorney General was already “investigating.”

53. This complaint suffered from the same defects as the earlier consumer complaints. Specifically, the consumer complaint did not assert that the complainant had received care from Dr. Bernard, *did not even identify Dr. Bernard as the subject of the complaint*, and reported only the following:

Section 5 Transaction/Incident Details – <i>attach additional pages if necessary</i>
Please remember to attach a copy of all documentation involved (order blank, warranty, credit card receipt and statement, invoice, contract or written agreement, advertisement, cancelled check, correspondence etc). Please print clearly or type. Do Not Include your Social Security Number.
If you answered "Yes" to 4-E or 4-F above please include in the transaction/incident details below when you complained and what action was taken.
doctor did not report rape of 10 year brought to indy from Ohio foe abortion

54. The complainant listed *herself* as the person the complaint was against and provided the following phone number:

Daytime Phone 317

55. The Attorney General and the Director opened the investigation into this consumer complaint even though, weeks before, they *already had access* to information that unambiguously showed there was absolutely no merit to it or any other consumer complaint against Dr. Bernard. As discussed above, a physician who performs an abortion in Indiana must report that procedure to the Indiana Department of Health. Dr. Bernard submitted the required TPR, consistent with Indiana law, and that report was made public. Nonetheless, the Attorney General, through the Director, opened this duplicative and blatantly unnecessary investigation based on this incomplete and invalid consumer complaint.

56. The Attorney General and Director ignored their responsibilities to find that this additional complaint, as well as the other consumer complaints, had merit before opening investigations into them. Instead, the Attorney General and Director opened multiple investigations into Dr. Bernard despite the obvious deficiencies in all the consumer complaints and the fact that publicly available information indicated that the complaints were frivolous.

57. Simply put, by the time the Attorney General and the Director notified Dr. Bernard that the investigations were opened, they already had access to the relevant materials that confirmed that Dr. Bernard had complied with all applicable reporting laws and that the additional complaint had absolutely no merit.

58. After opening investigations into these meritless complaints, the Attorney General and Director took the additional step of issuing sweepingly broad document subpoenas to a hospital system purportedly pursuant to the statutory authority of Indiana Code § 25-1-7-5(b)(5) for “the entire medical file” of the patient discussed in the news stories.

59. The Attorney General and Director issued these subpoenas on August 23, 2022, weeks after the Attorney General and Director *already had access to* the relevant TPR forms that confirmed Dr. Bernard had properly reported the rape. Such subpoenas serve no legitimate investigative purpose. The Indiana Supreme Court has made clear that kind of “fishing expedition[.]” cannot be tolerated, and the underlying subpoenas are at issue in a separate action. *See Nu-Sash of Indianapolis, Inc. v. Carter*, 887 N.E.2d 92, 96 (Ind. 2008); *see also, e.g., State v. Tucker*, 588 N.E.2d 579, 581 (Ind. App. 1992) (finding inventory search was improper fishing expedition); *Dahlin v. Amoco Oil Corp.*, 567 N.E.2d 806, 814 (Ind. Ct. App. 1991) (reasoning that Trial Rule 26(C) likewise “protects an individual from ‘fishing expeditions’ into irrelevant or privileged material”).

60. In May 2022, the Attorney General, through the Director, opened a similarly meritless and overbroad investigation into Dr. Caldwell. An individual had filed a consumer complaint based on a TPR obtained through an open records request. Even though the consumer complaint had been filed against an institution and did not reference Dr. Caldwell, the Attorney General and Director instead converted the complaint to be one against Dr. Caldwell. The Attorney General, through the Director, sent a letter to Dr. Caldwell that notified her of the investigation and asked her to respond to the consumer complaint.

61. In early July 2022, Dr. Caldwell responded to the Attorney General, providing information that made clear the consumer complaint lacked merit. Nonetheless, on July 22, 2022, the Attorney General, through the Director, served Dr. Caldwell with a document subpoena that sought all medical records relating to the patient identified in the TPR. Then, in October 2022, the Attorney General, through the Director, served a local health care clinic with a substantially similar document subpoena that sought all medical records relating to the same patient. The Attorney General did not provide Dr. Caldwell notice that he had served this subpoena and, upon information and belief, he did not notify the patient.

62. This action is separate and distinct from the action seeking to quash the subpoenas relating to Drs. Bernard and Caldwell's patients because it addresses the Attorney General's improper handling of consumer complaints, which need not lead to the issuance of subpoenas.

63. In addition to exceeding the Attorney General's authority to investigate, the Attorney General's overreach in seeking these irrelevant medical records poses a significant threat to patient privacy and the confidentiality of medical records. Because they lack notice of the document subpoenas, physicians like Drs. Bernard and Caldwell cannot take steps to ensure their

patients' most confidential and personal information is protected. Nor can they advocate on behalf of their patients to narrow or quash such subpoenas.

C. The Attorney General Has Violated Mandatory Confidentiality Provisions, Further Confirming His Investigations Are Improper.

64. Indiana Code § 25-1-7-10(a) specifies that “all complaints and information pertaining to the complaints shall be held in strict confidence until the attorney general files notice with the board of the attorney general’s intent to prosecute the licensee.” Only a person who is a party to the complaint is allowed to disclose information, unless subject to certain exceptions inapplicable here. *Id.* § 25-1-7-10(b).

65. The Attorney General and the Director have brazenly disregarded these requirements, and are likely to do so again.

66. Immediately following the filing of multiple baseless and facially invalid consumer complaints, and before making a reasonable effort to review the groundless allegations in those complaints, the Attorney General gave multiple interviews to the media, including appearing on cable television programs. For example, on July 13, 2022, the Attorney General stated on Fox News: “And then we have this abortion activist acting as a doctor with a history of failing to report. So we’re gathering the information. We’re gathering the evidence as we speak, and we’re going to fight this to the end, including looking at her licensure. If she failed to report it in Indiana, it’s a crime for – to not report, to intentionally not report.” *After discrediting a report on a 10-year-old Ohio girl needing an abortion, Fox’s Jesse Watters now targets the girl’s Indiana doctor*, MEDIA MATTERS FOR AMERICA (July 13, 2022), <https://www.mediamatters.org/fox-news/after-discrediting-report-10-year-old-ohio-girl-needing-abortion-foxs-jesse-watters-now> (including a video and transcript of Attorney General Rokita on Jesse Watters Primetime’s July 13, 2022 program).

67. On July 13, 2022, the Attorney General made public a letter he sent to Governor Holcomb, repeatedly referencing Dr. Bernard's name and the incorrect and baseless allegations he pushed on Fox News. Letter from Todd Rokita, Ind. Att'y Gen., to Eric Holcomb, Ind. Governor (July 13, 2022), https://interactive.wthr.com/pdfs/Governor-Eric-Holcomb_Bernard-OH-Minor-Abortion-Case.pdf.

68. The next day, the Attorney General issued an inflammatory press release, which stated: "Aside from the horror caused here by illegal immigration, we are investigating this situation and are waiting for the relevant documents to prove if the abortion and/or the abuse were reported, as Dr. Caitlin Bernard had requirements to do both under Indiana law. The failure to do so constitutes a crime in Indiana, and her behavior could also affect her licensure. Additionally, if a HIPAA violation did occur, that may affect next steps as well. I will not relent in the pursuit of the truth." Press Release, Todd Rokita, Ind. Att'y Gen., Attorney General Todd Rokita issues statement regarding Dr. Caitlin Bernard case (July 14, 2022), <https://tinyurl.com/5j9bzfjt>.

69. Ironically, in a press release responding to criticisms of his public statements, the Attorney General stated: "We must be critical consumers of information and not just believe anything we read or hear." The Attorney General consistently failed to apply that standard to himself. Press Release, Todd Rokita, Ind. Att'y Gen., Attorney General Todd Rokita and team committed to finding the truth (Aug. 19, 2022), [https://events.in.gov/event/attorney_general_todd_rokita_and_team_committed_to_finding_the_t
ruth?utm_campaign=widget&utm_medium=widget&utm_source=State+of+Indiana](https://events.in.gov/event/attorney_general_todd_rokita_and_team_committed_to_finding_the_truth?utm_campaign=widget&utm_medium=widget&utm_source=State+of+Indiana).

70. On September 1, 2022, the Attorney General spoke on "Facebook Live," making public comments about his investigation into Dr. Bernard, again violating the restrictions imposed by Indiana Code § 25-1-7-10(a). Att'y Gen. Todd Rokita, Attorney General Todd Rokita Press

Event, FACEBOOK (Sept. 1, 2022), <https://www.facebook.com/agtoddrokita/videos/attorney-general-todd-rokita-press-event/573016414605476/>. The Attorney General also discussed his investigation into Dr. Bernard in another interview on September 15, 2022. Kristen Eskow, *Indiana AG Rokita talks enforcement of abortion ban, lawsuits filed*, FOX59 (updated Sept. 18, 2022), <https://fox59.com/indianapolitics/indiana-ag-rokita-talks-enforcement-of-abortion-ban-lawsuits-filed/>.

71. The Attorney General’s conduct shows that he is willing and likely to continue violating the statute’s confidentiality provisions.

D. Defendants Lack Authority to Investigate Plaintiffs Based on the Facially Invalid Consumer Complaints.

72. Defendants lack authority to investigate the purported “consumer” complaints against Plaintiffs because they are facially invalid or frivolous. These actions have no legitimate investigative purpose. Unless restrained by a court, Defendants will continue to initiate and pursue unfounded investigations against physicians who perform abortions that remain legal in Indiana. These improper investigations unfairly burden Plaintiffs in numerous ways, threatening not only their livelihoods but also the availability of the essential services they provide to their patients.

73. As detailed above, the so-called consumer complaints were submitted by individuals who are not consumers and who did not engage in, or attempt to engage in, a transaction in Indiana, let alone a transaction with Plaintiffs. Those individuals had no connection whatsoever with Plaintiffs or their patients. Indeed, most of the complaints were submitted by individuals who do not reside in Indiana and have no connection to the State.

74. The face of these consumer complaints also showed the allegations were based on rumor, hearsay, or speculation. The complaints expressly asserted they were based on news stories

and social media posts. Moreover, several of the Consumer Complaint Forms included patently false statements and misrepresentations.

75. Indeed, all of the consumer complaints failed to include a valid affirmation. The Consumer Complaint Form requires that the complainant affirm under penalties for perjury that the representations in the complaint are true, requiring the complainant to have personal knowledge of its allegations. But the consumer complaints that gave rise to the “investigations” of Dr. Bernard and Dr. Caldwell were filed by individuals who patently lacked any personal knowledge of the allegations contained therein, and who therefore could not verify the accuracy of those allegations under penalty of perjury.

76. These consumer complaints were facially invalid and no reasonable prosecutor could determine that they had merit.

77. Even if the consumer complaints were not facially invalid, the Attorney General and the Director took none of the simple steps available to help determine whether the consumer complaints had merit. To the contrary, they purposefully opened duplicative investigations even where they already had access to information that confirmed the complaints were meritless.

78. Defendants’ “investigations” based on patently meritless consumer complaints necessarily violate the statutory mandate that investigations “shall be limited to those areas in which there appears to be a violation of statutes governing the regulated occupation.” Ind. Code § 25-1-7-5(b)(4).

79. The Attorney General’s and Director’s improper conduct dissuades patients who need emergency abortions from seeking care. It also threatens patients seeking legal abortions that their most personal and private medical records and health care decisions could be exposed as part of a meritless investigation.

80. The Attorney General and the Director will continue to initiate sham investigations of Plaintiffs unless enjoined by the Court.

E. Injunctive Relief Is Necessary and Appropriate to Prevent Defendants from Inflicting Irreparable Harm on Plaintiffs.

81. Defendants have acted beyond their statutory authority and have failed to comply with their statutory responsibilities. Defendants' unlawful conduct has caused Plaintiffs permanent and irreparable harm, disrupting their practices and diverting time and resources that are more properly directed to their patients. Defendants' pattern of conduct makes clear that Defendants intend to continue these unlawful actions, and Plaintiffs will continue to suffer permanent and irreparable harm. A state actor may be enjoined from future violations of law where the actor's "past compliance . . . raise[s] sufficient doubts regarding future compliance to merit an injunction." *Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 469 (Ind. Ct. App. 2006).

82. "[W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* 'irreparable harm' for purposes of the preliminary injunction analysis." *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853, 863–64 (Ind. Ct. App. 2006) (citing *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004). "Consequently, 'the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor.'" *Id.* at 864 (citing *L.E. Servs., Inc. v. State Lottery Comm'n of Indiana*, 646 N.E.2d 334, 349 (Ind. Ct. App. 1995), *trans. denied*). Even so, here Plaintiffs can demonstrate that the Attorney General's unlawful conduct has caused, and will continue to cause, irreparable harm.

83. Defendants will suffer no prejudice if they are required to act only as specified by Indiana statute. The Attorney General can exercise "only the authority granted by statute." *Holovachka*, 142 N.E.2d at 602.

84. The public interest is served by an injunction that enjoins Defendants' unlawful conduct.

CLAIMS FOR RELIEF

Count I

Declaratory Judgment and Permanent Injunction To Declare That Defendants' Conduct Does Not Comply with Statutory Requirements, and Enjoin Future Violations.

85. Plaintiffs reaffirm and reallege each and every allegation made in Paragraphs 1–84 as if set forth fully herein.

86. The consumer complaint statute requires Defendants to “make an initial determination as to the *merit* of each complaint” before initiating an investigation. Ind. Code § 25-1-7-5(b)(1) (emphasis added).

87. The Attorney General and Director have opened investigations without taking any steps to determine if the consumer complaints had merit. These include consumer complaints that are not based on personal knowledge, do not allege an apparent violation of law, are contradicted by readily available public records, and/or are submitted by individuals with no connection to the allegations or the State of Indiana.

88. A justiciable controversy exists between the parties, because Defendants have initiated multiple improper investigations without taking steps to determine if the consumer complaints have merit.

89. The controversy over Defendants' abuse of power and conduct in excess of their statutory authority is capable of repetition, yet evading review, and is likely to continue.

90. Plaintiffs, their patients, other licensed physicians, and other licensed professionals and businesses have suffered, and will continue to suffer, irreparable harm if Defendants are not preliminarily and permanently enjoined from abusing their authority under law.

91. A declaratory judgment action is the proper procedural vehicle to contest the extra-statutory conduct of a state actor, and is appropriate for the determination of “the legal right, the legal status, or the legal relationship of parties having adverse interests.” *Wells Fargo Bank, N.A. v. Tippecanoe Assocs., LLC*, 923 N.E.2d 423, 428 (Ind. Ct. App. 2010).

92. A permanent injunction would be in the public interest.

93. Defendants should be enjoined from initiating investigations without first making an initial determination as to the merit of each consumer complaint.

Count II
Declaratory Judgment and Permanent Injunction To Declare That Defendants’ Conduct Exceeds Their Statutory Authority, and Enjoin Future Violations.

94. Plaintiffs reaffirm and reallege each and every allegation made in Paragraphs 1–93 as if set forth fully herein.

95. The consumer complaint statute specifies that even when a complaint has merit, the investigation “shall be limited to those areas in which there appears to be a violation of statutes governing the regulated occupation.” Ind. Code § 25-1-7-5(b)(4).

96. The Attorney General and Director have opened investigations that are not limited to areas of purported violations.

97. A justiciable controversy exists between the parties because Defendants have initiated multiple improper investigations into areas that far exceed any apparent violation of law.

98. The Attorney General lacks statutory authority to pursue investigations premised on consumer complaints that are facially invalid, do not allege an apparent violation of law, and/or are contradicted by readily available public records. *See, e.g., Holovachka*, 142 N.E.2d at 602–03.

99. A justiciable controversy exists between the parties because Defendants have initiated multiple improper investigations of Plaintiffs based solely on consumer complaints that lack merit and are facially invalid.

100. The controversy over Defendants' abuse of power and conduct in excess of their statutory authority is capable of repetition, yet evading review, and is likely to continue.

101. Plaintiffs, their patients, other licensed physicians, and other licensed professionals and businesses will suffer irreparable harm if Defendants are not permanently enjoined from abusing their authority under law.

102. A declaratory judgment action is the proper procedural vehicle to contest the extra-statutory conduct of a state actor, and is appropriate for the determination of "the legal right, the legal status, or the legal relationship of parties having adverse interests." *Wells Fargo Bank*, 923 N.E.2d at 428.

103. A permanent injunction would be in the public interest.

104. Defendants should be enjoined from continuing to investigate areas beyond those in which there appears to be a violation of statutes governing the regulated occupation.

Count III

Declaratory Judgment and Permanent Injunction To Declare That Defendants Have Breached the Confidentiality Provisions and To Enjoin Future Violations.

105. Plaintiffs reaffirm and reallege each and every allegation made in Paragraphs 1–104 as if set forth fully herein.

106. Indiana Code § 25-1-7-10 mandates that "all complaints and information pertaining to the complaints shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee."

107. The Attorney General has acted in violation of these express statutory limits by failing to maintain the confidentiality of investigations.

108. A justiciable controversy exists between the parties because the Attorney General has failed to keep the multiple investigations into Dr. Bernard confidential and has demonstrated a willingness to violate the law again.

109. Plaintiffs, their patients, other licensed physicians, and other licensed professionals and businesses have suffered, and will continue to suffer, irreparable harm if Defendants are not preliminarily and permanently enjoined from abusing their authority under law.

110. The controversy over the Attorney General's abuse of power and conduct in violation of statutory requirements is capable of repetition, yet evading review, and is likely to continue.

111. A declaratory judgment action is the proper procedural vehicle to contest the extra-statutory conduct of a state actor, and is appropriate for the determination of "the legal right, the legal status, or the legal relationship of parties having adverse interests." *Wells Fargo Bank*, 923 N.E.2d at 428.

112. A permanent injunction would be in the public interest.

113. Defendants should be enjoined from violating the confidentiality provisions of Indiana Code § 25-1-7-10.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray the Court to grant the following relief:

- i. Issue a preliminary and permanent injunction enjoining Defendants from initiating or conducting an investigation into a consumer complaint without first making an initial

determination that the consumer complaint has merit, in accordance with the requirements of the consumer protection statute;

- ii. Issue a preliminary and permanent injunction enjoining Defendants from issuing subpoenas in connection with an investigation based on a consumer complaint without first making a valid and proper determination that the consumer complaint has merit;
- iii. Issue a preliminary and permanent injunction enjoining Defendants from violating confidentiality provisions imposed by law;
- iv. Assess the costs of this action against Defendants; and,
- v. Pursuant to the Court's inherent powers, grant such other and further relief as the Court may deem just, proper, and equitable.

Dated: November 3, 2022

Respectfully submitted,

/s/ Kathleen A. DeLaney

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