

STATE OF INDIANA) IN THE MONROE COUNTY CIRCUIT COURT
) SS:
COUNTY OF MONROE) CAUSE NO: 53C06-2208-PL-001756

PLANNED PARENTHOOD GREAT)
NORTHWEST, HAWAII, ALASKA,)
INDIANA, KENTUCKY, INC.; WOMEN'S)
MED GROUP PROFESSIONAL)
CORPORATION; WHOLE WOMAN'S)
HEALTH ALLIANCE; and ALLOPTIONS,)
INC. on behalf of themselves,)
their staff, physicians, and patients; and)
AMY CALDWELL, M.D., on her own)
behalf and on behalf of her patients,)

Plaintiffs,)

v.)

MEMBERS OF THE MEDICAL)
LICENSING BOARD OF INDIANA, in their)
official capacities; and the HENDRICKS)
COUNTY PROSECUTOR, LAKE COUNTY)
PROSECUTOR, MARION COUNTY)
PROSECUTOR, MONROE COUNTY)
PROSECUTOR, ST. JOSEPH COUNTY)
PROSECUTOR, TIPPECANOE COUNTY)
PROSECUTOR, and the WARRICK)
COUNTY PROSECUTOR, in their official)
capacities,)

Defendants.)

MOTION TO STRIKE APPEARANCES

Defendants—the members of the Medical Licensing Board of Indiana and the prosecutors of Henricks, Lake, Marion, Monroe, St. Joseph, Tippecanoe, and Warrick counties—respectfully submit this Motion to Strike the Appearances of Linda L. Pence and Suzannah W. Overholt for the Marion County Prosecutor. Undersigned Deputy Attorneys General have this day entered their appearances for the Marion

County Prosecutor and other Defendants. Only the Indiana Attorney General has authority to represent the defendants in this case. Notwithstanding clear statutory authority, attorneys Pence and Overholt, who are not deputy attorneys general, entered their appearances for the Marion County Prosecutor. The defendants ask the Court to strike the appearance of Ms. Pence and Ms. Overholt, stating the following in support:

1. This lawsuit is a challenge to the constitutionality of an Indiana state statute, brought against the members of the Indiana Medical Licensing Board and several prosecuting attorneys in their official capacities, including the Marion County Prosecuting Attorney, also in his official capacity.

2. The case caption does not even include the proper name of the Marion County Prosecuting Attorney, but merely says “Marion County Prosecutor . . . in their official capacities.” The complaint also says “[t]he county prosecutors are sued in their official capacities.” Compl. ¶ 24. Thus, the Complaint leaves no doubt that this lawsuit names the Marion County Prosecuting Attorney only in his official, not personal, capacity.

3. The Marion County Prosecuting Attorney is a State officer. *See Jones v. Cummings*, 998 F.3d 782, 786 (7th Cir. 2021) (holding that “Indiana’s laws and statutes indicate that [the prosecutor] is a state official”); *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1225 (Ind. Ct. App. 1999) (holding that a prosecutor “is not a city or county officer, but rather a state officer”).

4. On September 6, 2022, Linda L. Pence and Suzannah W. Overholt filed an appearance for the “Marion County Prosecutor.”

5. Pence’s and Overholt’s appearances should be stricken because only the Attorney General has authority to represent State officers, including the Marion County Prosecutor in this case.

6. Indiana Code Section 4-6-2-1 provides in part: “[the] attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana” and to “defend all suits *brought against the state officers in their official relations*.” Indiana Code § 4-6-2-1(a) (emphasis added).

7. In addition, to ensure the Attorney General’s litigation positions on behalf of the State are not undermined by contrary positions of other state officials, the legislature has provided that the Attorney General “shall have charge of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or *any state agency*.” Ind. Code § 4-6-3-2(a) (emphasis added). Here, critically, “state agency” expressly includes an “office” or “officer.” *Id.* § 4-6-3-1.

8. Indiana law thus gives the Attorney General the “exclusive power and right in most instances to represent the State, its agencies and officers,” *Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979), *i.e.*, “sole responsibility for the legal representation of the State.” *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 149 (Ind. 1978). Such exclusive power ensures that the State will adopt a unified, consistent position on legal issues. *See Ind. State Toll-Bridge Comm’n v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957) (“Before 1943, many of the

various boards, bureaus and commissions had been employing their own attorneys, with no effective authority vested in the Attorney General to establish a general legal policy for such agencies, and no responsibility of counsel to the Attorney General.”).

9. As explained in *Sendak*, the attorney general statutes create an independent focal point for “a general legal policy for State agencies” and thereby preclude other state officials from taking contrary positions in court, lest they engender chaos and cause “substantial prejudice to the Attorney General’s efficacy in defending his statutory client[s].” *Id.* Because the Attorney General is authorized by law with “defending State agencies, officers and employees,” he “must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect State interests.” *Id.*

10. This authority has been vindicated by the Indiana Supreme Court time and again. *Sendak*, 373 N.E.2d at 149; *State ex rel. Young v. Niblack*, 99 N.E.2d 839, 842 (Ind. 1951). Just this year, the Supreme Court of Indiana confirmed that the Attorney General retains “exclusive power to both represent and direct litigation strategy for state agencies and the state.” *Holcomb v. Bray*, 187 N.E. 3d 1268, 1288 (Ind. 2022).

11. Accordingly, the Attorney General routinely represents prosecuting attorneys in state and federal court when they are defendants in cases challenging the constitutionality of criminal statutes. *See, e.g., Whole Woman’s Health Alliance v. Rokita*, 553 F. Supp. 3d 500 (S.D. Ind. 2021) (St. Joseph County prosecutor); *All-Options, Inc. v. Attorney General of Ind.*, 546 F. Supp. 3d 754 (S.D. Ind. 2021) (Marion,

Lake, Monroe, Tippecanoe, and St. Joseph County prosecutors); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, No. 1:18-cv-01219, 2020 WL 10574374 (S.D. Ind. 2020) (Marion, Lake, Monroe, and Tippecanoe County prosecutors); *Bernard v. Individ. Members of the Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935 (S.D. Ind. 2019) (Marion County prosecutor); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017) (Marion, Lake, Monroe, and Tippecanoe County prosecutors); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 258 F. Supp. 3d 929 (S.D. Ind. 2017) (Marion, Lake, Monroe, and Tippecanoe County prosecutors); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 273 F. Supp. 3d 1013 (S.D. Ind. 2017) (Marion, Lake, Monroe, and Tippecanoe County prosecutors); *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004) (defendant class of all Indiana prosecuting attorneys).

12. The Attorney General is aware of no constitutional challenge where a county prosecuting attorney has been represented by someone other than the Attorney General or counsel hired by the Attorney General.

13. Because attorneys Pence and Overholt have no authority to represent the Marion County Prosecutor in his official capacity, their Appearances should be stricken.

WHEREFORE, Defendant Marion County Prosecutor respectfully request that the Court strike the Appearance of Linda L. Pence and Suzannah W. Overholt on behalf of the Marion County Prosecutor and all other appropriate relief.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Atty. No. 18857-49

By: s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General
Attorney No. 17949-49

James A. Barta
Deputy Solicitor General
Attorney No. 31589-49

Julia C. Payne
Attorney No. 34728-53
Melinda R. Holmes
Attorney No. 36851-79
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Phone: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on September 8, 2022, the foregoing document was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing document in the U.S. Mail, first class, postage prepaid, if exempt or non-registered user.

Kenneth J. Falk
Gavin M. Rose
Stevie J. Pactor
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
kfalk@aclu-in.org
grose@aclu-in.org
spactor@aclu-in.org

Linda L. Pence
SMITHAMUNDSEN LLC
Indiana 201 North Illinois Street, Suite 1400
Indianapolis, Indiana 46204
Lpence@smithamundsen.com

Suzannah W. Overholt
SMITH AMUNDSEN LLC
201 North Illinois Street, Suite 1400
Indianapolis, Indiana 46204
Soverholt@smithamundsen.com

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov