IN THE INDIANA SUPREME COURT
No. 26S-PL-128

INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, et al., *Appellants-Defendants,*	)	Appeal from the Marion Superior Court
v.	)	Trial Court No. 49D01-2209-PL-031056
ANONYMOUS PLAINTIFF 1, et al., *Appellees-Plaintiffs,*	)	The Honorable Christine R. Klineman, Judge

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BRIEF OF *AMICUS CURIAE* INDIANA CATHOLIC CONFERENCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

INTEREST OF *AMICUS CURIAE* 7

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. The lower courts erred in finding standing and granting class certification. 8

  A. Plaintiffs lack standing because their claims are speculative and hypothetical. 9

  B. Class certification is unjustified. 10

  C. Hoosier Jews for Choice lacks associational standing to pursue a RFRA claim. 12

II. The Superior Court erred in finding a substantial burden on religious exercise. 14

III. S.B. 1 satisfies strict scrutiny. 19

  A. Indiana has a compelling interest in prohibiting the taking of an innocent life. 19

  B. S.B. 1 is the least restrictive means of protecting its compelling interest. 30

CONCLUSION 32

WORD COUNT CERTIFICATE 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page(s)

Cases

Baird v. State,
604 N.E.2d 1170 (Ind. 1992) 24

Blattert v. State,
190 N.E.3d 417 (Ind. Ct. App. 2022) .... *passim*

Burwell v. Hobby Lobby Stores,
573 U.S. 682 (2014) .... *passim*

Cheaney v. State,
285 N.E.2d 265 (Ind. 1972) 22

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022) .... *passim*

Frazee v. Ill. Dep't of Emp. Sec.,
489 U.S. 829 (1989) 15

Freed v. Freed,
227 N.E.3d 954 (Ind. Ct. App. 2024) 29

Gonzales v. O Centro Espírita Beneficente União,
546 U.S. 418 (2006) 11, 25

Harris v. McRae,
448 U.S. 297 (1980) 12, 13

Holt v. Hobbs,
574 U.S. 352 (2015) 10, 14, 30

Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1,
233 N.E.3d 416 (Ind. Ct. App. 2024) .... *passim*

Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1,
246 N.E.3d 271 (Ind. 2024) 20

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 10, 30

Little Sisters of the Poor v. Pennsylvania,
591 U.S. 657 (2020) 23

Members of Med. Licensing Bd. v. Planned Parenthood,
211 N.E.3d 957 (Ind. 2023) .... *passim*

Merced v. Kasson,
577 F.3d 578 (5th Cir. 2009) 9

Moore-King v. County of Chesterfield,
708 F.3d 560 (4th Cir. 2013) 15

O Centro Espírita Beneficiente União do Vegetal v. Ashcroft,
282 F. Supp. 2d 1236 (D.N.M. 2002) 25

People v. Philips,
Ct. of General Sessions, City of N. Y. (June 14, 1813) 19

Prince v. Massachusetts,
321 U.S. 158 (1944) 20

Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson,
201 A.2d 537 (N.J. 1964) 22

Ramirez v. Collier,
595 U.S. 411 (2022) 23, 30

Red Lobster Restaurants LLC v. Fricke,
234 N.E.3d 159 (Ind. 2024) 9

Roman Catholic Diocese of Brooklyn v. Cuomo,
592 U.S. 14 (2020) 30

Satanic Temple v. Labrador,
716 F. Supp. 3d 989 (D. Idaho 2024) 29

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 8

Singh v. Berger,
56 F.4th 88 (D.C. Cir. 2022) 27

Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.,
182 N.E.3d 212 (Ind. 2022) 9

Tandon v. Newsom,
593 U.S. 61 (2021) 26, 27

United States v. Christie,
825 F.3d 1048 (9th Cir. 2016) 25

United States v. Grady,
18 F.4th 1275 (11th Cir. 2021) 20

United States v. Lee,
455 U.S. 252 (1982) 25

United States v. Quaintance,
608 F.3d 717 (10th Cir. 2010) 25

Villegas v. Silverman,
832 N.E.2d 598 (Ind. Ct. App. 2005) 10

Willis v. State,
888 N.E.2d 177 (Ind. 2008) 21

Wisconsin v. Yoder,
406 U.S. 205 (1972) 15, 16, 18

Statutes

Ind. Code § 16-34-1-0.5 29

Ind. Code § 16-34-2-1 .... 9, 27, 28, 29

Ind. Code § 34-13-9-8 20

Ind. Code § 34-13-9-9 .... 9, 10, 14

Ind. Code § 34-13-9-10 .... 11, 12

Other Authorities

Ari Berman, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*,
76 Stan. L. Rev. 1129 (2024) 25

Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*,
37 Persps. on Sexual & Reprod. Health 110 (2005) 25

Ind. Const. art. I, § 1 20

Ind. Trial Rule 23 11

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 24, 26, 28

Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J.L. & Pub. Pol'y 971 (2019) 19

Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121 (2012) 19

Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813 (2007) 28

INTEREST OF *AMICUS CURIAE*

The Indiana Catholic Conference is the statewide coordinating body for the five Catholic dioceses in Indiana. It serves as the official voice for the bishops and Catholic faithful regarding state and national matters; represents the Church where common public policy interests exist with religious and civic, social, and governmental units; and serves as liaison between the Catholic Church in Indiana and national Catholic groups with respect to public policy.

The Conference advocates for the protection of life from conception to natural death, and it advocates for religious freedom. The Conference is concerned that, if religious-freedom protections are misunderstood, protections for both life and religious freedom will suffer.

SUMMARY OF ARGUMENT

Plaintiffs ask this Court to be the first high court anywhere, in the Nation's long history, to recognize a religious right to end an innocent human life. The Court should decline that invitation. In keeping with America's longstanding tradition of ordered liberty, Indiana law rightly protects both life and religious freedom as complementary values that each contribute to human flourishing. If RFRA is distorted as Plaintiffs request, both values will be undermined, and vital protections will be lost.

Plaintiffs' novel claims fail RFRA's test at every turn. To begin, Plaintiffs lack standing because there is no impending burden on their religious exercise. This is particularly true for the organizational and class Plaintiffs, whose precise religious beliefs are unknown, yet who seek a sweeping injunction to obtain abortions up to the

point of birth. These group injunctions turn RFRA's structure on its head, creating a presumption of exemption for individuals who have not demonstrated that they themselves are experiencing a religious burden. Thus, the overbroad injunction leaves Indiana no further opportunity for the State to prove its compelling interest with respect to different religious claimants—a burden it can carry there and here.

Even if Plaintiffs had articulated a sincere religious exercise and a substantial and impending burden, their claims would still fail. Indiana has a compelling interest in protecting prenatal life, and this Court should reaffirm that interest. Indiana has also chosen the least restrictive means to protect that life interest here. Unlike other religious liberty cases, here the government has an interest in protecting each individual life, an interest that cannot be furthered by protecting some other life in some other way.

In short, Plaintiffs have attempted to create an unnecessary conflict between religious liberty and other rights, when none of the Plaintiffs has yet experienced such a conflict, and may never do so. When it comes to religious liberty, courts must be careful to "distinguish between real threat and mere shadow." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring). Here, there is merely shadow.

ARGUMENT

I. The lower courts erred in finding standing and granting class certification.

Indiana's constitution requires Plaintiffs to "demonstrate a personal stake in the outcome of the litigation and show that they have suffered or [are] in immediate

danger of suffering a direct injury," that is, an "actual demonstrable injury." *Red Lobster Restaurants LLC v. Fricke*, 234 N.E.3d 159, 167-69 (Ind. 2024) (internal quotations omitted). Plaintiffs are also required to show there is a "likely" and "impending" burden on their sincere religious exercise. Ind. Code § 34-13-9-9. Neither the individual plaintiffs, organizational plaintiff, nor class representatives have made the required showings.

A. Plaintiffs lack standing because their claims are speculative and hypothetical.

Plaintiffs' claims hinge on a highly speculative chain of events. For the claimed religious burden to be impending, a Plaintiff would need to: (1) be pregnant (none are); (2) experience a threat to her life, health, or wellbeing; (3) have a sincere religious belief that an abortion is not just permitted, but necessary, in that particular circumstance; and (4) be unable to otherwise obtain an abortion under Indiana law (*e.g.*, where the abortion is not "necessary to prevent any serious health risk … or to save the pregnant woman's life"). Ind. Code § 16-34-2-1. The probability of all this occurring is vanishingly small. At minimum, no Plaintiff is "in immediate danger of sustaining" such an injury. *Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 182 N.E.3d 212, 219 (Ind. 2022).

This stands in sharp contrast to state and federal RFRA cases where the conflict between the law and the religious exercise was clear and the penalties were likely. For example, in *Merced v. Kasson*, the plaintiff regularly engaged in religious animal sacrifice, an ordinance prohibited that sacrifice, and the city threatened enforcement. 577 F.3d 578, 592 (5th Cir. 2009). In both *Hobby Lobby* and *Korte*, the plaintiffs

already offered religiously compliant insurance plans, the government banned such plans, and penalties would soon begin. *See Korte v. Sebelius*, 735 F.3d 654, 662-64 (7th Cir. 2013); *Burwell v. Hobby Lobby Stores,* 573 U.S. 682, 700-04 (2014). In *Holt*, the prison had already required the plaintiff to shave off his religiously mandated beard on pain of "serious disciplinary action." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). But here, Plaintiffs may never seek an abortion, and if they did, it might fall within the exceptions included in Indiana's Senate Enrolled Act 1 (S.B. 1). The same is true of the members of the organizational plaintiff—who, as discussed below, do not even identify a religious exercise. Thus, their burdens are far from "likely" or "impending." Ind. Code § 34-13-9-9.

B. Class certification is unjustified.

Since the individual Plaintiffs also serve as class representatives, their lack of standing means that the class cannot be certified. *See Villegas v. Silverman*, 832 N.E.2d 598, 604 (Ind. Ct. App. 2005) ("In a class action, each named plaintiff must have standing."). Class certification would still be unjustified even if a representative had standing. The Court of Appeals, reviewing the Superior Court's class certification upon interlocutory appeal, relied on cases involving vaccine mandates and the contraceptive mandate. Based upon those cases, the Court of Appeals concluded that classes can be certified even where religious beliefs differ. *Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 443-44 (Ind. Ct. App. 2024). But those cases and this one have a crucial difference: in contraceptive and vaccine mandate cases, class members believed the mandated action (taking a COVID-19 vaccine, covering contraceptives or abortifacients) was always prohibited.

Their religious *reasoning* might differ, but the *relief* they needed was the same: a flat exemption from the rule. Here, Plaintiffs do not claim that the prohibited action (abortion) is always religiously mandated. They instead claim a right to obtain particular abortions in complex individual circumstances that may never occur and may be permitted under state law anyway. Such a right is a poor candidate for class-wide relief. *See* Ind. Trial Rule 23(A)(2)-(3) (requiring typicality and commonality).

This is especially true in light of RFRA's distinctive "to the person" standard. Ind. Code § 34-13-9-10. Under RFRA, the government's burden is to be borne only in relation to "*the particular claimant* whose sincere exercise of religion is being substantially burdened." *Blattert v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022) (internal quotation marks omitted) (emphasis added); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006) (rejecting the government's "categorical" approach to demonstrating its burden in the context of regulating controlled substances and instead requiring the government to demonstrate "the asserted harm of granting specific exemptions to particular religious claimants"). And this occurs only after "a court … determines that … the person's exercise of religion has been substantially burdened." Ind. Code § 34-13-9-10. The class-wide injunction here thus turns RFRA's standard on its head by allowing individuals to take advantage of the injunction without any proof that they even have a religious exercise as to a particular abortion, much less one that Indiana law forbids. The injunction also does not give Indiana the opportunity to demonstrate that "application of the burden" to each person "is in furtherance of a compelling

governmental interest," namely protecting a particular prenatal human life. Ind. Code § 34-13-9-10. Thus, the plain text of RFRA does not permit this class's certification.

C. Hoosier Jews for Choice lacks associational standing to pursue a RFRA claim.

Hoosier Jews for Choice likewise lacks standing to assert RFRA claims on behalf of its members. As the Attorney General has stated, Indiana law has not yet recognized associational standing. Defs.' MSJ Br. at 37-38. Federal courts do recognize such standing, but even under that more lenient standard, courts have held that a free exercise claim like the highly individualized claims asserted here "ordinarily requires individual participation." *Harris v. McRae*, 448 U.S. 297, 321 (1980) (cleaned up). Thus, in *Harris*, the U.S. Supreme Court held that the Women's Division of the Board of Global Ministries of the United Methodist Church ("Women's Division") did not have standing to challenge the Hyde Amendment, a federal ban on Medicaid funding for abortion. *Id.* Although the Women's Division members had a "diversity of view[s]" regarding the "necessity of abortion according to circumstance," the one thing on which members agreed was that the decision to have an abortion "must be ultimately and absolutely entrusted to the conscience of the individual before God." *Id.* The Supreme Court held that the "participation of individual members … is essential to a proper understanding and resolution of their free exercise claims," and that the Women's Division lacked associational standing. *Id.*

The Court of Appeals nevertheless waved *Harris* aside on two grounds: first, that the Women's Division members did not claim that they were "directed" by their

religion to obtain an abortion under specific circumstances, and second, that the Women's Division was more divided than Hoosier Jews for Choice on the question of whether abortion was permitted. *Anonymous Plaintiff 1*, 233 N.E.3d at 436. But this badly misreads both *Harris* and the record in this case.

On the first point, the Court of Appeals was simply mistaken to assert that no Women's Division members had claimed that in some circumstances, abortion was necessary. *Cf. Harris*, 448 U.S. at 321 (mentioning varied Women's Division views about the "necessity of abortion according to circumstance"). The *Harris* Respondent's brief—which the Women's Division joined—quoted United Methodist policy statements that "requiring a woman to give birth" without regard to "any and all circumstances" would "constitute a gross violation of our Christian faith" and that "abortion may in some instances be the most loving act possible." Appellees' Br. at 81, 1980 WL 339642 (cleaned up). This view is not meaningfully distinguishable for standing purposes from the view put forth by Hoosier Jews for Choice. The organization explains that, under Jewish law, the necessity of an abortion depends on "the circumstances surrounding the pregnancy," and each abortion is assessed on a "case-by-case basis." Defs.' MSJ Ex. 18 at 31.

On the second point—lack of uniformity—the Women's Division was no more diverse than Hoosier Jews for Choice. While its members might weigh the circumstances justifying an abortion differently, Women's Division members were united in their belief that decisions about abortion must be "entrusted" to each woman's conscience. *Harris*, 448 U.S. at 321. So too here: Hoosier Jews for Choice

seeks to "promote bodily autonomy for all people" and women's "choice." Pls.' MSJ Ex. 33 at 1-2; Defs.' MSJ Ex. 36 at 3, 4, 5. As in *Harris*, in this case each woman's free exercise claim must be considered separately, because each woman's religious and moral calculus is exclusive to her. It is also exclusive to the particular abortion at issue, which may not be part of her religious exercise or even prohibited by Indiana law.

II. The Superior Court erred in finding a substantial burden on religious exercise.

To state a RFRA claim, a plaintiff must first identify an "exercise of religion," Ind. Code § 34-13-9-9, showing that the conduct in which she seeks to engage "is grounded in a sincerely held religious belief," *Holt*, 574 U.S. at 361, not merely an action "clearly contrary to the challengers' views on a secular issue." *Hobby Lobby*, 573 U.S. at 725-26. Reviewing the plaintiffs' asserted burdens—which differ substantially from each other—only underscores the fact that their claims must be considered individually.

Consider Plaintiff 2. She asserts that S.B. 1 burdens her ability to exercise her belief that "we are endowed with bodily autonomy" and that it also burdens her because she "do[es] not believe that human life begins at conception." Pls.' PI Ex. 2 at ¶¶ 9-10. She says bearing another child "would stunt my ability to realize my full humanity." Defs.' MSJ Ex. 14 at 53:22-54:2. But her claim fails RFRA's substantial burden test because she has not shown that the beliefs she has asserted are religious, rather than personal or philosophical.

While people may sincerely hold secular moral or philosophical beliefs, those beliefs do not generally trigger statutory or constitutional protection unless they are

also rooted in a system of religious duty. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). In *Yoder*, the U.S. Supreme Court was careful to distinguish between a "philosophical and personal" decision to reject the "values accepted by the majority" and the "deep religious conviction" that undergirded the Amish way of life and was protected by the Free Exercise Clause. *Id.* This distinction anchors laws addressing "religion" in their historical context and ensures that religion is not made a proxy for personal or political ideology. *See, e.g., Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). And lower courts have not hesitated to distinguish between purely personal and philosophical beliefs and those that are religious. *See, e.g., Moore-King v. County of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013) (rejecting free exercise claim to a county's regulation of fortune tellers because plaintiff's alleged religious belief in her "inner flow" was a "personal philosophical belief[]").

Plaintiff 2 has not met this test. Plaintiff 2 testified that the source of her claimed need for complete bodily autonomy in all circumstances is the "universal connectiveness that we have." Defs.' MSJ Ex. 14 at 27:5-6. Her most important spiritual beliefs involve "having the ability to fully realize [her] own humanity," "dignity," and "bodily autonomy." *Id.* at 24:11-15. Bearing a child "would stunt [her] ability to realize [her] full humanity," so she does not want to have one at this time.[1]

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[1] Plaintiff 2 believes that her unborn children do not achieve the right to have their "bodily autonomy" recognized by her until they reach the point of viability. Defs.' MSJ Ex. 27 at 17:4-10. Acting on these beliefs, in 2019, she aborted a baby because "bringing another child into this world" would have decreased her "ability to realize [her] humanity" by interfering with her career and imposing a financial burden. Defs.' MSJ Ex. 14 at 16:22-25; 17:3-11 (Sep. 22, 2022).

Id. at 53:22-54:2. This combination of beliefs and personal value judgments is akin to the "philosophical and personal" beliefs of Thoreau—beliefs that *Yoder* distinguished from the religious beliefs protected by the First Amendment. 406 U.S. at 215-16.

There is also a significant gap between Plaintiff 2's assertion that her beliefs forbid her from bearing another child and her claim that S.B. 1 is the source of her burden. Plaintiff 2 does not have a religious objection to using other methods to avoid bearing a child, and she has relied on some of these methods during this lawsuit. Defs.' MSJ Ex. 14 at 59:6-8 (since S.B. 1 passed, she has been taking the "extra precautions" of ovulation tracking and periodic abstinence); Defs.' MSJ Ex. 27 at 10:11-21 (she has had no pregnancies since 2019); Defs.' MSJ Ex. 14 at 16:1-20, 55:25-56:1-2, 59:25-60:21 (discussing her preferences in this area in non-religious terms). Plaintiff 2 has not shown that any burden on her belief that she should not bear more children arises from S.B. 1, rather than from personal, nonreligious preferences. RFRA does not apply to such claims.

The burden asserted by Hoosier Jews for Choice has a different set of problems. Hoosier Jews for Choice can show only an undefined "connection" between abortion and religious belief—not that the abortions it seeks are required by, motivated by, or grounded in religious obligations. Nor is there any evidence that the abortions sought would actually be forbidden by Indiana law. Hoosier Jews for Choice claims its members would, in varying and highly individualized circumstances, be required to obtain an abortion under Jewish law. Order on Cross-Motions for Summary Judgment at 6 (Marion Sup. Ct. Mar. 5, 2026) ("Op."). But the organization enrolls

its members via a Google form that asks if "you [are] a uterus-having person of child-bearing age" and whether "you believe that you will be affected by the abortion ban in some way."[2] The form further asks whether "you [can] *connect the way in which you are affected* by [S.B. 1] to your religious beliefs."[3] And after submitting the online form, "We don't turn anyone down." Defs.' MSJ Ex. 28 at 51:3-14. The form does not require prospective members to explain their beliefs or even identify their religion, much less to believe that any particular religiously connected abortion is proscribed by Indiana law.

The organization's representative admitted in deposition that its members need not even agree with Jewish religious traditions. *See* Defs.' MSJ Ex. 18 at 34:7–19 (discussing those who were pro-choice but did not believe in the traditions: "Q. But no membership restrictions would attach there? A. No."). As a result of these broad membership policies, Hoosier Jews for Choice counts among its members both men as well as women past childbearing age. Defs.' MSJ Ex. 28 at 53:11-17. Nor do all of its members need to believe in Jewish religious traditions: the organization admits that its members might "not believe in traditions" and "no membership restrictions would attach there." Defs.' MSJ Ex. 18 at 33:19-34:19.

The record thus establishes neither a religious exercise nor a substantial burden on that exercise—since the court knows nothing about whether a particular abortion is sought for a religious purpose or for any other, and it cannot discern whether such

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[2] *See* Defs.' MSJ Ex. 35 at 4.

[3] *Id.* at 5 (emphasis added).

an abortion would violate Indiana law at all. Put simply, the question is not whether Plaintiffs' religious beliefs *permit* certain abortions, but whether those beliefs motivate or compel them to actually obtain an abortion that is actually proscribed by State law.[4]

The individual Plaintiffs have not shown a substantial burden for another reason as well. Plaintiffs seek an injunction allowing abortions until birth—but none challenged Indiana's prior laws, which banned abortions after twenty weeks or viability, and which were in effect for decades. *Cf.* Defs.' MSJ Ex. 13 at 33:7-18 (Plaintiff testifying that her religious beliefs authorize abortion "any time before birth"). Indeed, Plaintiff 2 testified that the 20-week ban was *consistent* with her faith. Defs.' MSJ Ex. 14 at 54:12-15. Such shifting claims would ordinarily receive careful scrutiny to ensure they are sincerely religious, rather than "philosophical and personal" (or political). *See Yoder*, 406 U.S. at 216. And only religious exercise that is "sincere" is protected by RFRA. *Hobby Lobby*, 573 U.S. at 717-18. No doubt Plaintiffs have grave personal, philosophical, or political objections to S.B. 1. But that is not enough to demonstrate a burden on *religious* exercise.

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[4] *Amicus* acknowledges the discussion of Jewish traditions in which a rabbi may advise a woman in particular circumstances to obtain an abortion. *See* Jewish Coalition for Religious Liberty COA Amicus Br. at 6-7 ("Jewish teachings on abortion are complex and cannot be reduced to the uniform, bright-line rule offered by the plaintiffs' rabbis."). But that does not create an impending burden for these Plaintiffs, none of whom claim to have received such advice and none of whom can claim that such advice would be for an abortion not already permitted by Indiana law.

III. S.B. 1 satisfies strict scrutiny.

The Superior Court identified a religious right to abortion. Op.13. While America's constitutional "'concept[ion] of ordered liberty,'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022), has long protected those with conscientious objections to taking a life, *see, e.g.*, Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121 (2012), there is no corollary history of laws protecting a religious right to take human life.

This is likely because the Founders didn't intend for the Constitution's protection of religious exercise to inhibit a State's interest in circumscribing those acts physically violent to others. *See, e.g.*, Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J.L. & Pub. Pol'y 971, 982-89 (2019) (describing the common Founding-era perspective that "robbery, theft, and other acts of violence" were not "protected by the free exercise of religion"). One of the earliest known cases applying a state free exercise guarantee held that citizens "are to be protected in the free exercise of their religion," unless they "under pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state." *People v. Philips*, Ct. of General Sessions, City of N. Y. (June 14, 1813).

A. Indiana has a compelling interest in prohibiting the taking of an innocent life.

Even if one were to accept the novel theory that RFRA protects a religious right to take an innocent life, that does not end the inquiry. Rather, Indiana can enforce S.B.1 if it can demonstrate that the burden imposed upon plaintiffs is "'in furtherance

of a compelling governmental interest'" and represents "'the least restrictive means'" of doing so. *Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 246 N.E.3d 271, 272 (Ind. 2024) (quoting Ind. Code § 34-13-9-8). Though this bar is high, it is not insurmountable. *See, e.g.*, *United States v. Grady*, 18 F.4th 1275, 1288 (11th Cir. 2021) ("The need for the uniform application of laws prohibiting unauthorized entry on naval base property, as well as the … destruction of naval base assets, are the least-restrictive means of achieving the government's compelling interest … and precludes the recognition of the proposed exceptions to these criminal laws, even under RFRA."). Indiana plainly satisfies it here. The state's interest in life is particularly strong in this context, where the state has a particularized interest in protecting each individual life and that interest can only be advanced by protecting that particular child.

Indiana's interest is compelling. Indiana has asserted a compelling interest in prohibiting the taking of innocent human lives. Indeed, protecting innocent human life is the paradigmatic compelling government interest. For example, this Court has recognized that "life" is the first right in the Lockean Natural Rights Guarantee of Indiana's Constitution. *Members of Med. Licensing Bd. v. Planned Parenthood*, 211 N.E.3d 957, 967 (Ind. 2023) (quoting Ind. Const. art. I, § 1). Critically, this case does not present the question of whether a particular life will be merely endangered by the asserted RFRA claim, but instead presents the question of whether it will be extinguished by it. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose … the child to … ill

health or death."); *see also Blattert*, 190 N.E.3d at 422 (finding Indiana "has a 'powerful interest in preventing and deterring the mistreatment of children'") (quoting *Willis v. State*, 888 N.E.2d 177, 180 (Ind. 2008)).

The Superior Court concluded that because Indiana has limited exceptions to its general prohibition of abortions, its interest is not compelling. Op.14 (citing *Anonymous Plaintiff 1*, 233 N.E.3d 416). Those narrow exceptions justified, in its view, a permanent injunction permitting the anonymous plaintiffs and certified class to obtain abortions whenever it would "substantially burden their religious exercise," regardless of the baby's gestational age. Op.17. No court outside of Indiana has so held.

Amicus believes that abortion is always a tragedy, never a necessity. It offers the arguments below not to signal agreement with the particular lines that the General Assembly drew, but to explain how Plaintiffs' arguments fail to disprove a compelling government interest in protecting innocent lives.

First, biology confirms Indiana's compelling interest in protecting human life, regardless of its stage of development. A scientific "consensus" agrees that fertilization "is the starting point of the self-directed development and life cycle of a human organism and thus the life of a human." Amicus Br. of Biologists at 12-13, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Second, under the "natural rights theory" underpinning Indiana's and other American constitutions, the *sine qua non* of government is "[t]o protect the weaker from the injuries … of the stronger," *Planned Parenthood*, 211 N.E.3d at 967-68. This

encapsulates Indiana's interest in protecting innocent human lives from being terminated when they are most vulnerable. Indeed, even Plaintiffs have acknowledged that Indiana's "interest" in protecting "viable" human life in utero is "strong." Pls.' COA Br. at 49 n.13.

Accordingly, it is well established in Indiana that "a State interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling." *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972). In so holding, this Court cited *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. 1964), with approval. *Id.* at 269. As this Court recounted it, in *Anderson*, the Supreme Court of New Jersey acted as "parens patriae" to "protect[] the life of an unborn child," where the mother had raised a "freedom of religion" claim to refuse a life-saving blood transfusion for her "unborn child." *Id.* That claim is analogous to Plaintiffs' claim. And here, as in *Anderson*, "the State's concern for the welfare of an infant," 201 A.2d at 538, provides a compelling interest in protecting unborn children—a goal which S.B. 1 furthers.

Furthermore, other compelling interests recognized by Indiana courts elucidate the compelling nature of Indiana's interest here. For instance, in *Blattert v. State*, the Court of Appeals rejected a father's RFRA defense to a criminal prosecution for child abuse. 190 N.E.3d 417, 419 (Ind. Ct. App. 2022) (Molter, J.). The father claimed a religious exercise of "physically punishing his children as he sees fit." *Id.* at 421-22. But the court held the prosecution satisfied the compelling-interest test and thus complied with RFRA. *Id.* at 419, 422-23. The court rejected the father's argument

that the existence of an affirmative defense for reasonable forms of corporal punishment undermined the state's interest in his abuse, which included beating his children with various objects, choking them, and punching them in the face. *Id.* at 420-23. Indiana law provided no affirmative defense for such violence, so its affirmative defense for *different* actions did not undermine the State's interest in prosecuting the defendant in *Blattert*. Importantly, the legislative decision to create a narrow exemption for *non-abusive* corporal punishment did not render Indiana powerless to police actual child abuse when it occurred. Compared with *Blattert*, this is an *a fortiori* case. If the State has a "compelling interest in protecting children from physical abuse," *id.* at 424, it must also have a compelling interest in protecting them against abortion.

All these considerations aside, this Court can also resolve the question "simply by asking whether [the General Assembly] has treated" the interest in protecting individual prenatal human lives as compelling, *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 696 (2020) (Alito, J., concurring), including by "examin[ing] history." *Ramirez v. Collier*, 595 U.S. 411, 442 (2022) (Kavanaugh, J., concurring).

The answer here is yes. In *Planned Parenthood*, this Court—surveying Indiana law stretching back to the Indiana territory's reception of "English law as of 1607"—explained that the law challenged here fit with "Indiana's long history of generally prohibiting abortion as a criminal act." 211 N.E.3d at 962-64, 978. "For all of Indiana's history," this Court explained, "abortion has been the subject of state lawmaking" and

"the legislature has generally prohibited abortions except for pregnancies that threaten a woman's life." *Id.* at 962; *see also Baird v. State*, 604 N.E.2d 1170, 1189-90 (Ind. 1992) (rejecting criminal defendant's arguments that his conviction under Indiana's feticide statute, enacted in 1979, was "contrary to law"). This historical record plainly indicates that Indiana treats its interests as compelling.

Finally, Indiana can also point to the risk that a religious exemption here would be misused, especially when granted to a broad class. Such risks may be considered as part of the government's compelling-interest showing where a religious exemption would create troubling incentives, encouraging citizens either to "feign religious belief in order to claim an exemption" or "honestly persuade themselves that they have come to hold the religious belief that entitles them to the exemption." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1017 (1990). Such fears are particularly acute for claims like that of Plaintiff 2, who testified that she did not recognize any external limits on the scope of her protected bodily autonomy. Defs.' MSJ Ex. 18 at 47:21-48:2. Importantly, this inquiry is distinct from the question whether the particular claimants at hand are *themselves* sincere. Instead, the question is more general: whether there is such an overlap between the religious claim and a claimant's secular self-interest that the temptation to false or induced exemption claims would defeat the challenged law's ability to accomplish its ends.

To illustrate: federal RFRA has exempted a corporation from covering abortifacients in employee health plans, where no cost savings were likely. *Hobby*

Lobby, 573 U.S. at 688-91, 731 n.38. But the U.S. Supreme Court has denied religious exemptions from the obligation to pay taxes, explaining that "[t]he tax system could not function" otherwise. *Id.* at 734 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)). Similarly, the U.S. Supreme Court recognized a religious exemption for a little-used hallucinogenic tea used for "sacramental" purposes, where the drug was unpleasant to ingest and "any market for" it was "thin[]." *O Centro*, 546 U.S. at 426; *see O Centro Espírita Beneficiente União do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1263-65 (D.N.M. 2002). But courts have denied similar claims for marijuana, citing its significant economic demand and its widespread recreational use. *See, e.g.*, *United States v. Christie*, 825 F.3d 1048, 1059 (9th Cir. 2016); *see also United States v. Quaintance*, 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) (noting that "the record contains … overwhelming … evidence that the [defendants] were running a commercial marijuana business with a religious front").

Here, Plaintiffs' claims, to say nothing of their class-wide injunction, raise these same risks. Abortions are, tragically, sought for many reasons—but only post-*Dobbs* did religious abortion claims become prominent. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persps. on Sexual & Reprod. Health 110, 113 (2005) (surveying reasons given for abortion, "Can't afford a baby now," 73%) ("My religion requires it" did not show up at all); Ari Berman, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*, 76 Stan. L. Rev. 1129 (2024). Indeed, here, organizational Plaintiffs do not claim their religious beliefs require or even motivate their potential future abortions,

saying only that they can "connect" their objections to S.B. 1 to religion. *Supra* p.14. To hold that this warrants an exception from Indiana's abortion law would encourage many to similarly "connect" their religious beliefs to virtually any policy, simply to pursue a course of action they are inclined to pursue anyway. Such "distorting effects" on private religious choice can—as here—ultimately *detract* from religious freedom, reinforcing the government's compelling interest in denying an exception. Laycock, 39 DePaul L. Rev. at 1016-17.

The Superior Court's compelling-interest analysis is erroneous. The Superior Court focused on the narrow and longstanding exceptions in S.B. 1 and concluded the law was "inconsistent" in furthering its compelling interest to protect humans in utero by excluding a religious exception. Op.14. This was error. In *Tandon v. Newsom*, the U.S. Supreme Court made clear that when a proscriptive government policy "treats some comparable secular activities more favorably than … religious exercise" to the point where the policy contains "exceptions and accommodations for *comparable* [non-religious] activities," the government must make a showing that the specific "religious exercise at issue" warrants more restrictive treatment to survive strict scrutiny. 593 U.S. 61, 62-64 (2021) (emphasis added). Thus, in *Tandon*, the Court held that California could not impose pandemic-related gathering restrictions on at-home religious exercise while providing more favorable treatment to comparable non-religious activities, such as gatherings at hair salons, retail stores, movie theaters, sporting events and concerts. *Id.* at 63. Accordingly, including comparable exceptions to a government policy can undermine the government's

showing that an interest is compelling. *See, e.g.*, *Singh v. Berger*, 56 F.4th 88, 99-103 (D.C. Cir. 2022) (finding that the Marine Corps had "not come close to meeting its burden of showing 'why it has a particular interest' in denying hair, beard, and religious article exceptions to these Plaintiffs 'while making them available to others' in the same or analogous form"). And so, Plaintiffs query, "[I]f an abortion *always* kills a human being, why are the statute's exceptions not extended to persons whose sincere religious beliefs compel them to obtain abortions?" Pls.' MSJ Reply Br. at 36.

The answer is simple—none of the limited, historical, and targeted exceptions in S.B. 1 are actually "comparable" to Plaintiffs' claimed religious exercise, especially when considered against the "risks" to the "asserted government interest that justifies the [law] at issue." *Tandon*, 593 U.S. at 62. As a threshold matter, Plaintiffs seek the ability to terminate prenatal human life at any stage of pregnancy, regardless of the physical condition of mother or child, Op.3-7—an exception wholly unlike any Indiana recognizes. And as described below, there are additional, meaningful distinctions between Indiana's exceptions and Plaintiffs' claim.

First, S.B. 1 permits an abortion whenever "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Ind. Code § 16-34-2-1(a)(1), (a)(3). Such exceptions aimed at preserving the mother's life have "traditionally and currently" been included in abortion bans, *Dobbs*, 597 U.S. at 339 n.2 (Kavanaugh, J., concurring), even as States have otherwise strictly regulated abortion. As this Court has held, "this fundamental right of self-protection … is so firmly rooted in Indiana's history and traditions, it is a relatively uncontroversial

legal proposition that the General Assembly cannot prohibit an abortion procedure that is necessary to protect a woman's life or to protect her from a serious health risk." *Planned Parenthood*, 211 N.E.3d at 976. Indiana's choice to legislate up to its constitutional limits cannot be characterized as an exception undermining its interest in life.

Indeed, if allowing an exception in this circumstance undermined a State's compelling interest in protecting life, then general prohibitions on intentional homicide wouldn't serve a compelling interest, either, since States uniformly recognize exceptions for self-defense. *See* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813, 1817, 1825-26 (2007). Yet no court, anywhere, has ever said these longstanding exceptions require States to allow religious honor killings or the like.

Second, S.B. 1 provides a limited exception, up to ten weeks' gestation, "if … the pregnancy is a result of rape or incest." Ind. Code § 16-34-2-1(a)(2)(A). But Plaintiffs do not seek a religious right to abortion up to ten weeks; they seek a religious right to abortion *at any stage*. Moreover, the exception for crime victims contains procedural safeguards in the form of a written doctor's certification. Ind. Code § 16-34-2-1(a)(2)(D). By contrast, the Superior Court granted Plaintiffs a broad-ranging injunction with no such safeguards, only requiring, in effect, a mere affirmation that one's desire for abortion is "connect[ed]" to one's religious beliefs, *supra* p.14, making the temptation to abuse such an exception far greater. *See* Laycock, 39 DePaul L. Rev. at 1016-17. A narrow exception aimed at protecting crime victims in

unfathomably tragic circumstances simply does not undermine the State's interest in a comparable way as would the broad and unrestricted exception sought by Plaintiffs. *See Satanic Temple v. Labrador*, 716 F. Supp. 3d 989, 1004 (D. Idaho 2024), *aff'd and remanded*, 149 F.4th 1047 (9th Cir. 2025) (exception for rape victims did not undermine Idaho's "compelling interests in preventing abortions and protecting victims of criminal conduct").

Third, S.B. 1 permits abortions up to the earlier of 20 weeks' gestation or viability if "the fetus is diagnosed with a lethal fetal anomaly." Ind. Code § 16-34-2-1(a)(1). Again, this exception addresses a situation where the State's interest is soon to be extinguished by circumstances beyond anyone's control. Such an exception does not also require the State to permit the extinguishing of prenatal human lives that would continue indefinitely, but for the abortion. That is, the State's interest in the "preservation of prenatal life," *Dobbs*, 597 U.S. at 301, doesn't require it to prohibit abortions for prenatal lives that *cannot* be preserved in order to prohibit abortions for those that *can*. *See Blattert*, 190 N.E.3d at 423.

Fourth, the inapplicability of S.B. 1 to *in vitro* fertilization likewise does not undermine its interest in comparable ways. *See* Ind. Code § 16-34-1-0.5. That exemption covers only a few days post-fertilization. *See, e.g.*, *Freed v. Freed*, 227 N.E.3d 954, 958 n.1 (Ind. Ct. App. 2024), *transfer denied*, 238 N.E.3d 642 (Ind. 2024) (discussing custody of a human *in vitro* that had been "frozen at six days old"). Indiana is by no means barred from addressing a direct, intentional threat to prenatal

human lives, up to birth, without having to first figure out how to address another, distinct, and more complex situation.

B. S.B. 1 is the least restrictive means of protecting its compelling interest.

S.B. 1 is the least restrictive means of protecting its compelling interest. Like legal restrictions on child abuse, restrictions on abortion are unique in the least restrictive means analysis. In most cases, the government can advance its interests through other means. For example, in the long-running dispute over the Affordable Care Act's contraceptive mandate, the question is whether the government can ensure women can obtain contraceptives without involving religious employers. Of course it can. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 728-29 (listing alternatives); *Korte*, 735 F.3d at 686 (noting "there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors"). In prisoner cases, the question is whether the government can achieve its security interest in some other way, such as by implementing additional searches or removing disruptive clergy from the execution chamber. *See Holt*, 574 U.S. at 365; *Ramirez*, 595 U.S. at 429-30. In COVID cases, the question was whether the government could mitigate the spread of disease through other means, such as through distancing or masking or capacity limitations. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (noting in parallel free exercise analysis "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services").

None of those cases is like this one. Under Indiana law, abortion is the direct taking of an individual, innocent life. An individual human life is not a good that can be obtained from a different purveyor, a security risk that might be avoided through other measures, or a health risk that can be otherwise mitigated. Each baby is unique and irreplaceable. No child is fungible. Similar governmental concerns abound in the context of prosecuting child abuse, given that the government has an interest in protecting *each* child from abuse and cannot satisfy its interest in protecting that child abuse by protecting a different child. In *Blattert*, the court held that prosecuting the defendant "in particular" for harming his children was the least restrictive means available to Indiana of furthering its compelling interest in protecting children in its jurisdiction from "physical abuse," since no other means was identifiable that would protect *those* children. 190 N.E.3d at 422-24. Similarly, prohibiting abortion is the least restrictive way—indeed, the only way—of furthering Indiana's compelling interest in protecting each individual human life at its earliest, most vulnerable stage.

Plaintiffs do not argue otherwise. Throughout this litigation, Plaintiffs have offered no less restrictive alternatives to those employed by S.B. 1. *See, e.g.*, *Anonymous Plaintiff 1*, 233 N.E.3d at 454. Plaintiffs instead adopted a maximalist approach, seeking a legal right to abortion any time up to birth if Plaintiffs deem that their own "health or wellbeing—physical, mental, or emotional—were endangered by a pregnancy, a pregnancy-related condition, or a fetal abnormality." Pls.' MSJ Reply Br. at 3. Indiana has never previously recognized such a right, before or after *Dobbs*.

The Superior Court, however, intervened to save Plaintiffs from their own litigation choices, reasoning that "the State's only rationale," namely, "'that granting a religious exemption to Plaintiffs will cause loss of potential life'" was "underinclusive" in light of its "'secular' exceptions." Op.15 (quoting *Anonymous Plaintiff 1*, 233 N.E.3d at 455). As explained above, it remains the case that none of them are "comparable" to the sweeping injunction Plaintiffs obtained here.

This Court already held that Indiana's exemptions represent the judgment of the General Assembly about how to best balance the "irreconcilable interests of a woman wishing to terminate a pregnancy against the interest in the prenatal life that abortion would terminate." *Planned Parenthood*, 211 N.E.3d at 980. In the vast majority of religious liberty cases, the government *can* reconcile its interest in accommodating a religious objector by adopting another alternative. But in the particular context of abortion, as with child abuse, the government has no alternative but to protect the child at issue. This Court should not accept the Plaintiffs' broad-ranging exemption from the balance that Indiana has struck.

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

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