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Clerk
Marion County, Indiana

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)	CIVIL DIVISION
COUNTY OF MARION	)	CAUSE NO. 49D01-2209-PL-031056

ANONYMOUS PLAINTIFF 1, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, *et al.*,	)
	)
Defendants.	)

Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction

Introduction

The plaintiffs have sincere religious beliefs that require and direct them to obtain abortions under circumstances where abortions are now prohibited in Indiana because of the passage of Senate Enrolled Act No. 1(SS) ("S.E.A. 1"). Although none of them are pregnant today, it is undisputed that they have altered their behavior to avoid the possibility of becoming pregnant, due exclusively to the fact that they are no longer able to obtain abortions that are compelled by their religious beliefs.

The arguments raised by the defendants (the "State") are erroneous for numerous reasons. One error that permeates each of these arguments, however, deserves mention at the outset. The State is apparently under the impression that Indiana's near-total ban

on abortions—including religiously mandated abortions—*only* affects women once they have become pregnant and wish to terminate a pregnancy. This is a remarkably naïve view that is inconsistent both with the facts before the Court and, indeed, with human behavior more generally. Confronted with the knowledge that Indiana will not allow them to have an abortion once they become pregnant, many women will simply alter their behavior in order to minimize or eliminate any chance that this will occur and that they will be forced to suffer the devastating physical and emotional consequences of an unwanted pregnancy. Acting responsibly, this is precisely what each of the individual plaintiffs and members of Hoosier Jews for Choice have done. But the fact that they have altered their behavior in order to avoid becoming pregnant in the first place, rather than waiting to file suit until they actually became pregnant, does not alter the clear injury that they are suffering as a result of S.E.A. 1's prohibition on religiously mandated abortions.

Given that the plaintiffs are today being injured by the statute, the State errs in arguing that their claims are not ripe. The State also errs in arguing that the statute does not impose a substantial burden on the plaintiffs' religious exercise, as the State has adopted a myopic view of "religious exercise" that has been rejected by the United States Supreme Court. S.E.A. 1 imposes a substantial burden that the State cannot justify as is required of it by Indiana's Religious Freedom Restoration Act ("RFRA"). Ind. Code § 34-13-9-8(b). The plaintiffs are likely to succeed on the merits of this action. Contrary to the State's arguments, the plaintiffs satisfy all the requirements for a preliminary injunction,

and one should issue, enjoining S.E.A. 1 as applied to the plaintiffs, and once certified, the plaintiff class.[1]

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[1] Plaintiffs are, of course, aware that a preliminary injunction, preventing S.E.A. 1 from going into effect, has been entered by the Monroe Circuit Court in *Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.*, *et al. v. Member of the Medical Licensing Board of Indiana*, *et al.*, No. 53C06-2208-PL-001756 (Mon. Circ. Ct. Sept. 22, 2022), *appeal pending.* The State does not argue that the pendency of this case should have any effect on the issuance of a preliminary injunction in this case. Nor should it. At the current time the defendants in the Monroe County case are appealing the decision and seeking a stay of the preliminary injunction. *See* Appellants' Corrected Emergency Motion to Stay Preliminary Injunction Pending Appeal with Notice to Other Parties, No. 22A-PL-02260 (Ind. Ct. App. Sept. 23, 2022). That motion has not yet been rule on and a preliminary injunction therefore remains necessary here in the event that a stay is granted. However, even if a stay were to be granted, plaintiffs' ability to obtain an abortion could be removed at some point in the not-so-distant future if there is an adverse appellate decision. As the court noted in *Northwest Immigrant Rights Project v. USCIS*, 463 F. Supp. 3d 31 (D.D.C. 2020), in finding that plaintiffs were suffering irreparable harm and entitled to a preliminary injunction despite the fact that the challenged rule had been enjoined in a pending proceeding in the Northern District of California,

> [t]he Court is persuaded that the parallel injunction entered in the present dispute does not remove the risk that Plaintiffs will suffer irreparable injury absent action by this Court. At least to date, Defendants have not committed to stand down in the parallel litigation, leaving the prospect that the injunction in that case could be stayed or set aside by the Ninth Circuit (or the Supreme Court). And, because this Court's reasoning does not track that of the Northern District of California in all respects, and because this Court is governed by the law of a different circuit, the Court cannot conclude that a stay or decision on the merits from the Ninth Circuit (or the Supreme Court) would resolve this case.

Id. at 81. Of course, this case, unlike the situation in *Northwest Immigrant Rights Project*, is based on an entirely different legal theory than the case arising from the Monroe Circuit Court and there is absolutely no certainty as to what will happen with that case. As noted below, the fact that the law exists is a current burden to the plaintiffs and as noted in their original memorandum and as set out in this memorandum, they meet the requirements for the grant of a preliminary injunction.

Facts

A. The impact of S.E.A. 1 on the plaintiffs

The State does not dispute the nature of the plaintiffs' religious beliefs or their sincerity. The State's characterization of the facts, however, attempts to minimize the degree to which the plaintiffs are all being harmed today by S.E.A. 1 by selectively borrowing from their deposition testimony. Given the State's attempts to cherry-pick excerpts from the plaintiffs' depositions, while ignoring both the context in which many of those statements were made and their crystal-clear affidavit testimony, the immediate effect of S.E.A. 1 on each of the plaintiffs bears reiteration.

Anon. 1 wants to become pregnant in order to have another child. (Declaration of Anon. 1 ¶ 31, Ex. 1 to Plaintiffs' Initial Evidentiary Submissions ["Anon. 1 Dec."]). Indeed, her deposition testimony could not be clearer on this point: "Q: Would you like to have more children? A: Yes." (Deposition of Anonymous Plaintiff 1, Ex. 4 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ["Anon. 1 Dep."] at 50:5-6). Somewhat remarkably, however, the State's brief attempts to characterize Anon. 1 as simply not wanting to get pregnant now or in the near future. (*See* State's Br. at 21 ["…she is taking these precautions because she would prefer not to become pregnant at this time…"]). In so doing, the State cites only Anon. 1's deposition testimony that she is currently trying to avoid getting pregnant, without citing her crystal clear response as to

why. (State's Br. at 21). As a full and accurate citation to the record indicates, she is not trying to become pregnant *because of S.E.A. 1*:

> Q: …you said right now you are not trying to become pregnant?
> A: Correct.
> Q: Why not?
> A: Because of the current laws in Indiana. And I can clarify, because I would not have the option to terminate a pregnancy if I needed [to].

(Anon. 1 Dep. at 50:10-16). Anon. 1 cannot become pregnant unless she is able to obtain an abortion consistent with her religious beliefs, and she knows that there are many circumstances in which S.E.A. 1 would prevent her from doing so. (Anon. 1 Dec. ¶¶ 33-36). She has also ceased having sex with her husband due to her fear of getting pregnant. (Anon. 1 Dep. at 52:2-25). This is so even though Anon. 1 believes that Judaism's pronatalist stance indicates that she should have more children. (Anon. 1 Dep. at 27:15-25).

Anons. 4 and 5 would also like to have children, and after beginning the medical process of using assisted reproductive technologies to do so, they have stopped that process due solely to S.E.A. 1. (Declaration of Anons. 4 and 5, Ex. 4 to Plaintiffs' Initial Evidentiary Submissions ["Anons. 4 and 5 Dec."], ¶¶ 11, 16). The State does not dispute this.

Hoosier Jews for Choice, a membership organization with over 125 members, includes members who are changing their reproductive and sexual activities due to S.E.A.

1. (30(b)(6) Deposition of Hoosier Jews for Choice, Ex. 10 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, ["HJ4C Dep."] at 53:5-22).

Anons. 2 and 3 do not currently want to become pregnant or have children, and they are altering their sexual practices as a result of S.E.A. 1. Anon. 2 experiences significant anxiety regarding the possibility of becoming pregnant without access to a religiously mandated abortion, and she has reduced her physical intimacy with her husband. (Declaration of Anon. 2, Ex. 2 to Plaintiffs' Initial Evidentiary Submissions ["Anon. 2 Dec."], ¶ 16; Deposition of Anonymous Plaintiff 2, Ex. 5 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ["Anon. 2 Dep."] at 55:17-18 ["…I don't have sexual intercourse with my husband nearly as much anymore…"]). The State simply ignores this uncontested fact, and instead characterizes her as "taking nearly identical steps to avoid becoming pregnant," though "perhaps" more "assiduously" than before S.E.A. 1 was in effect. (State's Br. at 22). But the uncontested evidence establishes that Anon. 2 is limiting her sexual intimacy with her husband and using birth control methods that she otherwise would not. (Anon. 2 Dep. at 55:13 – 56:16).

Likewise, while the State characterizes Anon. 3 as "remaining abstinent to prevent pregnancy," again, this statement is grossly misleading as to the record evidence. (State's Br. at 23). Anon. 3 is abstinent solely because of the statute: "I will therefore abstain from sexual intercourse, as that is the only way I can ensure that I will not need an abortion that would be prohibited by S.E.A. 1. I am making this decision solely because of the

application of S.E.A. 1." (Declaration of Anon. 3, Ex. 3 to Plaintiffs' Initial Evidentiary Submissions ["Anon. 3 Dec."], ¶¶ 24-25).

If a preliminary injunction is granted the plaintiffs will be able to resume their former, pre-S.E.A. 1, behavior. Anon. 1 indicated that she imagined with a preliminary injunction that she would once again resume having sexual relations with her husband. (Anon. 1 Dep. at 52:16-17). Similarly, Anon. 2 indicated that she would "go back to her normal behavior." (Anon. 2 Dep. at 58:23–59:2). Anon. 3 would once again be "able to be intimate." (Anon. 3 Dep. at 68:9-12). And although Anon. 4 indicated that she would be hesitant to become pregnant if there were only a preliminary injunction, when her wife was asked if her attitude would change if she knew the preliminary injunction would last months, she indicated that she "would feel more secure to be able to start reproductive—assisted reproductive technologies to get pregnant," or for Anon. 4 to begin the process. (Anon 4 Dep. at 25:8-16; Anon. 5 Dep. at 48:17–49:2).

B. Beliefs about when life begins are theological and philosophical in nature

The State, through declarations by Tara Sander Lee, Farr Curlin, and O. Carter Snead, rather remarkably attempts to establish that the question of when life and personhood begins is a matter of settled scientific or biological fact, and not the proper subject of religious belief. As illustrated by Dr. Brian Gray, while some biological elements of embryonic and fetal development are well-established, the account of development presented by the State's proffered expert is incomplete and misleading.

(Declaration of Dr. Brian Gray ¶¶ 5-10 [embryonic development generally], ¶¶ 11-12 [cardiac development], ¶¶ 13-15 [respiratory system development], ¶¶ 16-18 [fetal response to stimuli], ¶ 19 [lack of purposeful movement], ¶ 20 [olfactory theory], ¶ 21 [tear ducts]). And the process of human development certainly does not, in and of itself, answer the question about when a human's life begins. (*See id.* ¶¶ 5-9). Moreover, contrary to the statements of the State's proffered experts, the "personhood" statuses of a zygote, embryo, or fetus cannot be stated as matters of fact. (Declaration of Dr. Peter Schwartz, MD, PhD ¶¶ 11-19 [fetal status as an independent organism], ¶¶ 20-27 [limits of biological science and errors of State's proffered experts], ¶¶ 28-30 [conclusions as to role philosophical and theological considerations]). For many individuals, such as the plaintiffs, they certainly cannot be stated without reference to moral, ethical, spiritual, and religious beliefs. (*See* Anon. 1 Dec. ¶ 9; Anon. 2 Dec. ¶¶ 10-11; Anon. 3 Dec. ¶ 9; Anons. 4 and 5 Dec. ¶ 9; HJ4C Dec. ¶ 5).

Argument

I. This matter is ripe for adjudication

The doctrine of ripeness "asks whether [a] claim is sufficiently developed to merit judicial review." *Holcomb v. Bray*, 187 N.E.3d 1268, 1285 (Ind. 2022). "There must exist not merely a theoretical question or controversy but a real or actual controversy, or at least the ripening seeds of such a controversy." *Id.* at 1287 (internal citation omitted). The issues presented in the case must be "based on actual facts rather than abstract

possibilities," and there must be an adequately developed record on which such issues might be decided. *Id.*

The record evidence demonstrates, based on actual facts, that the plaintiffs are suffering injury and altering their behavior solely because of S.E.A. 1. There is nothing theoretical about the harms that they are suffering or the legal issues that are raised by the passage of the statute. Anons. 1, 4, and 5 are currently not attempting to become pregnant when—absent the statute—they would. Anon. 3 is currently abstinent when she otherwise would not be. And Anon. 2 has severely decreased her sexual intimacy with her husband and has been required to use birth control measures that she otherwise would not. Members of Hoosier Jews for Choice are altering their sexual and reproductive practices due to S.E.A. 1. None of this is disputed.

Moreover, the record is both fully developed and undisputed as to why the plaintiffs are taking these measures: their only alternative is the unacceptable risk of needing a termination that would be required by their religious beliefs but prohibited by S.E.A. 1. Of course, none of the plaintiffs is currently pregnant, but the risks to them are not hypothetical. Anons. 1 and 2 have been required in the past to terminate pregnancies based upon their religious beliefs, and Anon. 1 has been informed that, if she becomes pregnant again, she has at least a one-in-thirty chance of having to terminate under precisely the same circumstances. (Anon. 1 Dec. ¶¶ 38-40; Anon. 2 Dec. ¶ 14). Anon. 3 has a serious medical condition, and pregnancy would require her to forego her

medications, take on serious medical risks and instability, and experience pain and suffering. (Anon. 3 Dec. ¶¶ 16-22). And Anons. 4 and 5 are well aware of the risks to their health that pregnancy may engender, as are the members of Hoosier Jews for Choice. (Anons. 4 and 5 Dec. ¶¶ 13-14; HJ4C Dec. ¶ 7).

This Court need look no further than the Indiana Supreme Court's recent decision in *Holcomb v. Bray* to confirm that this matter is ripe for adjudication. 187 N.E.3d 1268 (Ind. 2022). That case involved a legislative enactment that would have enabled a small subset of legislators to authorize the convening of an "emergency session" of the Indiana General Assembly. *Id*. at 1274. The Governor vetoed that bill, explaining that, in his view, it unconstitutionally delegated to the General Assembly "the ability to call itself into a special session, thereby usurping a power given exclusively to the governor under Article 4, Section 9 of the Indiana Constitution." *Id.* The General Assembly overrode the veto, and the law went into effect. *Id.*

Soon after, the Governor filed suit against multiple legislative party defendants, seeking to enjoin enforcement of those provisions. *Id.* Among other arguments, the defendants contended that because no emergency session had yet been convened, and because none was in the offing, the matter was not ripe for the Court's adjudication. *Id.* The defendants argued that since they had "neither acted nor threatened to act in a manner that would present an immediate danger directly affecting the Governor's constitutional right to call a special session," the matter was not ripe. *Id.* at 1287.

Both the trial court and the Indiana Supreme Court rejected the defendants' ripeness argument. The Supreme Court agreed with the Governor that "waiting for a future emergency to challenge the law [was] neither prudent nor legally required." *Id.* at 1287. The Court held that the dispute was "far from theoretical," and that the parties had developed a sufficient record upon which it could rule on the constitutionality of the law. *Id.* at 1288.

So too here. Of course, the only harm facing Governor Holcomb was the *possibility* that the legislature would attempt to convene a special session. Here, as described at length, the plaintiffs are all experiencing *actual and present* harm. The State argues, without any support, that the plaintiffs are required to become pregnant before they may challenge the law. This remarkable position is supported neither in fact nor in the law, and it ignores the practical impossibility of fully litigating a pregnancy-related claim, as well as the realities of human behavior. The plaintiffs cannot be possibly be required to participate in placing themselves at physical risk, or at risk of violating their own religious beliefs, in order to challenge a statute that is already causing them harm: certainly that would be "neither prudent nor legally required." *Id.* at 1287. The dispute here is not theoretical: the plaintiffs are altering their behavior as a direct result of the challenged statute, and no more is required for this matter to be ripe for adjudication.

II. Plaintiffs are likely to succeed on the merits of their claim

A. SEA 1 imposes a substantial burden on plaintiffs' religious exercise

The evidence is uncontested that Jewish law provides that a fetus is not deemed to be a living person until birth and that when a pregnant woman's mental or physical health is threatened, the woman is compelled to obtain an abortion, even in circumstances where abortion is prohibited by S.E.A. 1. (Declarations of Rabbis Dennis and Sandy Sasso ¶¶ 9-11, Ex. 6 to Plaintiffs' Initial Evidentiary Submissions ["Submissions'] ["Sassos"]; Declaration of Rabbi Brett Krichiver ¶¶ 6-8, Ex. 7 to Submissions ["Krichiver"]). Islam also does not deem the fetus to be ensouled at conception, and conservative Islamic scholars agree that abortion must be available if necessary to protect the physical or mental health of the woman, even in situations prohibited by S.E.A. 1. (Declaration of Rima Shahid ¶¶ 7-9, Ex. 9 to Submissions ["Shahid"]). Therefore, Jewish and Islamic law agree that to the extent that S.E.A. 1 prohibits a woman from obtaining an abortion when it is necessary for her physical or mental health, the woman is not able to comply with religious law and this substantially burdens the woman's religious belief and exercise. (Sassos ¶¶ 11-12; Krichiver ¶¶ 9, 12; Shahid ¶ 11).

Anons. 1, 4, and 5 are Jewish, as are the members of Hoosier Jews for Choice. These three plaintiffs, and members of Hoosier Jews for Choice, are women who share the belief that Jewish law compels them to obtain an abortion if necessary for their mental and physical health, but S.E.A 1 precludes their ability to obtain an abortion absent a physical

health risk that is likely to cause substantial and irreversible impairment to a major bodily function. Anon. 3 is a devout Muslim who also believes that Islamic law compels her to obtain an abortion if her physical or mental health is threatened during pregnancy, even if the health risk falls short of causing her substantial and irreversible impairment to a major bodily function. All of these plaintiffs believe that not being able to obtain an abortion when compelled to do so by their religions substantially burdens their religious beliefs. This is not a matter of "self-actualization," it is a matter of Judaic and Islamic law.

It is true that Anon. 2 does not subscribe to a specific religion. But she is compelled by her religious beliefs to maintain autonomy over her body, which requires that she be allowed to terminate a pregnancy if the pregnancy interferes with her ability to fully realize her humanity and inherent dignity. S.E.A. 1 prohibits her from obtaining an abortion when she believes it would be necessary to obtain one, and it therefore substantially burdens her religious belief.

Religious exercise is substantially burdened if the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Rv. Bd. of Ind. Emp. Security Division*, 450 U.S. 707, 718 (1981). Given that the State does not argue that plaintiffs are not sincere and that S.E.A. 1—more than exerting pressure—actually prohibits behavior compelled by their religious beliefs, this would seem to be the end of the matter. However, the State argues that abortion is not a "religious exercise," and therefore Indiana's RFRA does not apply. But to make this argument the State

necessarily must determine that the plaintiffs are "wrong" in believing that their religion and religious beliefs compel them to obtain abortions under certain circumstances.

In doing so, the State ignores the fact that "courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (cleaned up). It is simply "not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). To do so would place a court as the arbiter of the reasonableness and propriety of religious belief and would violate the First Amendment. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (noting that the Free Exercise Clause "embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove . . . . The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."). The State is doing precisely what it cannot do: it is deeming plaintiffs' religious beliefs to be "incorrect."

Of course, abortion is not like a religious diet or gathering for the Sabbath that has obvious religious significance. (State's Br. at 29). On the other hand, growing a beard is not viewed by most as a religious exercise or obligation, but for some it certainly is. *See Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (prisoner policy prohibiting beards violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, as he

believed the Muslim men must grow beards). Slaughtering an animal is not deemed by most to be a religious event, but for some it is. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525, 547 (1993) (ordinance prohibiting the ritual slaughter of animals violated the free exercise rights of a church and its priest that practice Santeria religion, which engages in such sacrifice as part of its religious teachings). Having your photograph taken would not be deemed by most to involve religious belief, but for some it certainly does. *See Quaring v. Peterson*, 728 F.2d 1121, 1124, 1127-28 (8th Cir. 1984) (requiring that the State issue an identity document to the plaintiff without the required photograph because she believes that it violates the Second Commandment inasmuch as it a "graven image"), *aff'd by equally divided Court*, 472 U.S. 478 (1985). Similarly, there is nothing inherently religious about mandatory school-attendance laws, unless there is. *See Wisconsin v. Yoder*, 406 U.S. 205, 210-12, 234 (1972) (the First Amendment requires that Old Order Amish children be exempted from compulsory education beyond the eighth grade as commanded by the Amish religious beliefs that seek to minimize exposing children to "worldly influence").

The point, missed by the State, is that all of these cases recognize that what many would not deem to be "religious" is in fact imbued with religious significance for some and that the government has no business saying that the behavior is not "really" religious. And the State chooses to ignore the fact that this religious significance, and the obligations that flow from it, must be acknowledged and accommodated by the government. That is

the whole purpose of Indiana's Religious Freedom Restoration Act. Ind. Code § 34-13-9-0.7, *et seq.*

This is nowhere clearer than in *Hobby Lobby*, where federal regulations compelled closely held corporations to provide health insurance for employees that could be used to purchase contraception methods that violated the religious beliefs of the owners of the corporations as they believed that the methods would facilitate abortions. 573 U.S. at 689-91. Of course, paying insurance is not generally deemed to be imbued with religious significance. Yet, the Supreme Court concluded that the Health and Human Services ("HHS") regulations requiring the corporations to provide insurance violated the federal RFRA as they imposed a substantial burden without justification on the religious beliefs of the corporations' individual owners by requiring them to take actions that could lead to violations of their religious beliefs. *Id.* at 690-91.

In defending the regulations in *Hobby Lobby* the government argued that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." *Id.* at 723. But this argument ignored the religious beliefs of the plaintiffs as they sincerely believed that there was a direct linkage between the regulation and the destruction of embryos that made it immoral to provide the coverage, even if the government did not see that connection. *Id.* at 724. This was simply not something that

the government could challenge. "Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principle dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason we have repeatedly refused to take such a step." *Id.* at 725 (citations omitted). One of the cases the Court cited was *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the Court noted, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 887 (citations omitted).

The State here is doing exactly what the Supreme Court warned in *Hobby Lobby* that it must not do. The State has dismissed the significance of abortion for the individual plaintiffs and the members of Hoosier Jews for Choice as "but a secular means to a religious end." (State's Br. at 30). What does this mean? Surely the State would not attempt to argue that circumcision is not a religious activity for those who see it as such, simply because others may become circumcised for non-religious reasons. How can the State possibly make this argument in light of *Hobby Lobby* and a lengthy history of Supreme Court jurisprudence? The government argued in *Hobby Lobby* that paying insurance was just a secular act, with an attenuated connection to religious principles. The point is that abortion may be "secular" to some, in the same way that paying insurance may be "secular" to some. But to these plaintiffs, abortion is compelled by their religious beliefs in circumstances not allowed by S.E.A. 1. The State's argument is nothing

more than a reiteration of the "too attenuated" argument forcefully rejected in *Hobby Lobby*.

The State reenforces the argument that the plaintiffs are "wrong" in their beliefs—an argument it cannot make, by stating that "[p]laintiffs identify no principle that makes abortion a religious act any more than countless other actions that they believe affect their wellbeing." (State's Br. at 30). The point, of course, is that the plaintiffs have identified the specific religious principles that compel them—as a matter of those religious principles—to obtain an abortion in situations where the abortion would no longer be allowed under Indiana law and these beliefs are being substantially burdened.

The State argues further (State's Br. at 31), that even if the plaintiffs have a religious obligation to obtain an abortion, that issue is not present here because plaintiffs are taking steps to prevent this eventuality. This appears to be a recasting of its ripeness argument, and it is no more successful than it is elsewhere in the State's memorandum. Because of their religious obligation, the plaintiffs are having to radically alter their behavior as Indiana now prohibits what could be compelled by their religions if they became pregnant. If a Christian believed that she could not work on Sunday and a government employer said that it would give the employee the day off, but she would have to work two shifts on Saturday, is there any doubt that she would have a valid RFRA claim? Not under the State's logic, as she could take measures to avoid the burden on her religious exercise and belief, and thus there would be no substantial burden. The fact that the onus

is put on the religious practitioner to avoid being compelled to act contrary to her religion does not mean that placing that onus on her fails to create a substantial burden on her religious exercise.

S.E.A. 1 prohibits the plaintiffs and members of Hoosier Jews for Choice from obtaining abortions under situations where they are compelled to do so by their religious beliefs. The State's argument that this does not create a substantial burden on those religious beliefs is nothing more than an attempt to dismiss the beliefs as not worthy of protection by RFRA. This is not only insulting to the sincere religious beliefs of the plaintiffs and to the many thousands of adherents with the same religiously mandated beliefs, but it is contrary to law. The religious beliefs of the plaintiffs are substantially burdened by S.E.A. 1.

B. The State has not carried its burden under RFRA

1. The State has not demonstrated a compelling state interest in precluding virtually all abortions

Given that the plaintiffs have demonstrated that S.E.A. 1 substantially burdens their sincere religious beliefs, the State must demonstrate that the law furthers a compelling governmental interest and is the least restrictive means of furthering that interest. Ind. Code § 34-13-9-8(b). And, as plaintiffs have stressed previously, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita*

Beneficente Uniao do Vegetal, 546 U.S. 418, 430-31 (2006). *See also Blattert v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022) (same) (citing *O Centro*). The State argues that an abortion at any gestational age beginning at fertilization "ends the life of an innocent human being" (State's Br. at 32), and that it has a compelling interest in protecting this class of "vulnerable human beings" from being killed (*id* at 33).

Although the State has an affiant declare that the status of a fetus is not a "theological position," *id.* at 32, it is most certainly a theological position.[2] Judaism and Islam, two of the great religions of the world,[3] do not recognize the personhood of the fetus. (*Supra* at 12). It is a religious position that a fetus is a person at fertilization.

Despite the State's argument, Indiana does not, in its statutes, recognize that a fetus, from the moment of fertilization, is a human being. Our criminal code defines "human being" as "an individual who has been born and is alive." Ind. Code § 35-31.5-2-160. Thus, while killing a fetus can be murder under Indiana law, the murder statute differentiates between the killing of a fetus and the killing of a "human being." Ind. Code 35-42-1-1.

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2 Dr. Peter Schwartz addresses at length the State's proffered expert opinions regarding the status of zygotes, embryos, and fetuses. (*See* Schwartz Dec. ¶¶ 28-29). Suffice it to say, although the State presents these issues as factually and morally indisputable, they are not.

3 *See. e.g.*, *Shelby Co., Ala. v. Holder*, 679 F.3d 848, 904 (D.C. Cir. 2012) (Williams J., dissenting) (referring to Islam, Judaism, and Christianity as "the three great monotheistic religions), *rev'd on other grounds*, 570 U.S. 1006 (2012); *Handschu v. Special Services Division*, 273 F. Supp. 2d 327, 39 (S.D.N.Y. 2003) (describing Islam as "one of the world's great religions").

The legal distinction between a fetus and a human being is not surprising.[4] The Court of Appeals has noted that there is an inherent distinction between a child born alive and a fetus as "the child who has been born has an independent existence outside the mother's body, and the unborn fetus lives within her body." *McVey v. Sargent*, 855 N.E.2d 324, 328 (Ind. Ct. App. 2006). In 2009 (P.L. 129-2009, Section 8), the General Assembly expanded Indiana law, defining a "child" for purposes of an action for wrongful death or injury to include not only a child born alive but also "a fetus that attained viability," Ind. Code § 34-23-2-1(b), meaning that until the fetus can have an independent existence outside of the woman's body, it is not recognized as equivalent to a living person.[5]

Therefore, Indiana law does not recognize that a nonviable fetus is a human being. The fact that some religions do not allow the State to exalt and further that religious opinion as the opinion and law of the State of Indiana. To point out the obvious, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general" and government may not act "to benefit religion or particular religions." *Church of the Lukumi Babalu Aye,* 508 U.S. at 532. "The First Amendment mandates governmental neutrality between religion and religion, and between religion

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4 Though, to be clear, the issue here is not only the status of fetuses, but also the status of zygotes and embryos, as the State claims its interest from fertilization onward.

5 Although the State complains about the "arbitrary" distinction between viable and nonviable fetuses (State's Br. at 34), this is the distinction that still exists in Indiana law, as well as medical science. (*See* Gray Dec. ¶¶ 13-14; Schwartz Dec. ¶¶ 19-27).

and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The State's argument obliterates this mandated neutrality.

In support of its argument, the State cites to *Cheaney v. State*, 285 N.E.2d 265 (Ind. 1972). In this case, decided before *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org*. –U.S.–, 142 S. Ct. 2238 (2022), the Indiana Supreme Court opined that the State's "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." *Id.* at 270. This comment is removed from any constitutional analysis, so it is not clear what the Court meant by "compelling interest." In any event, subsequent jurisprudence has held that the state does not, as a matter of law, have a compelling governmental interest in embryonic or fetal life from its inception that outweighs, in this case, the rights safeguarded by RFRA.

As plaintiffs noted in their original memorandum, both *Roe*, 410 U.S. at 163 and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), *overruled by Dobbs*, recognized that states do not have a compelling interest in prohibiting abortions prior to viability. Although *Dobbs* overruled *Roe* and *Casey*, it did not change the fact that the United States Supreme Court has determined that there is no compelling state interest in preventing a woman from obtaining an abortion prior to viability. Instead, *Dobbs* held that there is no federal constitutional right to abortion, and therefore the challenged Mississippi law that generally prohibited abortion after a gestational age of 15 weeks was

subject only to rational basis scrutiny, which it satisfied. 142 S. Ct. at 2284. However, inasmuch as S.E.A. 1 substantially burdens the plaintiffs' religious exercise, it is not subject to rational basis scrutiny; it is subject to strict scrutiny. And this scrutiny must consider the State's interest in the "particular context" here, *Holt*, 574 U.S. at 363, an attempt to override plaintiffs' fundamentally important religious beliefs.

The fact that *Cheaney* is not controlling here can be seen in the fact that no Indiana case has relied on its "compelling" interest language. In *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003), which concerned a challenge under Indiana's Equal Privileges and Immunities Clause, Art. 1 § 23, to the State's failure to pay for certain abortions under the Medicaid program, the State cited *Cheaney*, arguing that it had a "valid and compelling" interest in protecting fetal life. 796 N.E.2d at 255. Whatever that means, that interest was not sufficient to prevent the Court from concluding that so long as the Indiana Medicaid program paid for abortions when necessary to preserve the life of the woman or where the pregnancy was caused by rape or incest, Art. 1, § 23 required that it pay for abortions for Medicaid recipients whose pregnancies created a serious risk of substantial and irreversible impairment of a major bodily function. *Id.* at 259. That is, the State's interest was not deemed compelling enough to allow the State to refuse to provide the Medicaid coverage for certain abortions.

In *Clinic for Women, Inc. v. Brizzi*¸ 837 N.E.2d 973 (Ind. 2005), the Court found that the "material burden" standard applicable in state constitutional challenges was identical

to the "undue burden" standard then applicable to assess abortion restrictions under the United States Constitution, thus allowing the Court to avoid deciding whether the Indiana Constitution contains a right to privacy encompassing abortion rights. *Id.* at 984. At no point in this analysis, or its subsequent discussion concerning the constitutionality of the challenged Indiana law, was *Cheaney* or the State's alleged compelling interest in protecting life from the point of conception even mentioned. Indeed, *Humphreys* appears to be the only Indiana that even mentions the "compelling" interest language of *Cheaney*.[6]

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[6] In an attempt to flesh out the meaning of the Court's statement in *Cheaney*, the State cites to *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022), where the Iowa Supreme Court quoted from its earlier decision in the case that "'the state has a compelling interest in protecting fetal life.'" *Id.* at 735 n. 16 (quoting *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 239 (Iowa 2018), *rev'd,* 975 N.W.2d 206 (Iowa 2022)). However, the quote is taken out of context as the full quotation in the earlier case is that

> the state has a compelling interest in promoting potential life. *See* [*Roe*] at 164, 93 S. Ct. at 732 (noting after viability the state may "promot[e] its interest in the potentiality of human life).

Id. (second alteration by the court). Plaintiffs do not disagree that the State has a strong interest in protecting a viable fetus, and the citation is not helpful to the State. Neither is its citation to *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), where in the course of upholding a feticide statute the court noted that the state has an interest in protecting the "potentiality of life" as recognized in *Roe* and that the state also protects the woman's right to determine whether she will carry the fetus *in utero. Id.* at 322.

Other states, interpreting their state constitutional provisions to protect abortion rights, have noted that there is not a compelling interest in protecting a nonviable fetus. *See, e.g.*, *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981) (the court reiterates that *Roe* establishes there is a not a compelling state interest in protecting a nonviable fetus and that the protections under the California Constitution are at least as broad as those specified in *Roe*); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995) (noting that under the Minnesota Constitution's a compelling state interest exists to overcome the right to abortion subsumed in the constitution's implicit privacy right "usually at viability") (internal quotation and citation omitted); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000)

The need to look specifically at the application of the statute to those whose "exercise of religion is being substantially burdened," *O Centro,* 546 U.S. at 430-31, has led courts applying RLUIPA and the federal RFRA to exempt persons from coverage of otherwise valid laws to allow the persons' religious beliefs to be accommodated. In *O Centro*, a federal RFRA case, the Supreme Court affirmed a lower court's determination that a religious group that received communion containing a plant-based hallucinogen regulated under the Controlled Substances Act should be able to have access to the plants. 546 U.S. at 425-27, 439. In *Holt*, a RLUIPA case, the prison was ordered to modify its beard policy so that the Muslim plaintiff-prisoner could grow a 1/2-inch beard in accordance with his beliefs. 574 U.S. at 369-70. In *Hobby Lobby*, the mandate to provide insurance was found to violate RFRA as applied to the closely held corporations. 573 U.S. at 736. In all these cases, a religious exemption was required for otherwise applicable laws, which presumably could continue to be enforced against persons without sincere religious objections. The State here has not demonstrated a compelling interest in not extending a religious exemption to plaintiffs here.

2. The State has not demonstrated that S.E.A. 1 is the least restrictive means to achieve a compelling interest

The State's position is that an abortion, regardless of gestational age of the zygote, embryo, or fetus, is the killing of an innocent human being. (State's Br. at 33). Yet, S.E.A.

(recognizing that "the State's interest in potential life becomes compelling at viability"), *superseded by amendment* Tenn. Const. art. I, § 36 (2014).

1 allows abortions to occur in the case of rape, incest, where the fetus has an abnormality that will not allow survival after birth for more than three months, or where the abortion is necessary to prevent the death of the woman or necessary to prevent a serious risk of substantial and irreversible physical impairment to a major bodily organ. Ind. Code § 16-34-3-1(1)(A)(i); Ind. Code § 16-34-2-3; Ind. Code § 16-34-2-1(a)(1)(A)(ii); Ind. Code § 16-34-2-1(a)(2). As plaintiffs previously noted, a statute is not narrowly tailored if it is underinclusive. *See, e.g., Williams-Yulee v. Florida Bar,* 575 U.S. 78, 802 (2011); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020). This statute is underinclusive by allowing for some exceptions, but not for those based on the substantial burdening of sincere religious beliefs.

The State's response to the obvious underinclusiveness of S.E.A. 1 is to argue that the exceptions allowed in the statute are not "related to the interests the State seeks to advance," *Blattert v. State*, 190 N.E.3d 417, 423 (Ind. Ct. App. 2022). This an odd assertion, as the State's asserted interest is to prevent what it terms as the "killing of innocent human beings." (State's Br. at 33). Allowing *any* exception to its position that abortion is always murder is, by definition, *contrary* to the interest that the State asserts it is advancing by the statute.

The State argues that the exceptions allowed under S.E.A. 1 do not "reveal sinister treatment of religion" and the law cannot be deemed to be underinclusive because it does not indicate invidious discrimination against religion. (State's Br. at 36-37). This argument

is erroneous, as it rests on a false premise. The State does not cite authority for its claim that there must be a "sinister" motive, and there need not be. It is enough that the State has allowed exceptions to the law in some situations, but not in the religiously mandated situations presented by plaintiffs.

The State has adopted a religious position as to the when human beings come into existence and disregards the fact that not all religious belief is consistent with its position. It has adopted prohibitions on abortion despite the fact that sincere religious beliefs compel abortions in situations in which they are no longer allowed. This is invidious discrimination against the religious beliefs to which the State does not subscribe, and indeed the substance and tenor of the State's briefing confirms that this is exactly what it is doing. *See, e.g., Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1186 (10th Cir. 2001) ("Discrimination is invidious if based upon impermissible or immutable classification such as race or other constitutionally protected categories, or arises from prejudice or animus.") (internal quotation and citation omitted).

The State argues that the exceptions in S.E.A. 1 are narrow rather than based on the "subjective preferences of individual women," which in the State's view would apparently be broader. (State's Br. at 37). This continues the State's unfortunate pattern of denigrating the plaintiffs' religious beliefs that, of course, are no more or less subjective than believing that a human being comes into existence at the moment of fertilization. It also continues the State's pattern of ignoring the fact that the State of Indiana does not

have the ability under the First Amendment to "rate" the validity of plaintiffs' sincerely held beliefs. In *O Centro*, in refusing to allow the government to prohibit a religious sect from gaining access to a hallucinogen that was otherwise prohibited as a Schedule I substance by the Controlled Substances Act, the Court did not criticize the "subjective preferences" of the members of this small sect. Instead, the Court noted that given that there was an exception in the Act for the use of peyote by recognized Indian Tribes, there was no reason to restrict its use to the plaintiffs who had sincere religious needs for the hallucinogen. 546 U.S. at 433-34. The Court rejected the argument that the unique relationship between the Indian Tribes and the United States justified the existing exception, as "if any Schedule I substance is *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote?" *Id.* at 434 (Court's emphasis). Similarly, if an abortion *always* kills a human being, what allows the exceptions in the S.E.A. 1, and why are they not extended to persons whose sincere religious beliefs compel them to obtain abortions?

Plaintiffs certainly do not criticize the exceptions contained in S.E.A. 1. However, having made exceptions, the State cannot be heard to say that it is relieved from the duty under RFRA to make exceptions for sincere religious beliefs, given the primacy of those beliefs. The statute is underinclusive, and the State has not demonstrated that S.E.A. 1 represents the least restrictive alternative to advance a compelling interest.

III. The other requirements for the grant of a preliminary injunction are met

A. Absent a preliminary injunction the plaintiffs will suffer irreparable harm for which there is no adequate remedy at law

As noted previously, Indiana cases hold that "when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor." *B&S of Fort Wayne, Inc. v. City of Fort Wayne,* 159 N.E.3d 67, 76 n.2 (Ind. Ct. App. 2020) (internal quotation citations omitted); *see also, e.g., Combs v. Daniels*, 853 N.E.2d 156, 160 (Ind. Ct. App. 2006); *L.E. Servs., Inc. v. State Lottery Comm'n*, 646 N.E.2d 334, 349 (Ind. Ct. App. 1995). While the State argues that this per se rule has never been adopted by our Supreme Court (State's Br. at 39), the rule been long established and frequently reiterated by the Court of Appeals. That binding precedent applies here and is entirely consistent with case law applying the identical federal standard for the issuance of a preliminary injunction. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Christian Legal Soc'y v. Walke*r, 453 F.3d 853, 859 (7th Cir. 2006); *Jolly v. Coughl*in, 76 F.3d 468, 482 (2d Cir. 1996). *Jolly* in particular reiterated the fundamental principle, ignored by the State, that "the denial of [a] plaintiff's right to the free exercise of religious beliefs is a harm that cannot be adequately compensated monetarily." 76 F.3d at 482.

The State nonetheless selects excerpts from the plaintiffs' depositions to argue that the harm they are suffering is merely speculative. (State's Br. at 39-41). This is merely a reiteration of its erroneous ripeness argument addressed above, and it fails for all the

same reasons. Anon. 1 has stopped having sex with her husband due to a fear of becoming pregnant in a state that will not permit her to have a religiously mandated abortion. Anons. 2 and 3 have also altered their sexual behavior significantly, as have members of Hoosier Jews for Choice. And Anons. 1, 4, and 5 are explicitly refraining from becoming pregnant—today—due to Indiana's near-total ban on abortion. This is all irreparable harm.

Ultimately, it appears that the State believes that irreparable harm might result from its abortion ban if and only if a currently pregnant plaintiff desires an abortion that she is unable to obtain. As underscored at the very outset and throughout this memorandum, this position exhibits a remarkably naïve view of the real-world implications of a ban on the abortion procedure. Given the threat to their physical and psychological wellbeing, and the religious need for an abortion that they would not be allowed to obtain, instead of risking a pregnancy that they might not be able to terminate, many women will simply alter their behavior to eliminate or minimize the chances that they will become pregnant in the first place. The plaintiffs have certainly done so. The fact that they are acting responsibly in light of Indiana's abortion ban, however, does not mean that they are not harmed by that ban. They are, and irreparably so. The State's arguments to the contrary are without merit.[7]

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[77] The State does not suggest that the plaintiffs have a damages remedy, nor could it as the plaintiffs' ongoing injuries cannot be compensated. They therefore do not have an adequate remedy at law. *See, e.g.*, *Bartow v. Sipes*, 744 N.E.2d 1, 9 (Ind. Ct. App. 2001) (noting that "a suit for

B. The balance of harms and public interest favor a preliminary injunction

Finally, the State argues that the remaining factors for preliminary relief—the balance of harms and the public interest—weigh in its favor. (State's Br. at 42-43). The argument it advances is simple: were a preliminary injunction to issue, the plaintiffs would be allowed to terminate their pregnancies. True enough, but there are three flaws in the State's argument.

First, and perhaps most notably, whether or not the State is able to articulate an interest in the abstract, it has absolutely no interest in acting unlawfully. To the contrary, given that S.E.A. 1 violates RFRA, "the public interest [in preventing the State from acting unlawfully] is so great that the injunction should issue regardless of whether . . . the plaintiff will suffer greater injury than the defendant." *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts.,* 811 N.E.2d 819, 823 (Ind. Ct. App. 2004). The State ignores this binding precedent.

Second, while the State argues that the legislature has decided what "balance to strike between the rights of the unborn child and the rights of the mother" (State's Br. at 43 [internal quotations and citation omitted]), it wholly ignores that, through RFRA, the legislature has decreed that other statutes must play second fiddle to persons' religious rights unless those statutes meet strict scrutiny. *See* Ind. Code § 34-13-9-8. Indeed, the

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money damages is an inadequate remedy at law of Sipes Body's economic injury and reputational harm").

Indiana General Assembly has reserved the ability to exempt particular statutes from RFRA's ambit, *see* Ind. Code § 34-13-9-2, but chose not to exempt S.E.A. 1. Given all this, the State simply may not successfully characterize its interest as forwarding the desires of the legislature.

And third, all of this aside, the State again ignores the clear and immediate harm that the plaintiffs are suffering as a result of S.E.A. 1. An injunction will prevent serious impingement on their religious beliefs while maintaining the *status quo* that has existed in Indiana for half a century. *See, e.g.*, *Stoffel v. Daniels*, 908 N.E.2d 1260, 1272 (Ind. Ct. App. 2009) ("Preliminary injunctions are generally used to preserve the *status quo* as it existed before a controversy, pending a full determination on the merits of the dispute.") (citation omitted).

The balance of harms and public interest both favor the issuance of a preliminary injunction.

Conclusion

S.E.A. 1 is requiring the plaintiffs and members of Hoosier Jews for Choice to alter their conduct in fundamentally important ways to avoid the need to obtain an abortion that their religious beliefs compel, but that the new law prohibits. Their claims are most certainly ripe and they most certainly will be able to demonstrate that S.E.A. 1 violates Indiana's RFRA. Inasmuch as all the other requirements for the grant of a preliminary injunction are met, one should issue, without bond, enjoining the application of the law

to the plaintiffs, including the members of Hoosier Jews for Choice.[8]

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[8] The State does not argue that any bond should be required if a preliminary injunction is granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2022, I electronically filed the foregoing document using the Indiana E-filing system ("IEFS").

I also certify that on this 11th day of October, 2022, the foregoing document was served on the following counsel of record via IEFS.

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