IN THE

Indiana Court of Appeals

No. 22A-PL-02938

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

PROPOSED *AMICUS CURIAE* BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANTS

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Becket has litigated cases under state and federal RFRAs for decades. Becket has litigated cases under RFRA and its companion statutes in state and federal courts around the country, including in Indiana. *See, e.g.*, *Calvary Chapel O'Hare v. Village of Franklin Park,* No. 1:02-cv-3338 (N.D. Ill. 2002) (Illinois RFRA); *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008) (Illinois RFRA); *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009) (Texas RFRA); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (federal RFRA); *Zubik v. Burwell*, 578 U.S 403 (2016) (federal RFRA); *Holt v. Hobbs*, 574 U.S. 352 (2015) (federal RLUIPA); *Chabad of Key West, Inc., v. FEMA*, No. 4:17-cv-10092-JLK (S.D. Fla. 2018) (federal RFRA); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020) (federal RFRA); *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931 (7th Cir. 2022) (federal RFRA); *Singh v. Berger*, --- F.4th ---, 2022 WL 17878825 (D.C. Cir. 2022) (federal RFRA); *Apache Stronghold v. United States*, No. 21-15295 (9th Cir.) (federal RFRA, en banc argument in March 2023). Becket therefore

has extensive experience litigating RFRA cases across a host of situations, and involving clients belonging to religious traditions including Santería, Christianity, Islam, Judaism, Sikhism, and Apache traditional religion.

Becket has also represented religious people and institutions with a wide variety of views about abortion. As an organization focused solely on religious liberty, Becket takes no position on abortion as such.

Becket offers this *amicus* brief because it is concerned that Plaintiffs' attempted expansion of RFRA will damage the law of RFRA and ultimately the free exercise of religion in Indiana. When insincere plaintiffs try to deploy RFRA to achieve political ends, it becomes harder to protect sincere religious believers from government coercion. Becket therefore urges the Court to reverse the decision of the Superior Court.

SUMMARY OF ARGUMENT

Indiana's Religious Freedom Restoration Act strikes a straightforward balance: the state can govern, but when that government burdens a person's religious exercise, an injured party can go to court to seek a remedy. If the state can avoid burdening sincere religious exercise, it must. RFRA does not dictate that religious claims always win. Its test is rigorous, and it is applied rigorously.[1]

[1] Unless otherwise specified, *Amicus* uses "RFRA" to refer, collectively, to federal RFRA and its Indiana counterpart.

Plaintiffs are misusing that law. Their RFRA arguments fail at each step.

First, Plaintiffs offer pure speculation about when they might—someday, somehow—experience an injury. They say Indiana law might forbid a hypothetical future religiously required abortion of a hypothetical future pregnancy. But by its nature, a religious claim to an abortion would require a highly specific, individualized analysis of the competing religious rules in very particular circumstances. Even though the law requires immediate injury and a substantial burden, Plaintiffs offer only hypotheticals and speculation. Indeed, Indiana's existing exceptions for the life and health of the mother make the likelihood of any true future conflict vanishingly small, or even entirely nonexistent.

Second, the court below failed to consider evidence that Plaintiffs' beliefs are insincere. Plaintiffs have not shown that their beliefs are truly held. Plaintiffs say they are religiously obligated to seek abortions up to the ninth month. But Indiana law has never conformed to their alleged religious belief that they "must terminate" any pregnancy that endangers their physical, mental, or emotional health to an unspecified degree based on a subjective self-assessment. Despite this discrepancy, Plaintiffs raised no religious objections to Indiana's prior abortion regime, and several of them openly embrace it—even though it effectively banned abortions after 20 weeks. Why the sudden change of heart? There is a reasonable inference that the true reason Plaintiffs filed this lawsuit is

because they disagree with the Supreme Court's intervening decision in *Dobbs*—not because their alleged religious beliefs are "truly held."

Third, Plaintiffs also cannot show a substantial burden on their religious exercise, for many of the same reasons they lack standing. Under RFRA, such burdens must be both "likely" and "impending." Theirs are neither.

Fourth, even if Plaintiffs had standing, and even if they could establish a prima facie case, Indiana still has a compelling interest in protecting life. Plaintiffs cite no case finding a religious right to take a life, the court below cited no such case, and *Amicus* is unaware of any such case. Plaintiffs ask this Court to be the first. Plaintiffs may disagree about when life begins—but that question has already been resolved as a matter of Indiana law, and the compelling interest analysis is not a test of whether the Court likes Plaintiff's line-drawing or the government's line-drawing better.

Fifth, Indiana has no less restrictive alternative to protect life. Many RFRA cases involve a good or service that a person can obtain elsewhere or a risk that can be mitigated by some other means. In other words, in most cases there is a win-win solution. But there is no such solution here. Restrictions on ending a life are unusual, perhaps unique, in this regard. Indiana has no other way to protect the life of an unborn child than to prohibit an abortion that would end that life.

For all those reasons, the decision below should be reversed.

ARGUMENT

RFRA provides that "a governmental entity may not substantially burden a person's exercise of religion" absent a showing that the burden is both "in furtherance of a compelling governmental interest" and the "least restrictive means" to further that interest. Ind. Code § 34-13-9-8 (2015). In addition—as in every justiciable case—Plaintiffs must first establish that they have a demonstrable injury. Plaintiffs fail at every step.

I. Plaintiffs lack standing because their supposed harms are entirely speculative.

Plaintiffs' claims fail at the outset because they lack standing. "The standing requirement is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury." *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (internal citation omitted). Standing ensures this Court can draw the line between policy disputes, which are entrusted to the legislative branch, and truly justiciable disputes arising from a demonstrable injury to a particular plaintiff. *See id.*[2]

Plaintiffs here have a policy dispute, not a legal injury. To prove the requisite injury, a plaintiff must show she "'has sustained or was in immediate danger of sustaining' a demonstrable injury." *Solarize Ind., Inc.*

[2] Indiana makes a similar argument, arguing that Plaintiffs' claims are not ripe. Whether the Court decides the issue under the rubric of standing or ripeness, the result is the same: the Court has no jurisdiction over this matter. *See Holcomb v. Bray*, 187 N.E.3d 1268, 1287 (Ind. 2022) ("In addition to requiring the person seeking declaratory relief to have standing, claims must also be ripe.").

v. S. Ind. Gas & Elec. Co., 182 N.E.3d 212, 219 (Ind. 2022) (quoting *Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995)); *see also Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022) ("An injury must be personal, direct, and one the plaintiff has suffered or is in imminent danger of suffering."). These Plaintiffs have not yet sustained any injury and are not in any danger of doing so anytime soon, if ever.

Plaintiffs' claimed burdens would only come into play if a highly speculative chain of events happens. First, a plaintiff would need to become pregnant. Second, the pregnancy would need to threaten the mother's life or health—or, according to Anonymous Plaintiff 2, her "fully realize[d] . . . humanity." Pls.' Ex. 2 ¶ 13.[3] Third, that threat would need to be of a particular kind, and of sufficient magnitude, to trigger the mother's religious beliefs that she must obtain an abortion. Fourth, that abortion would need to be prohibited by Senate Enrolled Act 1 ("S.E.A. 1"), which already exempts abortions "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Ind. Code Ann. § 16-34-2-1. The probability of all this occurring at some future point is vanishingly small; indeed, it is far more likely *never* to occur. At minimum, no Plaintiff is "in immediate danger of sustaining" such an injury. *See Solarize,* 182 N.E.3d at 219.

[3] All references to briefs and exhibits are to the parties' briefs and exhibits filed with the Superior Court relating to Plaintiffs' motion for preliminary injunction.

Plaintiffs' claims here stand in sharp contrast to cases where courts granted relief under federal RFRA, which uses similar standards of injury. *See, e.g.*, *City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), as "instructive" for injury requirement); *Pence*, 652 N.E.2d at 488 (citing *Frothingham v. Mellon*, 262 U.S. 447 (1923)). In those cases, the government prohibited something the plaintiffs were either already doing or about to do quite soon. For example, in both *Hobby Lobby* and *Korte*, the plaintiffs already offered religiously compliant insurance plans that the government deemed unlawful—and penalties were set to kick in soon. *See Korte v. Sebelius*, 735 F.3d 654, 662-64 (7th Cir. 2013); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700-04 (2014). In *Holt*, the Arkansas prison required Abdul Maalik Muhammad to shave off his religiously mandated beard on pain of "serious disciplinary action." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). In such cases, the plaintiff was "in immediate danger of sustaining" a demonstrable injury. *See Solarize*, 182 N.E.3d at 219.

A planned future religious exercise may of course give rise to a RFRA claim where the injury is immediately impending. For example, in *Ramirez v. Collier*, the plaintiff—a Texas inmate on death row—had a specific execution date when he filed a RFRA suit seeking access to clergy prayer and touch in the execution chamber. 142 S. Ct. 1264, 1273, 1278 (2022). And it was undisputed that Texas's execution protocol banned his

planned religious exercise. *Id.* at 1274, 1278. His injury had not come to pass, but there was no doubt that it would soon occur.

A similar analysis should apply under Indiana RFRA, which requires burdens to be both "likely" and "impending" before a plaintiff can seek relief. *See* Ind. Code Ann. § 34-13-9-9 (requiring RFRA claimant to establish that (1) she "has been substantially burdened" or "is likely to be substantially burdened," and (2) there has been a "violation" or an "impending violation" of RFRA). Although the Supreme Court has not addressed the issue, this Court has rejected a RFRA claim where the plaintiffs' "anticipated plans are wholly speculative and hypothetical." *Ind. Fam. Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1220 (Ind. Ct. App. 2020). The plaintiffs in *Carmel*—affiliated Christian advocacy organizations—challenged various city antidiscrimination ordinances on the ground that plaintiffs planned to hold future events in cities where their religious exercise might be burdened by the ordinances. This Court rejected their claim, noting that "the record is devoid of any details from which a court could determine whether the Companies' anticipated future events are subject to the ordinances." *Id.* The same is true here.

Plaintiffs here attempt to sidestep their lack of immediate injury by alleging that they have "altered their behavior to avoid the possibility of becoming pregnant." Reply 1. But they cannot manufacture an injury by taking such precautions. In an instructive federal case, *Clapper v. Amnesty International USA*, the U.S. Supreme Court addressed whether a

group of plaintiffs—people engaged in communications that may have been the target of surveillance under a federal statute—suffered an injury in fact because the statute "require[d] them to take costly and burdensome measures to protect the confidentiality of their communications." 568 U.S. 398, 415 (2013). The Supreme Court found no injury—and thus no standing—because the plaintiffs "merely speculate[d] and ma[de] assumptions about whether their communications . . . w[ould] be acquired" under the statute. *Id.* at 411. It concluded that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416. The *Clapper* rule is fully consistent with this Court's holding that plaintiffs should be in "'immediate danger of sustaining' a demonstrable injury" to establish standing. *Solarize,* 182 N.E.3d at 219. Plaintiffs cannot confer standing upon themselves to challenge the *government's* actions by unilaterally changing their *own*.

These shortcomings are all the more egregious as to the associational plaintiff, Hoosier Jews for Choice, which also obtained an injunction. This organization—which "did not exist until after [S.E.A. 1] passed," *see* Pls.' Ex. 10 at 14:11-13, 23-24, 16:14-18—allows individuals to join by signing a Google form that solicits contact information and 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*."[4] The form further asks whether "you [can] connect the way in which you are affected by [S.E.A. 1] to your religious beliefs"—but it does not require members to specify what those religious beliefs might be. This is transparently tactical. It is also a far cry from Indiana law, which requires a demonstrable injury and a substantial burden on a religious exercise.

Plaintiffs vehemently disagree with S.E.A. 1 as a matter of public policy. That is their right, but it is not the same as having standing to proceed in court. "At its core, … the doctrine of standing asks: Where should the remedy lie? With the courts, or through the franchise? With judges, or with our politically-accountable elected officials?" *Horner v. Curry*, 125 N.E.3d 584, 590 (Ind. 2019). The legislature has carefully crafted a law that Plaintiffs believe is wrong but has not personally injured them. It is therefore up to the legislature, not the judiciary, to decide where the lines ought to be drawn.

II. Plaintiffs fail to articulate a sincere religious exercise that is substantially burdened by S.E.A. 1.

Even assuming Plaintiffs had standing, their claims would fail on the merits because they lack a sincere religious exercise and have suffered no substantial burden.

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[4] *See Hoosier Jews for Choice*, Google Forms, https://docs.google.com/forms/d/e/1FAIpQLScTCnmdGaAMq8m6iOKpY-HGXrtt7ZyS-MnsrxFBsemx4I3hX7Q/viewform, archived at https://perma.cc/S357-5EQD (emphasis added).

A. There is powerful evidence that Plaintiffs' beliefs are not sincere.

Establishing a prima facie RFRA claim requires a threshold showing that the claimant's religious belief is "sincerely held." *Blattert v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022). Plaintiffs falter on that requirement.

"While the truth of a belief is not open to question, there remains the significant question whether it is truly held. This is the threshold question of sincerity which must be resolved in every case." *United States v. Seeger*, 380 U.S. 163, 185 (1965) (internal quotation marks omitted). That question is properly answered by the courts. As the Supreme Court explained in *Hobby Lobby*, federal RFRA shows that "Congress was confident of the ability of the federal courts to weed out insincere claims." 573 U.S. at 718.[5] The Indiana Legislature's decision to enact a state RFRA reflects a similar determination that Indiana courts are "up to the job" of "dealing with insincere . . . claims." *See id.*[6]

Courts routinely deny claims under RFRA—or the related Religious Land Use and Institutionalized Persons Act—where the underlying beliefs are not sincere. *See, e.g.*, *United States v. Quaintance*, 608 F.3d 717,

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[5] Indiana courts look to federal RFRA precedent when interpreting Indiana's RFRA. *See, e.g., Blattert*, 190 N.E.3d at 421 (relying on federal RFRA cases).

[6] Whether a belief is truly held is a different matter than whether a belief is reasonable to others, which is a question "courts have no business addressing." *Hobby Lobby*, 573 U.S. at 724.

718-19, 722 (10th Cir. 2010) (Gorsuch, J.) (rejecting RFRA claim by members of Church of Cognizance where "timing and circumstances" suggested that marijuana dealers "were acting for sake of convenience"); *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996) ("we are skeptical that Ochs's request to be racially segregated, first made in the midst of prison racial disturbances, reflected a sincerely held religious belief"); *Mahone v. Pierce County*, No. 10-5847, 2011 WL 2360354 at *7-8 (W.D. Wash. May 24, 2011) (plaintiff was not "sincere in his profession that he is Jewish" where there was "no evidence that [he] . . . ever engaged in the practices and tenets of Judaism other than his stated belief that he must eat kosher foods"); *United States v. Manneh*, 645 F. Supp. 2d 98, 114 (E.D.N.Y. 2008) ("defendant's religious beliefs relating to bushmeat are not the bona fide explanation for the criminal conduct she is charged with committing"). "Evidence that the accommodation sought by a claimant would be attractive to anyone, not just to religious objectors, may be powerful evidence of insincerity." Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1231-32 (2017) (collecting cases).

Here, the record provides powerful evidence of insincerity. For example, Anonymous Plaintiffs 1, 4, and 5 each allege that their religious beliefs "include the Jewish belief that life begins when a child takes its first breath after being born." Pls.' Ex. 1 ¶ 9; Pls.' Ex. 4 ¶ 9; *see also* Pls.' Ex. 5 ¶6 (Decl. of Hoosier Jews for Choice) (similar). They go on to assert, in a single, threadbare sentence, that "according to our Jewish beliefs, if a

pregnant person's health or wellbeing—physical, mental, or emotional—were endangered by a pregnancy, pregnancy-related condition, or fetal abnormality, they are *directed to terminate the pregnancy*." Pls.' Ex. 4 ¶ 10 (emphasis added); *see* Pls.' Ex. 1 ¶ 10 ("I must terminate the pregnancy."); *see also* Pls.' Ex. 5 ¶ 6 (Decl. of Hoosier Jews for Choice) ("an abortion is directed to occur"). The requisite degree of "physical, mental, or emotional" impairment is not specified—but Plaintiffs testified that it is "ultimately an individual decision." Defs.' Ex. 4 at 41:11-14 (Anonymous Plaintiff 1); *see also* Defs.' Ex. 7 at 16:8-14 (Anonymous Plaintiff 4) (Judaism "leaves us to be able to decide"); Defs.' Ex. 8 at 32:8-10 (Anonymous Plaintiff 5) ("[I]n Judaism . . . it's up to the individual person on when they determine when to have an abortion.").

At no point do these Plaintiffs—or the Hoosier Jews for Choice—qualify their religious beliefs about abortion based on the viability or age of the fetus. Indeed, Anonymous Plaintiff 1 testified at her deposition that her religious beliefs would authorize abortion "any time before birth." Defs.' Ex. 4 at 33:7-18. But for decades, Indiana law has proscribed abortion after viability except in very limited circumstances. In the statute that immediately preceded S.E.A. 1, abortions were prohibited "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age)" absent a certification by the attending physician that "the abortion is necessary to prevent a *substantial permanent impairment* of the life or physical health of the pregnant woman." Ind. Code § 16-34-2-1(a)(3)(C)

(2021) (emphasis added). That same limitation dates back to Indiana's very first abortion regulation post-*Roe*. Ind. Code § 35-1-58.5-2 (1973).

So Indiana law has *never* conformed to Plaintiffs' alleged religious belief that they "must terminate" any pregnancy that endangers their physical, mental, or emotional health to an unspecified degree based on a subjective self-assessment. *See* Pls.' Ex. 1 ¶ 10. But Plaintiffs filed no RFRA lawsuit and raised no religious objections until this suit was filed in September 2022, after S.E.A. 1 was enacted in the wake of *Dobbs*. Neither did anyone else—of any religion—raise such a RFRA claim prior to *Dobbs*. Indeed, multiple Plaintiffs testified—in open contradiction to their stated beliefs—that they had no religious objections to the prior regime. *See, e.g.*, Defs.' Ex. 7 at 18:5-7 (Anonymous Plaintiff 4) ("Q: Before Senate Bill 1 was enacted this summer, was Indiana law consistent with your faith? A: Yes, I think so.").

The "timing and circumstances of all this" strongly suggest that Plaintiffs are acting "not because they ha[ve] a sincere religious belief" that mandates abortion but because they think RFRA will serve as a "cloak" for their non-religious objections to S.E.A. 1. *See Quaintance*, 608 F.3d at 722-23. To be sure, sincerity "does not necessarily require strict doctrinal adherence to standards created by organized religious hierarchies." *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012). But courts do consider as evidence of insincerity "delay[s] in raising [a] claim," *United States v. Messinger*, 413 F.2d 927, 932 (2d Cir.

1969), and "material[] gains" from "hiding secular interests behind a veil of religious doctrine." *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981). Both considerations are present here.[7]

Anonymous Plaintiff 2 raises even more red flags. Her declaration nominally cabins her beliefs that "a fetus is a part of the body of the mother" "at least prior to viability." Pls.' Ex. 2 ¶ 11. But she then testified at her deposition that a fetus "become[s] human" "[w]hen they are born into the world." Defs.' Ex. 5 at 32:1-8; *see also id.* at 31:24-25 (testifying that "human" means "[i]ndividuals who are breathing in this world, post-birth"). Before that point, Anonymous Plaintiff 2 asserted a "spiritual obligation to determine whether to remain pregnant." Pls.' Ex. 2 ¶ 12. Based on her "central" belief in bodily autonomy, Anonymous Plaintiff 2 insists that "I should terminate" any pregnancy that "would not allow me to fully realize my humanity and inherent dignity." *Id.* ¶ 13.

Of course, Indiana law has never permitted elective abortion through "birth"—and certainly has never done so based on a personal determination that a pregnancy interferes with "full[]" self-realization or "achieving [y]our potential." *See id.* ¶ 8. But—like the others—Anonymous Plaintiff

[7] Plaintiffs' counsel filed both this lawsuit and a separate lawsuit seeking to invalidate S.E.A. 1 and vindicate a right to abortion under the Indiana Constitution. *Planned Parenthood Great Nw. v. Members of the Med. Licensing Bd. of Ind.*, No. 53C06-2208-PL-001756 (Monroe Cnty. Cir. Ct. Sept. 22, 2022), *petition to transfer granted*, 22A-PL-2260. The ACLU of Indiana's website explains that its "legal team has been fighting at every opportunity to protect abortion access and aren't stopping." ACLU of Indiana, "Abortion Access in Indiana," https://perma.cc/SRL8-V73H.

2 never raised any objections to Indiana's prior abortion regime. And she too testified at her deposition—in open contradiction to her claimed beliefs—that prior Indiana law was "consistent with [her] spiritual beliefs." Defs.' Ex. 5 at 54:12-15. Once again, all of this strongly suggests that Anonymous Plaintiff 2 "shifted [her] religious views, apparently for purposes of litigation." Chapman, 92 Wash. L. Rev. at 1234. It further suggests that her true objections to S.E.A. 1 are "philosophical and personal"—my body, my choice—rather than religious. *See Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

Sincerity is a "question of fact," *see Rowe v. Lemmon*, 976 N.E.2d 129, 136 (Ind. Ct. App. 2012), and Plaintiffs bear the burden to prove it, *see Blattert*, 190 N.E.3d at 16. Here, Plaintiffs assert that they "are sincere in believing that their religious beliefs compel them to be able to obtain abortions prohibited by the new law." Pls.' Br. 24. And the Superior Court summarily concluded—absent citation or explanation—that each Plaintiff's religious beliefs "are sincerely held." Op. at 14–15, 17, 19, 21. Remarkably, it reached that same conclusion—without limitation—as to the "members" of Hoosier Jews for Choice, Op. 21, only "*[s]ome*" of whom are even "capable of becoming pregnant," and thus potentially affected by S.E.A. 1. Pls.' Ex. 5 ¶ 7 (emphasis added). But the available evidence—Plaintiffs' bare-bones declarations and deposition transcripts—does not support sincerity; it undermines it. Because questions of sincerity are ap-

parent, the Superior Court clearly erred by perfunctorily concluding otherwise. At minimum, the Superior Court should have held an evidentiary hearing to assess Plaintiffs' credibility. *See United States v. Adeyemo*, 624 F. Supp. 2d 1081, 1087 (N.D. Cal. 2008) (the court "cannot determine whether Defendant has a sincere belief in the Santeria religion without holding an evidentiary hearing to assess credibility issues").

B. Plaintiffs cannot show any impending substantial burden on their religious exercise.

For many of the same reasons explained in Part I, Plaintiffs also cannot show a substantial burden on religious exercise. The religious exercise at issue here would be an abortion mandated by Plaintiffs' religious beliefs. *See* Pls.' Br. 24. But the burden on that exercise is speculative, remote, and hypothetical. To meet the statutory test, each Plaintiff must show both that (1) her specifically identified religious exercise (here, abortion) "has been substantially burdened" or "is likely to be substantially burdened," and (2) there has been either a "violation" or an "impending violation" of RFRA. Ind. Code Ann. § 34-13-9-9.

A substantial burden "arises when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Korte*, 735 F.3d at 682. To show a burden on religious exercise, RFRA claimants "must also show an actual incompatibility between their religious beliefs and the conduct at issue." *New Doe Child #1 v. Congress of*

the U.S., 891 F.3d 578, 587 (6th Cir. 2018). Plaintiffs are neither currently violating their religious beliefs nor being pressured to do so. None of them claims to be pregnant currently, much less to be experiencing a pregnancy their religion would direct them to abort. They fear that a religious exercise might be prohibited in the future, but none is being prohibited now, nor is a burden on religious exercise likely for any of the Plaintiffs.

Plaintiffs do not establish why they could not seek urgent relief if the harm were actually impending, such as in the event of a pregnancy that is likely to trigger the alleged conflict between their claimed religious obligation and Indiana law. Indiana already allows abortion based upon "reasonable medical judgment" in true emergencies, Ind. Code Ann. § 16-34-2-1. And Plaintiffs could of course seek judicial relief on an expedited basis if necessary. *See* Ind. R. Civ. P. 65 (providing for emergency relief). But no burden on their religious exercise exists here.

III. Indiana's law satisfies strict scrutiny.

Once a plaintiff has demonstrated standing, a sincere religious belief, and a substantial burden on that belief, the government must then prove that the burden imposed is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." Ind. Code Ann. § 34-13-9-8. This bar is high, but not insuperable, and Indiana satisfies it here.

Even if Plaintiffs had properly articulated a conflict between their religious exercise and the law, their claims would still fail because Indiana has a compelling interest in prohibiting the taking of an innocent life. The Plaintiffs argue against this compelling interest based upon the narrow and targeted exceptions in Indiana's law. But such exceptions have been part of Indiana law in some form for more than fifty years. The Indiana Supreme Court already recognized the state's interest is compelling against a constitutional challenge in *Cheaney*, where it held that Indiana's "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).

Plaintiffs point to no case where a court granted a religious right to take a life. The court below cited no such case. And *Amicus* is aware of no such case. While our nation's laws have 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 a life.

Indiana's law is also the least restrictive means of protecting its compelling interest. Restrictions on abortion are unusual, perhaps unique, in the least restrictive means analysis. In most cases, the less restrictive alternative has to do with whether a third party can obtain a similar benefit elsewhere, or whether the government can mitigate a risk through

another means. For example: In the long-running dispute over the 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 ("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 (prison could search of beard for contraband); *Ramirez*, 142 S. Ct. at 1280 (prison could remove disruptive clergy from execution chamber). In cases involving COVID restrictions, the question is whether the government can mitigate the spread of disease through other means, such as through distancing or capacity limitations. *See, e.g.*, *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (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. There is no alternative method to protect that life. 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 mitigated. Prohibiting abortion is

the least restrictive way—indeed, the *only* way—of furthering Indiana's compelling interest in protecting a particular life.

IV. Plaintiffs' attempt to distort RFRA is contrary to the balance that the statute struck.

Indiana's RFRA—like other RFRAs—is a scalpel, not a chainsaw. It is designed to relieve an individual religious objector facing a concrete and impending conflict between her sincere religious exercise and the laws of the state. Plaintiffs' approach would upend RFRA's carefully calibrated balance and invite insincere claims.

Claimants could manufacture standing by changing their own behavior and alleging a burden on their religious exercise, undermining this Court's safeguards on standing. They could assert merely philosophical claims as a counter to the law, seeking injunctions against anything that interferes with their own self-actualization. They could bring insincere claims and win relief without having their credibility assessed in court. They could obtain injunctions for anyone who claimed on a Google form that they can "connect the way in which you are affected by the bill to your religious beliefs." *See* supra fn. 4. They could undermine a state's interest in murder laws by pointing to self-defense exceptions that do not undermine the laws. They could claim the right to extinguish a life outright, limited only by their own religious beliefs about when it is appropriate to do so.

This is a parody of RFRA, not the standard that has worked successfully in the federal government and nearly half the states for decades. This Court should apply the law of standing and the law of RFRA as they are written and maintain the balance that the Indiana legislature struck.

CONCLUSION

The Superior Court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 7,000 words. It contains 6,293 words, including footnotes, in accordance with Appellate Rule 44E, and excluding the items permitted to be excluded by Appellate Rule 44(C).

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