IN THE COURT OF APPEALS OF INDIANA
NO. 22A-PL-02938

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

AMENDED BRIEF FOR THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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1. Statement of the Interest of *Amicus Curiae*

The Jewish Coalition for Religious Liberty (JCRL) is a nondenominational organization of Jewish communal and lay leaders. JCRL is devoted to ensuring that religious liberty jurisprudence enables the flourishing of diverse religious viewpoints and practices in the United States. In order to achieve that end, protections like the First Amendment and the Religious Freedom Restoration Act ("RFRA") must be flexible enough to protect religious people's Free Exercise rights while also allowing states to pursue their most compelling needs, as long as they do so in the manner that is least burdensome to religious liberty. We believe that reading the laws in that manner is faithful to RFRA's text and provides the best way to ensure that religious minorities can thrive in America. We submit this brief to highlight the long-term costs to religious liberty if the lower court's decision is affirmed.

2. Summary of the Argument

With the ink on *Dobbs v. Jackson Women's Health Org*. barely dry, the Superior Court has cracked a new fissure in American abortion jurisprudence. 142 S. Ct. 2228 (2022). Now, rather than enforcing a substantive due process right to abortion prior to viability, the lower court has devised a novel RFRA-right to abortion that would stretch to all phases of the pregnancy—so long as a woman can claim she sincerely believes that life begins at *birth*. This absolute veto on the state's police power would dwarf the pre-viability right that prevailed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But this veto is in no way required by Indiana's RFRA.

The claims in this case, like similar cases recently filed in other states, articulate four general premises. First, the argument goes, some religions (but not others) impose an obligation on women to have an abortion in certain circumstances. Second, laws that restrict those abortions impose a substantial burden on the religious exercise of some people of faith (but not others). Third, advocates contend, the state lacks a compelling interest to protect fetal life. And fourth, abortion laws are not the least restrictive means to achieve that state interest because the laws have exemptions for pregnancies caused by rape and incest. Therefore, these cases claim, abortion restrictions would violate Indiana and other states' Religious Freedom Restoration Acts (RFRAs).

There are legal problems at each step of this analysis. First, we concede that in certain rare cases, the Jewish faith may impose an obligation on a pregnant

woman to have an abortion.[1] But, contrary to the findings of the district court, Jewish teachings on abortion are complex and cannot be reduced to the uniform, bright-line rule offered by the plaintiffs' rabbis.

Second, we also concede that for some pregnant Jewish women, in very rare circumstances, a prohibition on abortion may substantially burden their free exercise of religion. We will assume for present purposes that the individual Jewish plaintiff in this case (Anonymous Plaintiff 1) may experience such a burden if she were to become pregnant, and the law would prohibit her from obtaining an abortion. But sincerity of belief is a deeply personal notion, which cannot be imputed to an entire class by judicial notice. Ultimately, if class-wide relief is not available, any ruling in his case would quickly become unadministrable.

Third, there is a vigorous disagreement between the plaintiffs and the state about when life begins. But the lower court erred by accepting the plaintiffs' framing of the state's interest. The Supreme Court has recognized that states have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Indeed, even *Casey* held that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a

[1] Aylana Meisel & Mitchell Rocklin, *American Jews — Not Just the Orthodox — Should Join Christians in Defending Religious Liberty*, FORWARD (Dec. 20, 2017), https://perma.cc/4XEX-SC2Q ("While the matter is complicated, most Orthodox legal precedents forbid abortion except in cases where the mother's life is in danger and require violating the Sabbath to save a fetus.").

child." 505 U.S. at 846 (1992). Decisions like *Blattert v. State* demonstrate that the state is owed deference when defining its own interests. 190 N.E.3d 417 (Ind. Ct. App. 2022).

Fourth, Indiana's abortion law, like those in other states, contains exemptions for abortions in case of rape or incest. But the mere existence of those exemptions does not render the abortion law unlawful. *Tandon v. Newsom*, and related cases, held that the existence of exceptions was proof that COVID-19 lockdown measures were not generally applicable, thus triggering the application of strict scrutiny. 141 S. Ct. 1294 (2021). But Indiana's RFRA automatically applies strict scrutiny. Under RFRA, the mere existence of exceptions is neither a necessary nor a sufficient condition to render the abortion law unlawful. Moreover, if the plaintiffs' argument prevails, then another statute that is essential to our social order, and serves Indiana's highest state interest, would be in jeopardy. Murder laws, which has certain exceptions, would no longer be deemed the least restrictive means to protect human life. Under the lower court's reading of RFRA, a person with a sincerely-held religious belief could invoke RFRA to take the life of another as part of a religious human-sacrifice ritual. Fortunately, the correct answer is that the state can protect life—whether through a murder statute or an abortion statute—while still carving out narrow exemptions for rare cases.

Finally, JCRL submits this brief to highlight a pragmatic concern with the manner in which the lower court handled this new frontier of abortion jurisprudence. The legal errors cited above would upset the compromise at the heart

of RFRA. This compromise allows the judiciary to protect religious liberty while allowing the state to burden religious exercise when doing so is necessary to further a compelling government interest. The lower court's legal errors would make it nearly impossible for Indiana to demonstrate that it has sufficient justification to burden religious exercise. JCRL worries that a ruling for the plaintiffs based on the lower court's misinterpretation of RFRA would, in the long run, weaken or even eliminate religious liberty protections. Faced with the prospect of judicial interpretations that effectively eliminate the delicate legislative balance contained within RFRA, state legislatures may seek to modify, or even repeal RFRAs, thus abandoning heightened protections for religious Americans. Other states that are looking to enact RFRAs may reconsider if faced with the choice between protecting religious liberty and enforcing other compelling interests. Any victories in this case for people of faith would be short-lived, as the critical RFRA compromise will be broken.

The decision of the lower court should be reversed, and the delicate framework undergirding RFRA should be restored.

3. Argument

3.1. The lower court misapplied each step of the RFRA analysis.

Indiana's RFRA, like its federal counterpart, provides that a "governmental entity may . . . substantially burden a person's exercise of religion" only if it "demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

furthering that compelling governmental interest." Ind. Code § 34-13-9-8. To establish a claim under RFRA, the plaintiffs in this case have made four general showings. First, Jewish women have claimed that they have a religious obligation in certain circumstances to have an abortion. Second, these Jewish women—who are not currently pregnant—have asserted that Indiana's abortion law may violate that religious obligation in the future should they become pregnant. Third, the plaintiffs argue that Indiana cannot have a compelling interest to protect fetal life because that interest contradicts the plaintiffs' religious beliefs. Fourth, the plaintiffs contend that the abortion law is not the least restrictive means to achieve the state's interest.

Each element of this analysis has problems. First, the lower court erred in how it described the relationship between Judaism and abortion. Second, the lower court failed to properly consider the "substantial burden" prong, especially with regard to imputing sincere religious beliefs to an entire membership organization. Third, the Supreme Court of the United States, and the Indiana courts, have long afforded the state with latitude to define its compelling interests. These precedents do not allow the challengers to define the state's interest. Fourth, the mere existence of exemptions to Indiana's abortion regime does not render the statute unlawful.

3.1.1. **The trial court erred by stating, as a matter of fact, what Jewish law requires.**

The trial court made several factual findings concerning "Jewish law":

- "Under Jewish law, a fetus attains the status of a living person only at birth, when the greater part emerges from the mother."[2]
- "An abortion is mandated [by Jewish law] to stop a pregnancy that may cause serious consequences to the woman's physical or mental health."[3]
- "Judaism allows for and requires that an abortion be provided if the pregnancy threatens the woman's mental health, for instance if the pregnancy would aggravate psychological problems or cause such problems."[4]

To support these claims, the trial court cited the declarations of three rabbis. These three rabbis cannot, and do not, speak for all Jews. There is no Jewish equivalent of a Pope. In the United States, many Jews associate with Reform, Conservative, or Orthodox synagogues. But even within these categories, there is no official or standardized set of teachings. The trial court erred by stating, as a matter of fact, what Jewish law obligates. The proper inquiry in this case was into what the particular plaintiffs before the court believed, and not into what Jews around the world believe. The court was required to determine whether the plaintiffs before it had a sincere religious belief, yet the court vastly exceeded that authority by determining what Judaism requires as a matter of law. These statements may have inadvertently amounted to an establishment of what the Jewish faith requires.

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[2] Order Granting Plaintiff's Motion for Preliminary Injunction, <¶16>, *Anonymous Plaintiff 1 v. The Individual Members of the Medical Licensing Board of Indiana*, No. 49D01-2209-PL-031056 (Marion Superior Court).
[3] *Id.*at ¶17.
[4] *Id.*

Moreover, this judicial declaration of Jewish law may actually *bind* future government litigation.

Especially puzzling is that the trial court recognized that another faith, Islam, has different perspectives on the abortion issue. The court stated: "Although, as in any religion, there are different Islamic schools and views, some Muslim scholars take the position that the fetus does not possess a soul until 120 days after conception."[5] Likewise, there are many different schools of thought within Judaism on abortion. Contrary to the findings of the district court, Jewish teachings on abortion are complex and cannot be reduced to the uniform, bright-line rule offered by the plaintiffs' rabbis. For example, the Rabbinic Alliance of America has stated that Judaism's concern for the preciousness and sanctity of all human life extends "even to the unborn child growing inside a mother, despite that such a fetus is not yet accorded" full legal status under religious law.[6] These rabbis also noted that under their interpretation of Jewish law, "the intentional termination of a fetus should never be done casually as there are two lives at risk — the mother's and the unborn child's."[7]

Next, the trial court discussed a Jewish woman, known as Anonymous Plaintiff 1. She stated that "her religious beliefs would *direct* her to terminate the pregnancy" if her "physical or mental health would be at risk in the pregnancy."[8]

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[5] *Id* at ¶20.
[6] *Rabbinical Alliance of America Opposes Imbalanced New York Abortion Law*, RAA Igud HaRabbonim (Jan. 30, 2019), https://perma.cc/L5K8-VMV5.
[7] *Id.*
[8] *Anonymous Plaintiff 1* at ¶37 (emphasis added).

We will assume for present purposes that Anonymous Plaintiff 1 sincerely holds the belief that Jewish law *compels* her to obtain an abortion in those circumstances. We only assume because the word "sincerely" appeared nowhere in her declaration. The trial court simply stated, without any citation, let alone any live testimony, that this Plaintiff's "religious beliefs are sincerely held."[9]

To be clear, RFRA does not require that a religion *compels* a particular practice. The statute defines the "exercise of religion" as "any exercise of religion, *whether or not compelled by*, or central to, a system of religious belief." Ind. Code § 34-13-9-5 (emphasis added).

3.1.2. **Sincerity of belief is a deeply personal notion, which cannot be imputed to organizations or classes.**

We will assume for present purposes that the individual Jewish plaintiff in this case may experience a substantial burden on her free exercise of religion if she becomes pregnant, and the law prohibits her from obtaining an abortion in certain circumstances. According to the record, Anonymous Plaintiff 1 is not currently pregnant. Indeed, it is not clear if any of the plaintiffs are currently pregnant. We doubt that a woman who is not yet pregnant can claim a present-day substantial burden on her free exercise based on the mere existence, rather than the actual enforcement of the abortion law. Anonymous Plaintiff 1 could conceivably suffer a present-day, non-self-inflicted injury for purposes of standing—for example, she

[9] *Id.* at ¶41.

"ceased having sex with her husband due to her fear of getting pregnant"[10]—but she did not plead that her abstinence is itself a substantial burden on her free exercise of religion. The only certain method for Anonymous Plaintiff 1 to seek an exemption from the abortion law would be to bring an as-applied challenge if she becomes pregnant and demonstrate that she does not fall into the abortion law's exemptions. At that point, her injury would be both "actual *and* imminent."[11]

Of course, a pre-enforcement challenge that seeks class-action certification would be far more orderly, and would avoid compressed litigation deadlines. RFRA, however, was not designed to facilitate preemptive litigation that could affect a large percentage of women in Indiana. Indeed, due to the broad nature of the religious claims at issue here—which could extend throughout all nine months of pregnancy—any ruling here could sweep even *more* broadly than the right recognized in *Roe* and *Casey*.

We recognize that the pace of litigation may extend beyond the nine months of pregnancy. The federal courts developed the so-called "capable of repetition, yet evading review" exception to the usual mootness standard to account for that timing. This rule permits a woman to continue litigating over an abortion ban even after she gives birth. We express no opinion on whether Indiana should adopt a

[10] *Anonymous Plaintiff 1* at ¶ 40.
[11] *See Ind. Family Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1217 (Ind. Ct. App. 2020) ("To establish standing, a party must show: (1) an 'injury in fact,' i.e., an invasion of a legally protected interest that is concrete, particularized, actual and imminent").

similar framework regarding a plaintiff who is *already* pregnant.[12] But a pre-enforcement challenge, by a woman who is not yet pregnant but speculates that the abortion law could burden her religious exercise, seems premature. At present, Anonymous Plaintiff 1 has not made any claims that her free exercise of religion is being substantially burdened at present.

The organization Hoosier Jews for Choice faces even greater hurdles to suit. We are not prepared to assume that *every member* of Hoosier Jews for Choice sincerely holds the same religious beliefs with regard to abortion, and neither should this Court.[13] The record contains only a single declaration from Rabbi Leon Olenick, a representative of the group.[14] At most, only those members who are capable of becoming pregnant could have their religious beliefs substantially burdened by the abortion ban. But at present, none of these members are currently pregnant. Whatever injuries the plaintiffs suffer now may affect their standing, but there is no evidence those injuries substantially burden their free exercise of religion. Indiana does not prohibit the actions the members of this organization may take to avoid becoming pregnant. Generally, religious obligations—such as keeping kosher or honoring the Sabbath—attach at all times. But the purported religious obligation claimed here *only* attaches when a woman is pregnant, and seeks to obtain an abortion that the state otherwise prohibits.

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[12] *See Seo v. State,* 148 N.E.3d 952, 965 (Ind. 2020) (Massa, J., dissenting) ("But this Court has, for better or worse, decided moot cases 'when the issue involves a question of great public importance which is likely to recur.'") (citations omitted).
[13] *Cf. Anonymous Plaintiff* 1 at ¶37.
[14] Olenick Declaration at ¶7.

Beyond this problem of proof, there are deeper issues with imputing sincere religious beliefs to an organization of unknown size with unidentified members. Generally, the commonality inquiry for purposes of associational standing is lenient.[15] So long as the members generally share the same views, or suffer a similar injury, relief can be afforded to all members of that organization. Our argument here does not concern standing, but focuses on the sincere belief prong of RFRA. RFRA is a poor fit for this type of association-wide relief since the statute turns on *individualized* assessments of sincerely-held religious beliefs.

Doster v. Kendall, a recent decision from the Sixth Circuit, illustrates these issues.[16] In *Doster*, Air Force service members sought religious exemptions from a COVID-19 vaccine mandate. The District Court certified a class of service members, and the Sixth Circuit affirmed. The panel's reasoning is instructive for the analysis concerning Hoosier Jews for Choice. Before that litigation even began, the Air Force performed an individualized assessment of each service member's religious objections. Yet the Air Force denied every religious exemption under an absolute policy. The Air Force argued "that RFRA claims categorically cannot be certified for class treatment."[17] Specifically, the Air Force contended that "the plaintiffs' RFRA claim requires the court to determine separately for *each* service member whether

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[15] *Cf. Bd. of Comm'rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 169–70 (Ind. 2017) ("While this Court has found the public standing doctrine available under the Indiana Constitution, we have never so ruled with respect to associational standing, though a number of decisions by our Court of Appeals have accepted the doctrine in Indiana.").

[16] 48 F.4th 608 (6th Cir. 2022).

[17] *Id.* at 613.

the vaccination mandate is the least restrictive means of furthering a compelling governmental interest."[18] The panel acknowledged "that most RFRA claims require that kind of individualized analysis."[19] And the panel had "no quarrel with the Department's contention that such an analysis could not be conducted class-wide here."[20] But the unique posture of that case, which turned on the categorial denial of claims, did not require any individualized assessment. The panel explained that the certification did "not turn on an analysis of the class members' individual circumstances and likely can be adjudicated class-wide." [21]

This analysis, if found persuasive, illustrates the problems facing Hoosier Jews for Choice. Indiana had not adopted any policy of categorically denying religious-based exemptions to the abortion statute. Indeed, it isn't clear if any plaintiff is currently pregnant, and has sought as-applied relief. As a result, the trial court should have undertaken an individualized assessment of *each* member of the organization. The current record does not support any such finding with regard to Hoosier Jews for Choice.

Perhaps Hoosier Jews for Choice includes doctors who perform abortions. And perhaps those doctors can claim their religion compels them to perform abortions in certain circumstances. These plaintiffs may be able to show a present-

[18] *Id.* (emphasis added).
[19] *Id.*
[20] *Id.*
[21] *Id.*

day substantial burden on their religious exercise. But based on record evidence, none of the plaintiffs fits this category.

Finally, we have doubts about the claims of Anonymous Plaintiff 2. The courts have long grappled with deciding when a system of beliefs constitutes a "religion" for purposes of the Free Exercise Clause,[22] and more recently RFRA.[23] Admittedly, this analysis is not straightforward.[24] Different courts have adopted different tests to draw a line between religion and philosophy.[25] At a minimum, the trial court erred by failing to probe the contours of Anonymous Plaintiff 2's beliefs, to determine if they are a "religion" for purposes of the Free Exercise Clause.

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[22] *See Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("Thoreau's choice was philosophical and personal, rather than religious, and such belief does not rise to the demands of the Religion Clauses"); *Welsh v. United States*, 398 U.S. 333, 340 (1970) ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content, but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons").

[23] *United States v. Meyers*, 95 F.3d 1475, 1482-84 (10th Cir. 1996) (finding that the definition of religion under the federal RFRA (on which the state RFRAs are modeled) tracks definitions of religion under First Amendment cases in lower court decisions.).

[24] See Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment*, 83 N.D. L. REV 123 (2007).

[25] *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (identifying three "useful indicia" to characterize what is a religious belief); *U.S. v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (A. Hand, J.) ("[Religion] is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.").

3.1.3. **The trial court erred by accepting the Plaintiffs' framing of the State's compelling interest.**

Under RFRA, the state carries the burden to establish that its interest is compelling. The challenger does not share this burden – with good reason. In most cases, religious objectors will argue that the state's interest is not compelling. The trial court, therefore, erred when it rejected the state's interest in protecting vulnerable human life because "the Plaintiffs [did] not share the State's belief that life begins at fertilization or that abortion constitutes the intentional taking of a human life." *Anonymous Plaintiff* 1 at ¶ 43. That the plaintiffs "have different religious beliefs about when life begins" than does the state did not license the court to set aside the government's proffered interest. *Id.* Indeed, in virtually every RFRA case, the challengers will argue that the state's interest conflicts with their sincerely-held religious beliefs. By adopting the challengers' view, the trial court placed an insurmountable burden on the state.

Blattert v. State illustrates why the plaintiffs cannot exercise such a veto over the state's interest. 190 N.E.3d 417 (Ind. Ct. App. 2022). In that case, a parent was charged with beating and strangling his children. *Id.* at 419. Blattert raised a defense under Indiana's RFRA. He argued that his religion "commands" him to "discipline his children with corporal punishment as he sees fit." *Id.* First, the Court assumed that Blattert satisfied his burden by showing that the law substantially burdened his religious exercise. *Id.* at 422. Second, the Court examined whether the state could meet its burden of demonstrating that it had a compelling governmental interest.

The *Blattert* Court agreed that the state had a compelling interest in protecting children from physical abuse. *Id.* at 422-23. The Court reached this finding even though that interest directly contradicted Blattert's faith, which allegedly compels corporal punishment. *Id.* at 420. The Court concluded that the safety of "Blattert's children fall[s] within the State's compelling interest in protecting children from physical abuse." *Id.* at 422. Therefore, the Court reasoned, "prosecuting Blattert's alleged excessive physical punishment of them furthers that [compelling] interest." *Id.* at 422-23. With this analysis, the Court properly examined the state's interest from the state's perspective, rather than from Blattert's perspective.

Blattert argued that the state's interest was in fact not-compelling by showing that the battery laws had exceptions. In other words, the defendant contended that the state's interest was *underinclusive*. Blattert pointed to the so-called "parental privilege," which allows, or *privileges*, parents to use some forms of "reasonable force" against their children. *Id.* at 423. This exemption from traditional battery laws, Blattert charged, "undermine[s] an argument that there is a compelling interest" in his prosecution. *Id.* The Court rejected this argument because this exception was not related to the state's compelling interest: "protecting children from physical abuse, which does not require a prohibition on reasonable corporal punishment." *Id.* Rather, "[a]dvancing that interest only requires a ban on *unreasonable* corporal punishment, and the parental privilege does not offer any exception to that restriction." *Id.* (emphasis added).

In *Tyms-Bey v. State*, the Court of Appeals performed a similar analysis with regard to the state's compelling interest. 69 N.E.3d 488 (Ind. Ct. App. 2017). In this case, a religious adherent claimed that paying taxes violated his faith. The Court concluded that the state had a compelling interest in collecting taxes. In reaching that conclusion, the Court did not consider whether the defendant's religious beliefs conflicted with the state's compelling interest. To the contrary, the Court held that "there are no facts that Tyms-Bey could proffer with respect to his exercise of religion that would not be overcome by the State's compelling interest and the means used by the State in furthering that interest." *Id.* at 492.

In *Blattert* and *Tyms-Bey*, the Court did not reject the state's compelling interest simply because the interests would have run afoul of the defendants' religious beliefs. The state asserted interests in prohibiting unreasonable corporal punishment and in enforcing its tax code. Blattert claimed that his religion *compelled* him to beat and strangle his children. And Tyms-Bey claimed his faith *compelled* him to stop paying taxes. The Court did not hesitate to reject either claim. Moreover, the Court was deferential to how the state framed its compelling interest. In *Blattert*, for example, the Court did not require the state to define its interest at a high level of generality, such as prohibiting all forms of child abuse. Rather, the Court allowed the state to distinguish between reasonable and unreasonable forms of corporal punishment. This distinction was essential to the Court's analysis. In this case, the Trial Court's non-deferential analysis was entirely inconsistent with the framework from *Blattert* and *Tyms-Bey*.

The Supreme Court of the United States has recognized that states have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales,* 550 U.S. at 163 (2007). Indeed, even *Planned Parenthood v. Casey* held that "the State has legitimate interests from the *outset of the pregnancy* in protecting the health of the woman and the life of the fetus that may become a child." 505 U.S. at 846 (1992) (emphasis added).

Going forward, to determine whether the state has a compelling interest, the Indiana judiciary need not determine when life begins, as a matter of law. That profound question is a matter on which people and the government take different positions. Rather, the inquiry for the judiciary is quite narrow: is Indiana's stated interest in protecting life from the moment of conception *compelling*? Stated differently, does this interest rise to the sufficient level of compellingness? Yes, the interest in protecting fetal life is one of "those interests of the highest order." *Blattert*, 190 N.E.3d at 422 (quoting *Yoder*, 406 U.S. at 215). It was an error for the lower court to resolve the state's interest based on the religious objections of the people who had already challenged the law.

3.1.4. **The abortion law, even with narrow exceptions, can still be the least restrictive means to accomplish the state's compelling interest.**

The final element of the RFRA analysis turns on whether the state uses "the least restrictive means" to further its "compelling interest." This prong "requires the government to 'show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.'"

Holt v. Hobbs, 574 U.S. 352, 364–65 (2015) (internal quotations and alterations removed). That language calls for a "comparative analysis" under which a court must assess "the State's preferred means" of furthering its compelling interest and compare it with other potential methods of achieving its goal. *Blattert*, 190 N.E.3d at 424. This prong is extremely demanding, but it is not designed to be insurmountable. Indiana's abortion statute contains exceptions that permit abortions in cases of rape or incest. Ind. Code § 16-34-2-1(a)(2)(A). The law also permits an abortion when it is "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or to prevent a "lethal fetal anomaly." Ind. Code § 16-34-2-1(a)(1)(A). The lower court found that, because of these exceptions, the state could not prove that the abortion law was the least restrictive means to further the state's interest.

This ruling was inconsistent with *Blattert v. State*. 190 N.E.3d 417 (Ind. Ct. App. 2022). In that case, discussed *supra*, the state's battery laws had an exception for "parental privilege." 190 N.E.3d at 423. In other words, parents could use reasonable corporal punishment against their children. Despite this exception, the Court of Appeals found that the battery laws were *still* the least restrictive means to accomplish the state's compelling interest in protecting children from physical abuse. *Id.* at 423–24. Specifically, this exception "accommodates religious practices which require reasonable corporal punishment" but "does not accommodate religious practices requiring unreasonable corporal punishment." *Id.* at 424. The Court added that "there is no apparent accommodation of those practices which

would still allow the State to achieve its compelling interest in protecting children from physical abuse." *Id.* Stated differently, an exception that allowed parents to inflict mild or "reasonable corporal punishment" was consistent with the state's interest in protecting children from physical abuse, but an exception that allowed more severe or "unreasonable corporal punishment" was not. This analysis reflects the flexible degree of precision to which the Court allowed the state to define the boundaries of its compelling interest. And the battery laws, coupled with the "parental privilege" exception, were *still* the least restrictive means to accomplish that interest, since only reasonable corporal punishment was excused. Once again, the Court deferred to the state's framing of its compelling interest.

Affirming the trial court's ruling in this case could have sweeping consequences for other laws that contain exceptions. Indeed, if the lower court's ruling stands, the judiciary may be compelled to carve out RFRA-based exceptions for murder.

Consider a series of hypotheticals. First, a modern-day sect of Mayans seeks to perform an obligatory ritual human sacrifice. Second, a group of Sabbatarians seeks to stone to death those who desecrate the Sabbath, as mandated by scripture. Third, another sect professes a religious obligation to alleviate the suffering of the terminally ill—including through physician-assisted suicide. All three of these acts would constitute some degree of murder under Indiana law. And, we can assume for argument's sake that each sect could profess a sincerely held religious belief that the enforcement of Indiana's murder statute substantially burdens their religious

exercise. Each sect argues that Indiana's murder statute is not the least restrictive means because the law contains a self-defense exception.[26] There are many other defenses to murder, such as lack of intent, lack of knowledge, insanity, and intoxication. Moreover, the state imposes various degrees of punishment for different levels of offenses, including crimes of murder, voluntary manslaughter, reckless homicide, involuntary manslaughter, and so on. Indeed, the sects argue that Indiana lacks a compelling interest to protect life precisely because there are so many carve-outs to the murder law.

If this Court allows the lower court's reasoning to stand, the State's murder laws, which are riddled with exceptions, would no longer be deemed the least-restrictive means to protect life. Under that misreading of RFRA, a person with a sincerely-held religious belief could invoke RFRA to take the life of another, for reasons Mayan, Sabbatarian, or Kevorkian.

The trial court's ruling is inconsistent with precedent from this state, like *Blattert*, as well as precedent from the United States Supreme Court concerning the federal RFRA. Take for example *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*. 546 U.S. 418 (2006). The trial court in this case relied on *O Centro* to reach its conclusion that the mere existence of exceptions determinatively establishes that a regulation is not the least restrictive means. In *O Centro*, religious objectors sought an exemption from the Controlled Substances Act (CSA) to use *hoasca*, a

[26] Ind. Code § 35-41-3-2.

sacramental tea made with a hallucinogenic plant. The government's "central submission" was "that it ha[d] a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on the use of the hallucinogen can be made . . . ." *Id.* at 423 (emphasis in original). The government argued that the CSA "cannot function with its necessary rigor and comprehensiveness if subject to judicial exceptions." *Id.* at 420 (quotation marks omitted). The Court analyzed the existence of exceptions under the CSA in order to show that contrary to the government's claims, the CSA does not "preclude exceptions altogether." *Id.* at 434. The Court noted that the CSA's exception for religious peyote users, for example, "undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." *Id.*

Indiana has not argued that it has a particular interest in the uniform application of the law at issue in this case. Nor should it. Indeed, the state is not required to pursue its interest in protecting life in all contexts—with regard to the murder law, as well as the abortion law. (The murder law has far more exceptions than does the abortion law.) RFRA does not compel such a result. *Blattert* recognizes this principle: the state does not need to accommodate severe beatings as part of a religious ritual, even though mild forms of corporal punishment are permissible. *Blattert*, 190 N.E.3d at 424.

There are many possible reasons Indiana could be willing to allow abortions in cases of rape or incest—both of which are crimes—while prohibiting abortions for

fetuses that were conceived through lawful means. With regard to the exceptions for pregnancies that could risk the woman's health or life or where a fetal anomaly exists, the state could argue that the balance of the state's interests comes out differently where another life is at risk. Indeed, these exceptions have deep roots, as pre-*Roe* state abortion laws included these types of carveouts. Post-*Dobbs*, the Court should once again afford the state considerable leeway when the government delicately balances its most compelling interests. The mere existence of these exemptions is not fatal to Indiana's argument, and certainly does not imply that the state does not take its compelling-interest argument seriously.

Recent Supreme Court precedent concerning the Free Exercise Clause supports this well-developed rule. *Tandon v. Newsom* held that the existence of exceptions to the government's lockdown order was proof that the law was not generally applicable, thus triggering the application of strict scrutiny. 141 S. Ct. 1294, 1296 (2021). Likewise, in *Fulton v. City of Philadelphia*, the Court found that exceptions to the government's discrimination policy were proof that that law was not generally applicable, thus triggering the application of strict scrutiny. Specifically, "the inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable." 141 S. Ct. 1868, 1878 (2021). In both cases, after these preliminary findings, the Court then proceeded to determine if the policies were in fact unconstitutional. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must

satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest."). In *Tandon*, *Fulton*, and *Roman Catholic Diocese*, the exceptions that led to invalidating state laws came into play well before the strict scrutiny analysis—like the one demanded by RFRA—even began. The findings that there were exceptions triggered strict scrutiny review.

By contrast, in Indiana, RFRA applies strict scrutiny regardless of whether the abortion law is neutral or generally applicable. Under RFRA, the mere existence of exceptions is neither a necessary, nor a sufficient condition, to render the abortion law unlawful. The fact that the state can provide some accommodations and still fulfill its interest does not mean that it must offer every conceivable accommodation.

3.2. **Affirming the lower court's ruling would, in the long run, weaken protections for religious liberty.**

For nearly three decades, the federal and state RFRAs have been essential bulwarks for religious freedom. Though initially supported by a bipartisan consensus,[27] over time, RFRAs would prove controversial. Look no further than Indiana, which enacted its RFRA in 2015.[28] At the time, critics—including the

[27] President William Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993* (Nov. 16, 1993).
[28] Eric Rosenbaum, *The Business Case Against Indiana's Religious Faith*, CNBC.COM (Mar. 26, 2015), https://perma.cc/H4JX-UGEK.

ACLU of Indiana, counsel for plaintiffs in this case—argued that RFRA would license discrimination.[29]

The Jewish Coalition for Religious Liberty (JCRL) does not take the RFRAs for granted. These regimes are subject to legislative modification, or even repeal. RFRA's survival hinges on an important balance: the state can burden a person's sincere religious beliefs *only* when the state is pursuing a compelling interest through the least restrictive means. Congress found that the purpose of the federal RFRA was to create a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."[30] This deliberate balance protects religious adherents' right to exercise their faith in most cases, but RFRA does not allow them to prevent the government from pursuing its most vital interests, such as protecting the health and safety of its citizens.

However, if a person's religious beliefs can automatically invalidate the state's compelling interest, then a RFRA claim would succeed 100% of the time. The state's interest could *never* be deemed compelling. And if the existence of *any* exemptions automatically renders a law as not "the least restrictive means," then the government would lose 100% of the time. At first blush, these outcomes may seem appealing to religious liberty proponents. JCRL disagrees with that myopic

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[29] ACLU Comment on Indiana Gov. Mike Pence Signing Discriminatory "Religious Freedom" Bill Into Law (March 26, 2015), https://perma.cc/JW52-ADA9; Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, THE WASHINGTON POST (June 25, 2015), https://perma.cc/F7G5-LNHG. But *cf.* Josh Blackman, *Is Indiana Protecting Discrimination?*, NATIONAL REVIEW (March 30, 2015), https://perma.cc/JYL2-DA4K/.

[30] 42 U.S.C. § 2000bb.

view. The lower court's analysis, if it catches on, would quickly prove to be unsustainable. The ACLU's criticisms circa 2015, which we think were flat-out wrong based on RFRA as written, could quickly become valid and even understated.

JCRL, which advocates for strong protection of religious liberty, rejects this "get of jail free" card. If this ruling is upheld, Indiana and other states may feel that they have no choice other than to amend or even repeal their RFRAs. JCRL favors the overruling of *Employment Division v. Smith*, but we share Justice Scalia's concern from that landmark case: "each conscience" cannot become "a law unto itself." 494 U.S. 872, 890 (1990). In the long run, the lower court's maximalist misreading of RFRA would allow virtually anyone who professes any sincerely-held religious belief to become a law unto herself. If this ruling stands, RFRA would not be long for this world.

Compounding these difficulties is the contentious subject matter of the litigation. For half a century, *Roe v. Wade* was the law of the land. 410 U.S. 113 (1973). During those five decades, the judicialization of abortion "led to the distortion of many important but unrelated legal doctrines." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022). To name a few, stare decisis, the freedom of speech, facial challenges, the tiers of scrutiny, severability, standing, and so on. *See* Josh Blackman, *End The Epicycles of* Roe, The Volokh Conspiracy (Nov. 2, 2021), https://perma.cc/3BY2-7EQC. Justice O'Connor lamented "that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v.*

Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Now, with the ink on *Dobbs* barely dry, the "ad hoc nullification" machine has targeted for distortion another pillar of our legal system: religious freedom.

In *Dobbs*, the Supreme Court took the momentous step of extricating the federal judiciary from the abortion question. Now, advocates seek to bog down the state judiciaries in this same quagmire. Some state constitutions have express protections for abortion rights. Indeed, Michigan recently approved such a constitutional amendment. But Indiana is not one of those states. Instead of using political channels to achieve their ends, advocates have pivoted to RFRA in an effort to justify abortion rights based on their novel understanding of religious liberty. Abortion presents a contentious social issue, which the political process is currently working its way through. The Free Exercise of Religion will suffer if this case does to RFRA what *Roe* did to the Free Speech Clause. *See*, *e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000). During this period of transition, RFRA and religious freedom should be afforded a reprieve from the "ad hoc nullification" machine that distorted foundational American law for five decades. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

4. **Conclusion**

Though this case is limited in scope, its effect will be felt nationwide. The plaintiffs are poised to establish a precedent that will irreparably alter how religious liberty is viewed in this country. Much to our dismay, religious liberty is

already a divisive topic. Affirming the decision below only worsen these political and cultural arguments by upsetting RFRA's legislative compromise. The decision of the court below should be reversed.

5. Word Count

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Respectfully submitted,
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Certificate of Service

I hereby certify that on February 11, 2023, the foregoing *Amicus Brief* was filed electronically using the Indiana E-filing system ("IEFS").

I also certify that on February 11, 2023, the foregoing *Amicus Brief* was served by electronic filing using IEFS upon:

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