STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
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, in their official capacities, *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In August 2022, the General Assembly enacted Senate Bill 1 (S.B. 1), which prohibits abortion except where a pregnancy seriously endangers a mother's health or life, a pregnancy is the result of rape or incest, or the unborn child has a lethal anomaly. Five anonymous individuals and a newly organized group called Hoosier Jews for Choice have challenged this law on the grounds that its restriction of abortion violates Indiana's Religious Freedom Restoration Act (RFRA) because it substantially burdens their exercise of religion when making the decision to terminate a pregnancy in accordance with their religious beliefs. Through this claim, Plaintiffs seek, on religious grounds, truly extraordinary—perhaps unprecedented—relief. Rather than avoid unwanted medical treatment or duties imposed by law that would impinge their religious exercise, Plaintiffs use religious beliefs to demand medical intervention to end human life. The State is aware of no case in America holding that a religious belief entitles someone to medical intervention of any kind, much less intervention that ends human life. Such a claim would also seem to extend, for example, to physician-assisted suicide. This Court should not be the first to order such relief.

Even apart from the unprecedented relief sought, insurmountable obstacles thwart it. To start, Plaintiffs' claims are not ripe for adjudication. No Plaintiff is pregnant. Nor is it certain that Plaintiffs would feel compelled to terminate a pregnancy if they became pregnant. Indeed, some want children. Each Plaintiff merely alleges a panoply of hypothetical circumstances that may—or may not—lead them to desire an abortion in a future pregnancy. Traditional ripeness principles preclude an award of broad-ranging relief based on speculation and abstract possibilities. This Court cannot perform the fact-specific analysis RFRA requires.[1]

[1] Additionally, another state court enjoined enforcement of S.B. 1 on separate constitutional grounds. *See* Order Granting Plaintiffs' Motion for Preliminary Injunction, *Planned Parenthood Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc. v. Members of the Medical Licensing Board of Indiana*, No. 53C06-2208-

To the extent that analysis is possible, Plaintiffs' claims are without merit. Plaintiffs argue that S.B. 1 prohibits them from obtaining an abortion in accordance with their religious beliefs, such as whenever they believe continuing a pregnancy would harm their physical, emotional, or mental well-being. But their allegations do not amount to a "substantial burden" on their "exercise" of religion. First, Plaintiffs do not plead facts showing that abortion *itself* constitutes a religious exercise. They assert only that abortion may, in some hypothetical circumstances, provide an acceptable means to a religiously prescribed end (safeguarding maternal physical and mental health). Second, Plaintiffs themselves fail to specify any actual burden they experience from S.B. 1. The only actual burden alleged—feelings of anxiety and changes to contraceptive and sexual practices—do not amount to substantial burdens on religious exercise.

Additionally, S.B. 1 is the least restrictive means of furthering the State's "valid and compelling" interest in protecting unborn children—whom the Indiana Supreme Court 50 years ago described as, "at the very least, from the moment of conception . . . living being[s]." *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972). Here, Plaintiffs merely cite the overruled *Roe* and *Casey* holdings to argue that the State's interest in the unborn prior to viability is not compelling—and thereby seek to shoehorn rejected constitutional doctrine into Indiana's statutory free exercise doctrine. But RFRA does not enact *Roe* and *Casey*, and *Dobbs* discredited the logic of those cases on the viability point anyway.

As for the request for injunctive relief, Plaintiffs describe a *lack* of certain and irreparable harm—they cannot know if they will become pregnant, whether they would choose to abort that pregnancy, and whether their reason for aborting would be allowed by S.B. 1's exceptions. Most,

PL-001756 (Monroe Cnty. Cir. Ct. Sept. 22, 2022). The State is seeking a stay pending appeal. Unless and until a stay is granted, however, Plaintiffs here suffer no injury that provides standing, gives rise to a RFRA claim, or justifies a preliminary injunction.

if not all, wouldn't even change anything they are doing now were a preliminary injunction granted. Besides, any changes to contraceptive and sexual practices likewise fail to rise to the level of certain irreparable harm, particularly given the doubt as to whether any Plaintiff would change their conduct if granted an injunction. The balance of harms and public interest likewise favor denying the injunction, as preserving human lives outweighs speculative concerns about hypothetical future pregnancies and modest alteration of Plaintiffs' current sexual and contraceptive practices. The State respectfully urges the Court to deny Plaintiffs' request for preliminary injunction.

STATEMENT OF FACTS

I. Factual Background

Abortion at any time after fertilization is the intentional termination of an unborn human life. Exhibit 1, Declaration of Dr. Tara Sander Lee (Sander Lee Decl.) ¶ 8; Exhibit 2, Declaration of Farr Curlin, M.D. (Curlin Decl.) ¶¶ 16–17. As Dr. Farr Curlin, a licensed physician and bioethics professor at Duke University, explains, "[t]hat the human fetus is a human being is neither a moral judgment, nor a theological position; it is a simple scientific observation." Ex. 2, Curlin Decl. ¶¶ 15.

The scientific evidence for a fetus being a distinct, living human being is overwhelming. As Dr. Tara Sander Lee, a biochemist and researcher with over twenty years of experience in academic and clinical medicine, explains, "established science [shows] . . . development begins" at fertilization, when the single-celled human (or "zygote") bears a unique molecular composition distinct from its parental gametes and "directs *its own* development to more mature stages of human life," producing "increasingly complex tissues, structures and organs that work together." Ex. 1, Sander Lee Decl. ¶¶ 2, 3, 10; *see also* Dr. Maureen L. Condic, *When Does Human Life Begin?*

The Scientific Evidence and Terminology Revisited, 8 U. St. Thomas J.L. & Pub. Pol'y 44 (2013). That development happens rapidly.

The first sign of the unborn child's developing brain appears within three weeks of fertilization. Ex. 1, Sander Lee Decl. ¶¶ 12–13. In the third week after fertilization, the unborn child develops its own heartbeat. *Id.* ¶ 14. A respiratory system starts to form about a week later. *Id.* ¶ 15. "During the sixth week, the preborn baby starts moving, and the first sense develops—touch." *Id.* ¶ 17. More than 90% of body parts form by the end of the eighth week. *Id.* ¶ 19. At nine weeks, an unborn child starts to exhibit "more complex behaviors, such as thumb-sucking, swallowing, and stretching." Ex. 1, Sander Lee Decl. ¶ 20. The unborn child's lips and nose mature into their adult shape by week eleven, and around that time, the child will start "practic[ing] breathing" and producing "complex facial expressions." *Id.* ¶ 22. By thirteen weeks, the unborn child can feel pain. *Id.* ¶ 24. Ability to hear certain sounds arrives a week later. *Id.* ¶ 25; *see id.* ¶ 29 (explaining that preborn babies will respond to music, reading, and singing). By nineteen to twenty weeks, unborn children will respond "to taste, temperature, pain, pressure, movement and light." *Id.* ¶ 28. And during the eighth and ninth months of pregnancy, unborn children spend "almost 40% of the time" "practic[ing] breathing." *Id.* ¶ 31.

II. Statutory and Regulatory Background

A. Indiana Laws Regulating Abortion

S.B. 1 carries forward legal prohibitions on abortion stretching back centuries. "At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022). In early America, "the vast majority of the States"—Indiana among them—"enacted statutes criminalizing abortion at all stages of pregnancy." *Id.* at 2252.

Indiana's first abortion statute dates from 1835. That statute imposed criminal penalties on "every person" who administered "to any pregnant woman[] any medicine, drug, substance or thing whatever . . . with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman." 1835 Ind. Laws ch. XLVII, p. 66 § 3. Two decades later, amendments expanded the statute to prohibit a "druggist, apothecary, physician, or other person selling medicine" from selling any "medicine . . . known to be capable of producing abortion or miscarriage, with intent to produce abortion." 1859 Ind. Laws ch. LXXXVI, p. 469, § 2. And in 1881, the penalty for violating the law was raised "from a misdemeanor to a felony," and the legislature criminalized "solicitation of an abortion by the pregnant woman." *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 989 n.2 (Ind. 2005) (Dickson, J., concurring).

Only after the U.S. Supreme Court declared abortion a federal fundamental right in 1973, *see Roe v. Wade*, 410 U.S. 113, 93 (1973), did the General Assembly amend Indiana law to permit abortion in certain circumstances, *see* 1973 Ind. Acts, P.L. No. 322 (codified at Ind. Code § 35-1-58.5-1 to -8 (1973)); 1977 Ind. Acts, ch. 335, § 21. Although *Roe* compelled the State to liberalize abortion restrictions, the State persisted in its commitment to protect the unborn by (1) making unlawful abortions a Class C felony, *see* Ind. Code 35-1-58.5-4 (1973) (recodified at Ind. Code § 16-34-2-7), (2) imposing medical reporting requirements on abortion providers, *see* Ind. Code 35-1-58.5-5 (1973) (recodified at Ind. Code § 16-34-2-5), and (3) making experimentation on and transportation of aborted children a Class A misdemeanor, *see* Ind. Code 35-1-58.5-6 (1973) (recodified at Ind. Code § 16-34-2-6).

In 1992, Indiana acquired additional authority to protect prenatal life and maternal health when the U.S. Supreme Court upheld Pennsylvania's parental consent, informed consent, and 24-

hour waiting period requirements. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Following *Casey*, Indiana adopted its own informed consent and 18-hour waiting period requirements, as well as new protocols for physicians performing abortions, definitions for medical emergency warranting an abortion, and criminal penalties for violating the abortion code. *See* 1995 Ind. P.L. 187-1995. It also enacted a host of new restrictions, including hospital admitting privileges, ultrasound requirements, and clinic licensing and inspection laws. *See* 2014 Ind. P.L. 98-2014. Later, the State would ban race-selective, sex-selective and disability-selective abortions (later overturned) and impose new protocols for the disposition of fetal remains (recently enjoined by a federal court), among other regulations promoting fetal life and maternal health. *See* 2016 Ind. P.L. 213-2016.

Some restrictions were ruled contrary to the federal abortion right recognized in *Roe and Casey*. *See, e.g., Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Indiana State Dep't of Health*, 265 F. Supp. 3d 859, 873 (S.D. Ind. 2017) (enjoining anti-discrimination, information dissemination, and fetal disposition provisions), *aff'd*, 888 F.3d 300 (7th Cir. 2018), *reh'g en banc granted in part and judgment vacated*, 727 F. App'x 208 (7th Cir. 2018), *opinion reinstated by evenly divided court*, 917 F.3d 532 (7th Cir. 2018), *rev'd in part sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (vacating injunction for fetal disposition provision, but leaving other provisions enjoined). When Indiana's informed-consent requirements were challenged under the Indiana Constitution, however, the Indiana Supreme Court deemed the requirements lawful, whether or not the Indiana Constitution afforded a right to abortion. *See Brizzi*, 837 N.E.2d at 978.

In June 2022, the U.S. Supreme Court held that the federal constitution did not confer a right to abortion, reversed *Roe* and *Casey*, and "returned to the people" of Indiana and "their

elected representatives" the "authority to regulate abortion." *Dobbs*, 142 S. Ct. at 2279. Shortly thereafter, in August 2022, the General Assembly enacted S.B. 1, which, like Indiana's historical restrictions on abortions, makes "abortion" a "criminal act" except when expressly authorized. Ind. Code § 16-34-2-1(a) (as amended by S.B. 1, Sec. 21).

Under S.B. 1, abortion is permitted in only three circumstances:

First, as amended, Indiana Code § 16-34-2-1(a)(1) permits abortions "before the earlier of viability of the fetus or twenty (20) weeks postfertilization age of the fetus" where (i) "reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or (ii) "the fetus is diagnosed with a lethal fetal anomaly." A "serious health risk" is one "that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function," but "does not include psychological or emotional conditions." Ind. Code § 16-18-2-327.9. Only hospitals and ambulatory surgical centers may perform abortions under subsection (a)(1). Ind. Code § 16-34-2-1(a)(1)(B).

Second, Indiana Code § 16-34-2-1(a)(3) permits abortions "at the earlier of viability of the fetus or twenty (20) weeks of postfertilization age and any time after" where "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life." Because subsection (a)(3) permits abortions later in pregnancy than subsection (a)(1), it imposes some additional requirements. Those include that the abortion be "performed in a hospital" and be "performed in compliance with" Indiana Code § 16-34-2-3. Ind. Code § 16-34-2-1(a)(3)(C)–(D). Indiana Code § 16-34-2-3—which governs "abortions performed on or after the earlier" of viability twenty (20) weeks postfertilization age—in turn requires the presence of a second physician who

is prepared to provide care for any "child born alive as a result of the abortion." Ind. Code § 16-34-2-3(b); *see also id.* Ind. Code § 16-34-2-3(a), (c)–(d) (imposing additional requirements).

Third, Indiana Code § 16-34-2-1(a)(2) permits abortions "during the first ten (10) weeks of postfertilization age" where the pregnancy arose from rape or incest. Only hospitals and ambulatory surgical centers may perform abortions under subsection (a)(2). Ind. Code § 16-34-2-1(a)(2)(C).

Carter Snead, a bioethicist and Director of the Center for Ethics and Culture at the University of Notre Dame, observes that SB1's prohibition on abortions is grounded in Indiana's interests in promoting respect for the life of the unborn, safeguarding the integrity of the medical profession and protecting its practitioners, and preserving societal respect for human life and human dignity broadly, beyond the context of abortion." Exhibit 3, Declaration of O. Carter Snead (Snead Decl.) ¶ 7. In his view, "Indiana's ethical judgment finds ample support in the history of American public bioethics and in the vexed debate over abortion in particular." *Id.* Moreover, given the limited statutory exceptions for abortion, "it is evident that Indiana's reasoning follows the general framing of the abortion debate as it has unfolded historically, namely, by weighing the interests of the unborn child against those of her mother, and crafting a regulatory framework accordingly." *Id.* ¶ 14. Nor is such weighing of interests inherently theological: "One need not profess any religious faith at all to understand and assent to these propositions, and indeed, there are pro-life proponents of every faith tradition, as well as agnostics and atheists (e.g., the late progressive journalist Nat Hentoff or current conservative journalist Charles Cooke)." *Id.* ¶ 12.

B. Indiana's Religious Freedom Restoration Act

All Americans are constitutionally entitled to the free exercise of their religious faith without government infringement. U.S. Const. amend. I ("Congress shall make no law . . . prohibiting

the free exercise [of religion]"); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (noting the incorporation of this protection to the States). For many years, the Supreme Court analyzed Free Exercise claims using a two-part balancing test: first, the Court considered whether the government action imposed a substantial burden on the practice of religion; if it did, the Court evaluated whether the action was nonetheless necessary to serve a compelling government interest. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

But in 1990, the Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, a case of two members of the Native American Church who were fired after ingesting peyote for sacramental purposes, and then were denied government benefits owing to the circumstances of their discharge. 494 U.S. 872, 874 (1990). The Supreme Court rejected application of the *Sherbert* test to the resulting Free Exercise Clause challenge because balancing religious objections to generally applicable laws "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 888. Accordingly, it concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879.

A few years later, out of concern that *Smith* had eroded the constitutional guarantee of religious liberty, Congress enacted the Religious Freedom Restoration Act (RFRA). Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4). "[L]aws [that are] 'neutral' toward religion[,]" Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise[.]" 42 U.S.C. § 2000bb(a)(2); *see also* § 2000bb(a)(4). The federal RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government

"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." 42 U.S.C. § 2000bb-1(a), (b).

As enacted, RFRA applied not only to the Federal Government but also to the States and their political subdivisions. But in *City of Boerne v. Flores*, the Court held that RFRA could not constitutionally be applied to States or local governments because it exceeded the scope of Congress's power to enact remedial legislation pursuant to Section 5 of the Fourteenth Amendment. 521 U.S. 507, 536 (1997). Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc-1(b)), which imposes on state prisons essentially the same burdens as RFRA as a condition of accepting federal grants. *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

After *City of Boerne* was decided, nearly half the States (including Indiana) have enacted their own statutory (or in the case of Alabama, constitutional) RFRAs. Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 Wake Forest L. Rev. 585, 647 n.15 (2017).

Indiana's RFRA was adopted in 2015. It states:

> (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.
>
> (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity 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.

By its terms, RFRA applies to subsequently enacted statutes, unless those statutes state otherwise. Ind. Code § 34-13-9-2. RFRA provides both a defense and a private right of action for relief: "[a] person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding[.]" Ind. Code § 34-13-9-9. Relief "may include . . . [d]eclaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter." Ind. Code § 34-13-9-10(b)(1).

III. Plaintiffs Bring This Lawsuit

A. The Complaint and Demand for Relief

The named Plaintiffs are five women and the organization Hoosier Jews for Choice. On September 8, 2022, they filed a complaint challenging S.B. 1 under Indiana's Religious Freedom Restoration Act, Ind. Code § 34-13-9-0.7, *et seq.*, and a motion for preliminary injunction. The complaint alleges that S.B. 1 violates the State's RFRA because it "burdens the plaintiffs' sincere religious beliefs, and those of a putative class of those similarly situated," by prohibiting abortion in circumstances where Plaintiffs' religion "direct[s]" them to obtain an abortion. Compl. ¶¶ 2, 11. Plaintiffs seek "a preliminary injunction, later to be made permanent, enjoining defendants from taking any action that would prevent or otherwise interfere with the ability of the individual plaintiffs, the class members, and Hoosier Jews for Choice's members from obtaining abortions as directed by their sincere religious beliefs." Compl. at 26.

Although Plaintiffs styled their complaint a "class action complaint" and filed a motion for class certification, no class has been certified. Briefing on the motion for class certification will continue only after the preliminary injunction briefing is complete.

B. Named Plaintiffs

1. Anonymous Plaintiff 1

Anonymous (Anon.) Plaintiff 1 is a 39-year-old Jewish woman who is "married and ha[s] one child" after having "been pregnant twice." Declaration of Anonymous Plaintiff 1 in Support of Motion for Preliminary Injunction (Anon. 1 Decl.) ¶¶ 2–4, 11. "[A]ccording to Jewish law and teachings," she believes "that the life of a pregnant woman, including her physical and mental wellbeing, must take precedence over the potential for life embodied in a fetus," *id.* ¶ 10, and that her religion permits abortion any time before birth. Exhibit 4, Deposition of Anonymous Plaintiff 1 (Anon. 1 Dep.) 33:12–18.[2] Anon 1. suffered from health complications during her first pregnancy. Anon. 1 Decl. ¶¶ 14–15. Those complications and the discovery of a non-hereditary chromosomal abnormality informed her decision to abort her second pregnancy "in accordance with [her] religious beliefs." *Id.* ¶¶ 17, 19–25, 28. Although she and her husband "wish to try to have another child," *id.* ¶ 36, Anon. 1 fears that "because of [her] age . . . a pregnancy might seriously endanger [her] health, without necessarily causing death or [the] serious risk of substantial and irreversible physical impairment" sufficient to obtain an abortion under S.B. 1's exceptions. *Id.* ¶¶ 31–33. After S.B. 1 entered effect on September 15, 2022, she is "not having sex with [her] husband" and yet is "taking birth control." Ex. 4, Anon. 1 Dep. 51:3–6. Should the Court issue an injunction, Anon. 1 only "imagine[s] [she] would resume sexual relations with [her] husband" but "can't say for sure," ultimately concluding that she does not know how her behavior would change—if at all. *Id.* at 52:16–17, 20, 23.

[2] By agreement between the parties, Plaintiffs' counsel redacted identifying information from the Anonymous Plaintiffs' depositions attached to this brief.

2. Anonymous Plaintiff 2

Anon. 2 describes herself as a married "30-year-old woman" with "two children" who believes that "within the universe exists a supernatural force or power that connects all humans" and "direct[s] [us] to act in a manner that promotes and does not harm our fellow humans or this community of humanity." Declaration of Anonymous Plaintiff 2 in Support of Motion for Preliminary Injunction (Anon. 2 Decl.) ¶¶ 2, 3, 6–9. Her spirituality "direct[s]" her to "refrain[] from interfering with another person's full expression of humanity and dignity. *Id.* ¶ 8. "Central" to her spiritual beliefs is a notion that "we are endowed with bodily autonomy, and we are not to infringe on the bodily autonomy of others." She "do[es] not believe that human life begins at conception," and thus, "at least prior to viability, a fetus is a part of the body of the mother." *Id.* ¶¶ 9–11.

Anon. 2 further believes that "if a pregnancy or the birth of another child would not allow [her] to fully realize [her] humanity and inherent dignity, [she] should terminate that pregnancy," and has done so "for precisely this reason" once before. *Id.* ¶¶ 12–14. She brought this lawsuit due to fears that she "*may* in the future become pregnant" and be unable to obtain an abortion should her "beliefs . . . require" one. *Id.* ¶¶ 15–16 (emphasis added). Anon. 2 has experienced "anxiety" that "reduc[ed] physical intimacy" in her marriage, thus creating a "barrier to feeling fully connected to . . . her husband" and "imping[ing] on [her] . . . spiritual tenets." *Id.* ¶¶ 16–17. Anon. 2, who "used condoms every now and then" and "used . . . the rhythm method . . . much *more* than . . . now," increased the "*extent*" to which she tracks her ovulation and abstains from physical intimacy with her husband. *See* Exhibit 5, Deposition of Anonymous Plaintiff 2 (Anon. 2 Dep.) 55:16–25; 56:1–16 (emphasis added). Should a preliminary injunction be issued, she would simply "go back

to [her] normal behavior" by becoming less "stringent" with the "extra precautions" to avoid pregnancy. *Id.* at 56:16; 59:2–7.

3. Anonymous Plaintiff 3

Anon. 3 is an unmarried 24-year-old Muslim woman who does not have children and "do[es] not want to have children at any point in the foreseeable future," in part because she suffers from Crohn's disease. Declaration of Anonymous Plaintiff 3 in Support of Motion for Preliminary Injunction (Anon. 3 Decl.) ¶¶ 2–4, 16–17. Although she would like to have children someday, she believes, "according to the teachings of Islam," that "life does not begin at conception," but at the time an unborn child's soul—or "*ruh*"—is "breathed into a womb at around 120 days' gestation." Exhibit 6, Deposition of Anonymous Plaintiff 3 (Anon. 3 Dep.) 55:20–21; Anon. 3 Decl. ¶¶ 9–10. Anon. 3 worries about circumstances—including when "a pregnancy . . . [i]s simply unwanted"—where her "need" for an abortion "might arise" but S.B. 1 would bar her from obtaining one. *Id.* ¶¶ 14–15. She alleges that S.B. 1 "substantially burdens [her] religious beliefs" because she now believes she must "abstain from sexual intercourse" to "ensure that [she] will not need an abortion that would be prohibited" by the statute—even though her partner successfully used contraceptives when they were intimate before S.B 1 was passed, Ex. 6, Anon. 3 Dep. 67:13–20, and would presumably continue using them after an injunction because she does not want children in the foreseeable future. *Id.* at 55:16–19; Anon. 3 Decl. ¶¶ 24–26. With an injunction, Anon. 3 would "not be abstinent," Ex. 6, Anon. 3 Dep. 10:18, and if she became pregnant and the injunction ended, "would probably try to find . . . some legal avenue . . . to terminate a pregnancy." *Id.* at 70:10–13.

4. Anonymous Plaintiffs 4 and 5

Anon. 4 and Anon. 5 are married Jewish "female individuals" who believe Judaism teaches "that life begins when a child takes its first breath after being born" and "the life of a pregnant person, including their physical and mental health and wellbeing, takes precedence over the potential for life embodied in a fetus." Declaration of Anonymous Plaintiff 4 and Anonymous Plaintiff 5 in Support of Motion for Preliminary Injunction (Anons. 4 & 5 Decl.) ¶¶ 2, 9–10. Anon. 4 and Anon. 5 would like to conceive a child using "assisted reproductive technologies." *Id.* ¶ 11. Anon. 4 "was going to be the one to first . . . try to become pregnant and carry," though Anon. 5 is willing to "be the backup." Exhibit 7, Deposition of Anonymous Plaintiff 4 (Anon. 4 Dep.) 19:16–19; Exhibit 8, Deposition of Anonymous Plaintiff 5 (Anon. 5 Dep.) 42:19. Before S.B. 1, they had begun planning a pregnancy and "[c]onsulting a doctor." Ex. 7, Anon. 4 Dep. 19:1. They have now suspended that process to avoid circumstances "in which [their] religious beliefs would direct [them] to terminate a pregnancy, but where such a termination would be prohibited" by S.B. 1 (*e.g.*, when their "physical or mental health would be harmed by a pregnancy, but where the pregnancy d[oes] not put [them] at risk of death or permanent impairment of a bodily system."). Anons. 4 & 5 Decl. ¶¶ 11–13. Anon. 4 acknowledged that, even with a preliminary injunction, she "would still be hesitant to get pregnant, because if an appeal went through and [the injunction] was overturned again, then [she] would be pregnant but in a place where the law was still standing." Ex. 7, Anon. 4 Dep. 25:12–16.

5. Hoosier Jews for Choice

Prompted into existence in part by S.B. 1, Hoosier Jews for Choice "exists to take action within the Jewish community and beyond to advance reproductive justice, support abortion access, and promote bodily autonomy . . . across the state of Indiana." Declaration of Hoosier Jews for

Choice in Support of Motion for Preliminary Injunction (Hoosier Jews Decl.) ¶ 3. The organization subscribes to the belief "that under Jewish law and religious doctrine, life does not begin at conception" and that "an abortion is directed to occur if it is necessary to prevent physical or emotional harm to a pregnant person." *Id.* ¶¶ 5–6.

Hoosier Jews for Choice has about 128 members. Exhibit 9, HJ4C Membership Demographics. It avers that some members—around 45, Exhibit 10, 30(B)(6) Deposition of Hoosier Jews for Choice Through Amalia Shifriss (Hoosier Jews Dep.) 53:19—"are capable of becoming pregnant and if they became pregnant, could require an abortion that would be prohibited" by S.B. 1. Hoosier Jews Decl. ¶ 7. A few such members—perhaps six—have allegedly "alter[ed] their sexual practices, birth control practices, and family planning as a result of the law and their fear of becoming pregnant." *Id.* Specifically, according to Hoosier Jews for Choice Steering Committee Chair Amalia Shifriss, "[a] couple people are having their husbands get vasectomies" while "several" others opted for "arm implants or IUDs." Ex. 10, Hoosier Jews Dep. 53:7, 8; 10–12. Shifriss "doubt[s]" these members would alter their efforts at birth control—i.e., reverse vasectomies or remove implants and IUDs—should the Court grant a preliminary injunction, even concluding that she "do[esn't] think" that they would. *Id.* at 55:9–10. She stressed twice on cross examination that her own "behavior would not change because the preliminary injunction is temporary." *Id.* at 58:3–4.

Hoosier Jews for Choice believes that "a person's right to . . . have an abortion . . . should just be between that person and their doctor," and when asked whether the State has a "role to play in the regulation of abortion," answered "[w]e don't believe it should." *See* Ex. 10, Hoosier Jews Dep. 27:8–10; 29:2–11. Shifriss allowed that a woman pregnant after the point of viability who seeks to terminate her pregnancy to preserve her physical or mental well-being might do so through

induction of labor, which may save the child's life. *Id.* at 61:2–15. Yet she also answered "yes" when asked whether "there be a circumstance where even if induction is available, a woman might, consistent with Jewish law and tradition, want to have an abortion." *Id.* at 61:10–15.

STANDARD OF REVIEW

A preliminary injunction is "an extraordinary equitable remedy that should be granted in rare instances" only. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011) (internal quotation marks omitted). "To obtain a preliminary injunction, the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction." *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008). None of the factors supports an injunction here.

NO REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs are unlikely to succeed on the merits of their RFRA claims. To start, their claims are not ripe for adjudication. None of the Plaintiffs is currently pregnant, and none is certain to desire an abortion even if she becomes pregnant. RFRA claims require fact-specific analysis as to whether a person's exercise of religion is substantially burdened by government action, and if so, whether enforcing the law in that circumstance advances a compelling governmental interest. But no fact-specific analysis can be performed here because whether and under what circumstances Plaintiffs might desire an abortion are hypothetical. No concrete set of facts yet exists.

Despite the limited information available at this juncture, Plaintiffs fail to demonstrate that enforcement of S.B. 1 *substantially* burdens their *exercise* of religion. At most, Plaintiffs demonstrate that, in some hypothetical circumstances, abortion may provide a permissible and desirable

means to achieve their religious ends—protection of maternal physical and mental health above the interests of the unborn child. No Plaintiff has alleged that abortion *itself* amounts to a religious exercise, or that the activities they avoid (or precautions they take) owing to the unavailability of abortion are themselves religious exercises. And even putting aside the burden question, S.B. 1 is the least restrictive means of pursuing the State's compelling and overriding interest in preserving prenatal life. Plaintiffs are unlikely to succeed on the merits.

I. The Plaintiffs' Claims Are Not Ripe for Adjudication

Predicated on the Indiana Constitution's "express distribution-of-powers clause" in Article 3, Section 1, the doctrine of standing and "the corollary doctrines of mootness and ripeness" are "vital element[s] in the separation of powers," as they "limit[] the judiciary to resolving concrete disputes between private litigants while leaving questions of public policy to the legislature and the executive." *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019). The doctrine of ripeness accordingly guides Indiana courts in the exercise of "judicial restraint" by declining to "engage in academic debate or mere abstract speculation." *Id.* "Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities . . . ." *Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336 (Ind. 1994). "A claim is not ripe for adjudication if it rests upon contingent future events 'that may not occur as anticipated, or . . . may not occur at all." *Ind. Family Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1218 (Ind. Ct. App. 2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1988)). That is the case here.

RFRA requires a plaintiff to establish "*a person*'s exercise of religion" is "substantially burden[ed]." Ind. Code § 34-13-9-8(a) (emphasis added). Determining whether a substantial burden exists necessarily involves a "case-by-case consideration" sensitive to individual facts and circumstances. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436

(2006) (applying federal RFRA); *see also, e.g.*, *United States v. Quaintance*, 315 Fed. App'x 711, 713 (10th Cir. 2009) (quoting *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir.1985)) ("whether a particular question is 'substantial' [under federal RFRA] must be determined on a case-by-case basis"); *Barr v. City of Sinton*, 295 S.W. 3d 287, 302 (Tex. 2009) (Texas' RFRA "requires a case-by-case, fact-specific inquiry").

Plaintiffs' claims, however, evade the "focused inquiry required by RFRA." *Gonzales*, 546 U.S. at 432. The facts that would inform the focused inquiry do not yet exist but are contingent on a chain of future events that may never come to pass or may not come to pass as envisioned. To start, an abortion is only possible in the event of a pregnancy. But no Plaintiff is currently pregnant, and especially in the case of Plaintiffs seeking to avoid pregnancy, whether any will become pregnant is uncertain. It likewise is uncertain whether any Plaintiff will face circumstances in which they might want to seek an abortion or what those circumstances might be. The resulting lack of any concrete information frustrates efforts to determine whether an abortion is in fact being sought because of religious beliefs and whether S.B. 1 places a material burden on those beliefs. *See Apache Stronghold v. United States*, 38 F.4th 742, 769 (9th Cir. 2022) (explaining the "factual" "problem" in trying to determine the substantial burden because "[a]t this early stage in the litigation, it is not clear whether the Apache will in fact be subject to civil trespass liability" where existing accommodations mean that they "may never" be "restrict[ed] access at all").

Nor is that the only hurdle to analyzing Plaintiffs' claim. RFRA also requires a context-specific assessment as to whether the "compelling governmental interest is 'satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Blattert v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022) (quoting *Gonzales*, 546 U.S. at 420)); *see also, e.g.*, *United States v. Christie*, 825 F.3d 1048,

1062 (9th Cir. 2016) (this "determination is necessarily fact-specific and context-dependent"); *Yellowbear v. Lampert*, 741 F.3d 48, 62 (10th Cir. 2014) ("the feasibility of requested exceptions usually should be assessed on a 'case-by-case' basis, taking each request as it comes").

In the State's view, its compelling interest in saving prenatal life *always* justifies applying S.B. 1's general prohibition on abortion to religious claimants. To the extent that Plaintiffs or the Court thinks that the State's interest justifies S.B. 1's application only to *some* claimants or under *some* circumstances, however, a "fact-specific," "context-dependent" analysis will be required. *Christie*, 825 F.3d at 1062. RFRA requires that analysis precisely because "RFRA empowers courts to grant *exceptions* to generally applicable laws so that otherwise-unlawful conduct may be permitted to continue." *Id.* at 1064 (emphasis added). RFRA exemptions cannot be granted in gross.

The murkiness of the relief Plaintiffs seek underscores the lack of a ripe dispute. Plaintiffs request a "preliminary injunction." Br. 33. But RFRA does not authorize an injunction preventing application of S.B. 1 to Plaintiffs in all circumstances. RFRA requires that any relief be tailored to "prevent[], restrain[], correct[], or abate[] the [alleged] violation of" RFRA, Ind. Code § 34-13-9-10(b)(1), and Trial Rule 65(D) further requires any injunction to be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." That makes it incumbent upon Plaintiffs to identify the specific circumstances in which complying with S.B. 1 would allegedly violate their religious beliefs. Plaintiffs, however, nowhere state what an injunction would say. That lack of clarity reflects the highly contingent, hypothetical nature of Plaintiffs' claims.

For all Plaintiffs, abortion is no more than a possible resort in the event a series of remote contingencies all happen to occur and make abortion a desired option. None of the Plaintiffs is pregnant, several are actively taking steps to avoid pregnancy, and (unsurprisingly) none would

intentionally get pregnant with the intention of having an abortion. *See, e.g.*, Ex. 4, Anon. 1 Dep. 50:7–10 (responding "no" to whether she would "get pregnant with the intention of having an abortion"); Ex. 8, Anon. 5 Dep. 43:7 (explaining Judaism "does not require us to become pregnant"). Their individual stories warrant further inspection.

A. Anonymous 1

Anon. 1 is not pregnant. Ex. 4, Anon. 1 Dep. 50:1–2. Moreover, she does not wish to become pregnant in the near future and is taking precautions to prevent pregnancy. *Id.* at 50:3–4, 10–11, 50:22–51:3. Even before S.B. 1, Anon. 1 was taking steps to avoid becoming pregnant. *Id.* at 51:4–6. She "resumed taking birth control" "after her last pregnancy" ended in March 2022. *Id.* 51:5–6; Anon. 1 Decl. ¶ 27.

Although she is taking these precautions because she would prefer not to become pregnant at this time, Anon. 1 would not necessarily seek to terminate *all* future pregnancies. Ex. 4, Anon. 1 Dep. 49:8–17. In fact, the opposite is true—Anon. 1 would like to have more children and would not get pregnant with the intention of having an abortion. *Id.* at 50:5–9.

If Anon. 1 becomes pregnant in the future, she would only consider getting an abortion depending on "[t]he impact on [her] physical, mental, and emotional well-being and health" if she were to carry the pregnancy to term. Ex. 4, Anon. 1 Dep. 49:22–25. Although Anon. 1 is concerned about the potential for a future fetus to have a genetic abnormality, she would not necessarily abort a fetus with such a genetic abnormality. *Id.* at 49:8–11, 49:18–21. Indeed, she would at that time consider "[t]he impact on [her] physical, mental, and emotional well-being and health." *Id.* at 49:22–25. Anon. 1 moreover understands that in "most of the cases," the presence of the "same chromosomal abnormality that [she] had in [her] previous pregnancy" would fall within S.B. 1's exception for lethal fetal anomalies. *Id.* at 49:1–7, 51:23–52:3. Any burden that S.B. 1 imposes on

Anon. 1's desire to have an abortion is thus highly remote and contingent. Her challenge is far from ripe.

B. Anonymous 2

Anon. 2 is not pregnant. Ex. 5, Anon. 2 Dep. 55:6–7. She also does not wish to become pregnant in the near future and therefore is taking precautions to prevent pregnancy. *Id.* at 55:13–56:1 ("I have to be very particular about when we can have intercourse, depending on if I'm ovulating or not. So I have to be able to plan when we can have intercourse; on top of that, we have to wear a condom . . . ."). Even before S.B. 1, Anon. 2 was taking nearly identical steps to avoid becoming pregnant, albeit perhaps less assiduously. *Id.* at 56:5–16. Anon. 2 had been using "the rhythm method," "tracking . . . [her] menstrual cycle," and "us[ing] condoms every now and then." *Id.* at 56:11–16.

Yet, Anon. 2 would *not* seek to terminate all future pregnancies. For Anon. 2, her decision to get an abortion is entirely dependent on "if [she] deems that it is necessary for [herself] to have another child in order to realize . . . [her] full humanity." Ex. 5, Anon. 2 Dep. 50:21–51:1. This includes myriad considerations, such as whether she can "mentally . . . take on another human," and whether she can "financially sustain a living." *Id.* at 53:6, 49:22. In fact, "[i]t entails *everything*" and requires her to "do as [she] see[s] fit for [her]self and [her] family" at that time. *Id.* at 50:18–20. Anon. 2 could always change her mind about whether having another child "would infringe on [her] ability to fully realize [her] humanity." *Id.* 55:8–12, 58:2–4; *id.* at 50:23–51:1 ("if I deem that it is necessary for me to have another child in order to realize . . . my full humanity, then I would have another child"). Again, any application of S.B. 1 to Anon. 2's circumstances is highly remote and contingent—too much so for ripe adjudication.

C. Anonymous 3

Anon. 3 is not pregnant. Ex. 6, Anon. 3 Dep. 55:22–24. She also does not wish to become pregnant in the near future and therefore is remaining abstinent to prevent pregnancy. *Id.* 65:14–17. But even before S.B. 1, Anon. 3 was taking steps to avoid becoming pregnant. *Id.* at 67:13–17 (her partner was using a method of contraception).

But Anon. 3 would not seek to terminate all future pregnancies. Although she does not want children in the foreseeable future, she "would" like to have children someday. Ex. 6, Anon. 3 Dep. 55:17–21. The decision to get an abortion or keep the baby depends on many considerations, including her "financial well-being" and whether she has "go[ne] into remission [for Crohn's disease] for an extended period of time." *Id.* at 58:15–16, 58:24. Again, with so many contingencies, the Court cannot assess whether and how S.B. 1 imposes a substantial burden on Anon. 3's religious exercise or whether, if S.B. 1's compelling interest is less than universally sufficient, it nonetheless prevails here.

D. Anonymous 4 and Anonymous 5

Anon. 4 and Anon. 5, who are married to each other, are not pregnant. Ex. 7, Anon. 4 Dep. 18:12–13; Ex. 8, Anon. 5 Dep. 41:1–2. Nor are they under any certain or immediate risk of getting pregnant, which would require use of artificial insemination or in vitro fertilization. Ex. 7, Anon. 4 Dep. 18:14–15. Nor would Anon. 4 and Anon. 5 seek to terminate all future pregnancies, as both want to have children, Ex. 7, Anon. 4 Dep. 19:5–6; Ex. 8, Anon. 5 Dep. 41:3–5, and "definitely would not go into a pregnancy with the intent to have an abortion," Ex. 8, Anon. 5 Dep. 41:15–17. A hypothetical decision to get an abortion would depend on several considerations, including whether their "physical, mental, [and] emotional well-being endangered their holistic well-being," which "is up to that individual person." Ex. 8, Anon. 5 Dep. 28:10–14, 30:15–16; Ex. 7, Anon. 4

Dep. 22:25–23:3. Again, all these contingencies prevent sufficient assessment of RFRA's substantial burden and, unless S.B. 1 always prevails over religious exercise (which, again, the State contends to be the case), compelling interests tests.

E. Hoosier Jews for Choice

Hoosier Jews for Choice does not present any concrete circumstances for evaluation under RFRA. It merely asserts associational standing, the availability of which remains in question in Indiana. *Bd. of Comm'rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 169–70 (Ind. 2017) (observing that "associational standing is largely a creature of federal law" and the Indiana Supreme Court has "never . . . ruled with respect to associational standing"). Even if associational standing is later recognized in Indiana as a general concept, Indiana's RFRA by its terms does not permit it. *See* Ind. Code § 34-13-9-7 (a "person" who may bring a RFRA claim includes "an individual," "an organization . . . organized and operated primarily for religious purposes," or an "entity that . . . exercises practices that are compelled or limited by a system of religious belief held by . . . the individuals").

But even if Indiana's RFRA permits an organization to assert the rights of its membership, it does not apply here. In the federal context, "[o]ne of th[e] requirements" of associational standing "is that 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Harris v. McRae*, 448 U.S. 297, 321 (1980) (quoting *Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Critically, with respect to abortion regulations, "the participation of individual members" is "essential to a proper understanding and resolution of their free exercise claims." *Id.* (rejecting associational standing to advance the claims of members who would choose abortion but were discouraged from doing so by the Hyde Amend-

ment). RFRA claims, like free exercise claims, require individualized determinations, not categorical group exceptions. *See also Ackerman v. Washington*, 16 F.4th 170, 182 (6th Cir. 2021) ("RLUIPA requires a practice-specific analysis."). And Hoosier Jews for Choice's claims on behalf of its members require the "participation of individual members" in order to "proper[ly] understand[] and resol[ve]" their claims. *Harris*, 448 U.S. at 321.

In any event, the uncertainties of whether a Hoosier Jews for Choice member will become pregnant and then desire to get an abortion are even more pronounced. Hoosier Jews for Choice does not allege that any of its members is currently pregnant. Nor does it allege that its members would seek to end *all* future pregnancies in accordance with religious beliefs. Hoosier Jews Decl. ¶ 7 ("Some members of the organization are capable of becoming pregnant and if they became pregnant, could require an abortion that would be prohibited by S.E.A. 1."). Again, detailed RFRA analysis is not possible.

* * *

With all these contingencies, none of the Plaintiffs present "defined issues" that "are based on actual facts rather than on abstract possibilities." *Ind. Dep't of Envtl. Mgmt.*, 643 N.E.2d at 336. Instead, each Plaintiff's claim "rests upon contingent future events 'that may not occur as anticipated, or . . . may not occur at all." *Ind. Family Inst. Inc.*, 155 N.E.3d at 1218 (quoting *Texas*, 523 U.S. at 300). Deciding whether it is reasonably likely each of the Plaintiffs will face a substantial burden on their religious exercise requires speculation as to remote and uncertain future events. *Apache Stronghold*, 38 F.4th 742 ("At this preliminary injunction stage, these factual uncertainties prevent" the plaintiffs "from showing a 'likelihood'" that they will be burdened). These claims therefore are not sufficiently concrete for adjudication.

II. The Plaintiffs Are Not Likely To Succeed on the Merits of Their RFRA Claims

Plaintiffs do not state a claim regardless. Indiana's RFRA first requires plaintiffs to establish that "a governmental entity" has "substantially burden[ed] a person's exercise of religion, even if the burden results from a rule of general applicability." Ind. Code § 34-13-9-8(a); *see Blattert*, 190 N.E.3d at 421. That burden includes at least two components: an "exercise of religion" and a state-imposed "substantial burden." *Id.* Critically, a substantial burden on something that is not an exercise of religion does not count. Likewise, an insubstantial burden on something that *is* an exercise of religion does not count.

Only after Plaintiffs make these initial showings does the burden shift to the State to "establish that a compelling governmental interest is 'satisfied through application of the challenged law to the *person*—the *particular* claimant whose sincere exercise of religion is being substantially burdened.'" *Id.* (quoting *Gonzales*, 546 U.S. at 420) (emphasis added). Yet, "[w]hile it is the State's burden to show it has chosen the least restrictive means to achieve its compelling interest, it need not refute the 'universe of all possible alternatives'" when a plaintiff "does not proffer an alternative scheme which is less restrictive than the State's proposed means." *Id.* at 424 (quoting *Smith v. Owens*, 13 F.4th 1319, 1326 (11th Cir. 2021)).

A. S.B. 1 does not "substantially burden" any Plaintiff's "religious exercise"

RFRA requires Plaintiffs to make a prima-facie showing that the challenged governmental action "substantially burden[s] . . . a person's *exercise* of religion." Ind. Code. § 34-13-9-8(a) (emphasis added); *see Blattert*, 190 N.E.3d at 421–22. This burden is heavy: "[A] substantial burden on religious exercise is one that necessarily bears *direct, primary, and fundamental responsibility* for rendering religious exercise . . . effectively impracticable." *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (emphasis added).

1. "Abortion access" is not religious exercise, and neither abortion itself nor any other act affected by S.B. 1 constitutes a "religious exercise" for these Plaintiffs

RFRA, like the federal RLUIPA, provides that "'exercise of religion' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Ind. Code § 34-13-9-5. The notion of religious exercise is broad, but not boundless. Even though a "ritual[]" or "practice" need not be "central" to a religious adherent's beliefs, the act must nonetheless involve "religious activity" that is "important to his free exercise of religion." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 332–33 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). For instance, "the food at issue in a RLUIPA case must have some religious significance or else there is no claim in the first place." *Ackerman v. Washington*, 16 F.4th 170, 189 n.10 (6th Cir. 2021).

Cognizable religious exercises have included prison diets for "keeping kosher," *Baranowski v. Hart*, 486 F.3d 112, 124 (5th Cir. 2007), "Sabbath and holy day gatherings," *Adkins v. Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004), and "participating in sacramental use of bread and wine," *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). In each of these cases, "religious significance" imbued the practices themselves—whether diets, gatherings, or sacraments. In contrast, preferring Saturdays over Wednesdays for religious meetings does not qualify for religious protection when, though it better facilitates religious meetings, the day of the meeting carries no religious significance. *Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 85 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2676 (2022) (*Green Haven*) (holding that Quaker prisoners "failed to establish

that scheduling the Quarterly Meetings on Saturdays (as opposed to any other day) bears any religious significance whatsoever" even if it "would inconvenience" some plaintiffs). Here, Plaintiffs' RFRA claim concerns conduct that does not carry such religious significance.

To begin, Plaintiffs' allegation of religious exercise is too abstract to qualify for RFRA protection. Plaintiffs assert "that their religious beliefs compel them *to be able to* obtain abortions prohibited by the new law." Br. 24 (emphasis added). But that assertion goes only as far as theoretical abortion *access*—not the abortion itself. Thus, even aside from whether abortion may constitute religious exercise for Plaintiffs in some circumstances (and it does not, as discussed below), Plaintiffs have taken the novel position that religious significance attaches to the mere hypothetical availability of that religious exercise, rather than the actual abortion itself. Perhaps this is Plaintiffs' way of making their case seem ripe. Regardless, no case supports such an abstract idea of religious exercise. Plaintiffs say "[t]he notion of 'religious exercise' is synonymous with 'religious belief,'" Br. 24, but religious exercise requires "'not only belief and profession'" but also "'performance of (or abstention from) physical acts' that are 'engaged in for religious reasons,'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (quoting *Smith*, 494 U.S. at 877).

Nor does abortion qualify as Plaintiffs' "religious exercise," as Plaintiffs ultimately do not consider abortion itself to have "religious significance." *Ackerman*, 16 F.4th at 189 n.10. Rather, they consider abortion to be one among many options for achieving the religious ends they desire (*e.g.*, self-actualization, physical and mental well-being). *See, e.g.*, Ex. 3, Anon. Dep. 1 18:23–25 (Judaism requires preservation of "physical health," "mental and emotional health," and "quality of life"); Ex. 5, Anon. 2 Dep. 7:3–6 (spiritual beliefs call her "realize [her] full humanity and inherent dignity"); Ex. 6, Anon. 3 Dep. 41:22–24 (Islam prohibits self-harm to "physical, mental, and emotional well-being"); Anons. 4 & 5 Decl. ¶ 10 ("Jewish beliefs" demand abortion only when

"a pregnant person's health or wellbeing—physical, mental, or emotional—were endangered by a pregnancy . . . ."). Other acceptable means for Plaintiffs to achieve such ends in the context of childbearing include sexual abstinence, contraceptives, IUDs, and natural family planning, just to name a few. *See e.g.*, Ex. 4, Anon. 1 Dep. 51:3–8 (discussing "not having sex with . . . husband" and "taking birth control" to avoid pregnancy); Ex. 5, Anon. 2 Dep. (using "the rhythm method," a variation of natural family planning, and "condoms every now and then" to avoid pregnancy); Ex. 6, Anon. 3 Dep. 61:23 ("Right now I'm abstinent"); Ex. 10, Hoosier Jews Dep. 22:24–25 ("10 percent of our members have changed their either sexual practices or birth control practices as a response" to S.B. 1).

Amalia Shifriss, the representative of Hoosier Jews for Choice, drove this point home when she testified that, according to Jewish belief, a woman pregnant after the point of fetal viability who needs to "terminat[e]" the pregnancy for the sake of her mental or physical health could do so via induction of labor that may not kill the fetus. *See* Ex. 10, Hoosier Jews Dep. 60:19–23; *see also* Ex. 8, Anon. 5 Dep. 27:14–25. The critical religious value here is *not* a particular procedure or even the death of the fetus, but achievement of individually defined physical and mental well-being. Abortion itself, therefore, is not a religious exercise for the Jewish Plaintiffs according to their professions of belief. *See e.g.*, Ex. 4, Anon. 1 Dep. 34:3–4; 37:4–6 (discussing religious obligation to preserve "physical, emotional, psychological health, and well-being" consistent with Jewish teaching about "a hierarchy of well-being" in which "the woman, the mother . . . takes priority over the fetus").

The same is true for the non-Jewish Plaintiffs. Anon. 2's "spiritual beliefs" may "compel[]" her to "terminate" a future pregnancy "*because* it would infringe on [her] ability to fully realize

[her] humanity." Ex. 5, Anon. 2 Dep. 19:22–25, 58:2–10 (emphasis added). For Anon. 2, her spirituality requires that she do whatever she believes achieves this end. *See e.g.*, *id.* at 28:23–29:1 (answering "no" to whether she would ever "distinguish between [her] religious beliefs and [her] lifestyle choices."). Consequently, abortion is not itself a religious exercise under this framework but simply one avenue by which a religious obligation—here, "be[ing] healthy [to] do as [she] see[s] fit for [her]self and . . . family"—can be satisfied. *Id.* at 50:19–20. Anon. 3 is no different, as her religious beliefs do not value abortion as such but instead prevent her from engaging in any self-harm to her "physical, mental, and emotional well-being" (or "haram"). Ex. 6, Anon. 3 Dep. 41:22–23, 48:9–11.

Plaintiffs attach no more religious significance to abortion than the *Green Haven* plaintiffs attached to Saturdays—it is but a secular means to a religious end. Like the Quaker prisoners, whose religious exercise in Quarterly Meetings was inconvenienced by the New York prison's alternative weekday schedule, 16 F.4th at 85, Plaintiffs can exercise their religious commitment to maintaining their full capacity for self-actualization, emotional health and well-being through various alternatives. Plaintiffs identify no principle that makes abortion a religious act any more than countless other actions that they believe to affect their wellbeing. Adopting their view would permit the assertion of RFRA claims against any law that regulates practices Plaintiffs subjectively believe could affect their wellbeing—from restrictions on raw milk to marijuana—even if the action itself carries no inherent religious significance. "[T]he inconveniences they suffer as a result of [S.B. 1], therefore, cannot constitute substantial burdens on their religious exercise." *Id.* (emphasis omitted).

2. No Plaintiff pleads circumstances establishing that S.B. 1 substantially burdens a desired abortion, and S.B. 1 does not substantially burden any other religious exercise pled by Plaintiffs

For the reasons described, Plaintiffs' exercise of abortion is neither concrete and particularized nor a religious exercise. Setting that aside, S.B. 1 is undoubtedly a substantial burden on abortion generally, as it is designed to be. Whether Plaintiffs will incur circumstances where they experience that substantial burden is indeterminate, which makes concrete adjudication impossible. But to the extent the State needs to justify that burden, it does so in Part II.B, *infra*.

Plaintiffs, however, also seem to suggest that S.B. 1 burdens their personal religious exercise because it prompts them to take, or refrain from taking, various actions to avoid pregnancy. Such incidental impacts of S.B. 1 are not substantial burdens on *abortion*, however, and no Plaintiff alleges that her efforts to avoid pregnancy contravene her religious beliefs or exercise. None, of course, asserts that her religion commands her to become pregnant simply to obtain an abortion.

Furthermore, Plaintiffs' religious exercise, again, is not abortion itself, but is instead avoidance of physically or mentally harmful pregnancies. And S.B. 1 does not substantially burden that religious exercise. Unlike, for example, denying a prisoner a kosher diet—which substantially burdens religious exercise with every meal—abortion is merely one means for Plaintiffs to achieve their religious ends, *i.e.*, maximum self-actualization and avoidance of unspecified physical or mental harms resulting from pregnancy. The other measures Plaintiffs take to avoid pregnancy demonstrate that they may yet avoid the sorts of pregnancies they say their religious beliefs frown upon. S.B. 1 is therefore not a substantial burden on Plaintiffs' achievement of their religious exercise, *i.e.*, the avoidance of pregnancies that are excessively difficult or that deprive them of opportunities for self-actualization.

B. The State's compelling interests justify any burden on Plaintiffs' religious exercise

The Indiana Supreme Court has recognized that the State has a "valid and compelling" interest in protecting the unborn from "the moment of conception." *Cheaney v. State*, 285 N.E.2d 265, 270 (1972). Recent scientific advances provide tremendous insight into the stages of human development that renders this interest more compelling today than ever before. *See* Ex. 1, Sander Lee Decl. ¶¶ 8–10. For example, it is now clear that the "living human being . . . *created at fertilization*" has DNA "packaged into 46 chromosomes, [with] . . . every instruction [it] needs to develop, grow and become an adult . . . including sex, eye color, and other physical traits." *Id.* ¶ 10 (emphasis added). "This DNA sequence produces the genetic variation that creates a person's biological individuality," *id.*, and that person's "*[d]evelopment begins at fertilization*" which is when [t]he unicellular zygote divides many times and becomes progressively transformed into a multicellular human being through cell division, migration, growth, and differentiation." Ex. 2, Curlin Decl. ¶ 15 (emphasis added).

Science thus tells us that "[t]he act of performing an induced abortion during *any* stage of pregnancy, from fertilization up to birth, ends the life of an innocent human being." Ex. 1, Sander Lee Decl. ¶ 8; Ex. 3, Snead Decl. ¶ 16; Ex. 2, Curlin Decl. ¶ 11 ("That human fetuses are human beings is a scientific fact, not a theological claim."). According to Dr. Curlin, "[p]rotecting a class of human beings against being intentionally killed is a fundamental ethical obligation, and one that the weight of medical tradition has embraced throughout history." Ex. 2, Curlin Decl. ¶ 11. Indiana's laws, he says, "reflect centuries of ethical consensus that abortion contradicts a universal norm—*do not kill the innocent*." *Id.* Professor O. Carter Snead, the Notre Dame bioethicist, explains this consensus is not a "theological position," as the Plaintiffs assert, Br. 27–28, "in the sense of depending on the proposition of any revealed religious tradition." Ex. 3, Snead Decl. ¶ 12.

From an ethical as well as legal standpoint, Indiana has a "compelling government interest in protecting a class of vulnerable human beings—namely, human fetuses—from unjust discrimination and violence." Ex. 2, Curlin Decl. ¶ 35; *Cheaney*, 285 N.E. 2d at 275; *Dobbs*, 142 S. Ct. 2252. As Snead puts it, "there is arguably no more compelling interest than preventing the killing of innocent human beings." Ex. 3, Snead Decl. ¶ 17.

For Plaintiffs, "[t]he unborn child is invisible from their analysis," Ex. 3, Snead Decl. ¶ 19, but Indiana is entitled to take it into account. "Indiana is entitled to protect the unborn in the womb from violence, and has chosen to do so via SB1." *Id.* S.B. 1 thus "reflect[s] centuries of ethical consensus that abortion contradicts a universal norm—*do not kill the innocent*." Ex. 2, Curlin Decl. ¶¶ 13, 15; Ex. 1, Sander Lee Decl. ¶ 9. Notwithstanding the *Roe* interregnum, Indiana has imposed that norm by prohibiting abortion since at least 1835.

Other jurisdictions agree, recognizing that States have an interest in protecting unborn human life at various stages during pregnancy. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 736 n.16 (Iowa 2022), *reh'g denied* (July 5, 2022) ("[T]he State has a compelling interest in promoting human life" in the womb); *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990) (recognizing that the State has an interest in "protect[ing] . . . the unborn child, whether an embryo or a nonviable or viable fetus . . . ."); *Ex parte Phillips*, 287 So.3d 1179, 1234 (Ala. 2018) (affirming double-homicide conviction for convict who killed a pregnant woman).

Plaintiffs invoke the overruled cases *Roe v. Wade* and *Planned Parenthood v. Casey* to argue that the State's interest is not compelling, "at least pre-viability." Br. 27. But in *Dobbs*, the U.S. Supreme Court explained in detail the "glaring deficiency [in] *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions" and its relationship to the

government's compelling interest. *Dobbs*, 142 S. Ct. at 2268. The viability line is "arbitrary" and "heavily depend[s] on factors that have nothing to do with the characteristics of a fetus," such as "the state of neonatal care at a particular point of time." *Id.* at 2269. *Casey* also "provided no principled defense of the viability line," and instead "merely rephrased what *Roe* had said." *Id.* at 2271. Having demonstrated that "[t]he viability line . . . makes no sense," the Supreme Court overruled *Roe* and *Casey* and "return[ed] th[e] authority to the people and their elected representatives" to regulate abortion. *Id.* at 2270, 2285. Plaintiffs pin their hopes on judicial resuscitation of *Roe* and *Casey* via RFRA, but no plausible understanding of its statutory text permits that.

In sum, the State's "well-established" interest in "defending unborn human life from the lethal threat of abortion" has, in the aftermath of *Dobbs* and given modern embryological science, become more compelling than ever. Ex. 3, Snead Decl. ¶ 22. Plaintiffs' disagreement with that interest does not negate its importance. So, even if S.B. 1 substantially burdens Plaintiffs' religious beliefs, it does so in furtherance of a compelling governmental interest and survives strict scrutiny.

C. S.B. 1 is the least restrictive means to achieve the State's compelling interests

1. S.B. 1's restriction on when an abortion may occur "is the least restrictive means of furthering" the State's compelling interest in preserving fetal life. Ind. Code § 34-13-9-8(b). "The relevant 'means,' for purposes of RFRA, is the 'burden' the party hopes to avoid." *Tyms-Bey v. State*, 69 N.E.3d 488, 491 (Ind. Ct. App. 2017). Here, the burden that Plaintiffs seek to avoid is S.B. 1's limitations on when abortions may be performed. But, apart from preventing abortions from occurring, there is no other way for the State to further its interest in preventing the deaths of unborn children. No alternative would be less restrictive on religion while still furthering the State's interest in protecting the unborn. Permitting these Plaintiffs—or anyone else—to abort their children in the future would necessarily require the State to forgo its interest entirely.

In this regard, "[t]he least-restrictive-means standard invokes a 'comparative analysis,'" meaning the Court "must take the State's preferred means . . . and then [it] must 'lay such preferred means side by side with other potential options." *Blattert*, 190 N.E.3d at 424 (quoting *United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016)). "[I]n order to be a viable least-restrictive means for purposes of RFRA, the proposed alternative need[s] to accommodate both the religious exercise practiced in this case . . . and simultaneously achieve the government's compelling interest[]." *United States v. Grady*, 18 F.4th 1275, 1287 (11th Cir. 2021). When the plaintiff "does not proffer an alternative scheme which is less restrictive than the State's proposed means," the State "need not refute the 'universe of all possible alternatives.'" *Blattert*, 190 N.E.3d at 424 (quoting *Smith v. Owens*, 13 F.4th 1319, 1326 (11th Cir. 2021)); *see United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (explaining the analysis is "limit[ed] . . . to consideration of the alternative regulation schemes proffered by the parties, and supported in the record."). Nor must the State undertake the "herculean burden . . . to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA." *Blattert*, 190 N.E.3d at 424 (quoting *Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008)).

Here, the State's preferred means is clear—S.B. 1 proscribes abortion in most cases. Plaintiffs have not offered an alternative, and the State need not refute all conceivable approaches.

2. Plaintiffs do not contest the main point that S.B. 1 cannot be more narrowly tailored and still achieve the State's objectives. Instead, they briefly assert that S.B. 1 is "underinclusive," Br. 29—even though, in their own words, S.B. 1 "make[s] *virtually all abortions* illegal in Indiana," Br. 1 (emphasis added). S.B. 1 permits abortion in "limited circumstances," Br. 29, notably

where there is a compelling interest on the other side—the life of the mother, risk of serious, permanent injury to the mother, or the pregnancy was the result of criminal conduct. Narrow tailoring within the statute does not undermine its capacity to preserve human life.

The mere existence of exceptions does not spoil narrow tailoring under RFRA or other free-exercise analyses. *See Blattert v. State*, 190 N.E.3d 417, 423 (Ind. Ct. App. 2022). Courts invoke under-inclusiveness only when exceptions reveal sinister treatment of religion.

First, the inclusion of numerous, arbitrary exceptions may in some cases indicate that the government is not actually pursuing a compelling interest. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (explaining under First Amendment strict scrutiny analysis, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited" (cleaned up)). But that is not always the case, as in *Blattert*, where a parental corporal punishment exception from the child battery prohibition did not undermine the compelling nature of the State's interest in preventing child abuse. *Blattert*, 190 N.E.3d at 422–23. Both there and here, no one can seriously doubt that the law materially advances the State's compelling interest, notwithstanding narrow exceptions.

Second, exceptions can be problematic if they suggest the adequacy of more narrowly tailored alternatives. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–32 (2014), for example, the Court ruled that *for-profit* companies were entitled to religious exemption because the law already afforded a religious exception for *non-profit* companies. With no relevant distinction between non-profits and for-profits, the exception for non-profits undermined the government's claim that no less restrictive alternative would work. *Id.* But while distinguishing between non-profits and for-profits advanced no legitimate government interest, here distinguishing between

the exceptions defined by statute and those demanded by Plaintiffs does. The statute affords exceptions for limited circumstances defined in law and, in some cases, assessed by medical professionals. Plaintiffs, in contrast, demand exemptions that turn entirely on the subjective preferences of individual women who may wish to choose abortion for a broad array of reasons connected to physical or mental health or even self-actualization. Such a broad exception has no limiting principle and would blow a hole in Indiana's abortion prohibition.

Third, a law's exclusion of a broad swath of conduct may indicate invidious discrimination against religion. Back to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the challenged city ordinances "target[ed] Santeria sacrifice" because the narrow definition of the prohibited conduct—which notably used religious terms like "sacrifice"—and broad exceptions meant that "few if any killings of animals [we]re prohibited other than Santeria sacrifice." 508 U.S. 520, 535–36 (1993). The ordinances even included religious exemptions for kosher slaughter. *Id.* The Court ultimately concluded that the ordinances were "not neutral" because they clearly "had as their object the suppression of religion." *Id.* at 542. Here, in contrast, there is no suggestion that S.B. 1 "targets" religious conduct.

3. Finally, Plaintiffs cryptically suggest that "[t]he statute may be overinclusive as well," Br. 29 n.8. The theory as to when the statute would prohibit abortion where the State has no interest in protecting prenatal life is not immediately clear. S.B. 1 operates to protect unborn human life in all cases in which it applies; it does not cover *any* conduct unnecessary to that end, much less any more religious conduct than necessary.

* * *

As Dr. Curlin explains, this case asks the State to "permit one class of Hoosiers to be harmed simply because the Plaintiffs' sincere beliefs support them in doing so." Ex. 2, Curlin Decl.

¶ 36. Such a claim "contradict[s] basic principles of fairness and the ethical traditions that have long governed medicine." *Id.* No understanding of religious liberty heretofore has encompassed such an extraordinary claim, with all its unfathomable implications. The Court should reject it here.

NO IRREPARABLE HARM

Merits aside, Plaintiffs bear "the burden of demonstrating an injury which [would be] certain and irreparable if the injunction is denied." *Wagler Excavating Corp. v. McKibben Const., Inc.*, 679 N.E.2d 155, 157 (Ind. Ct. App. 1997). To obtain an injunction, a plaintiff must demonstrate personal harm. *See, e.g.*, *Tilley v. Roberson*, 725 N.E.2d 150, 154 (Ind. Ct. App. 2000) ("Tilley had the burden of showing that her remedies at law were inadequate, thereby causing her to suffer irreparable harm."). Critically, "[s]peculative injuries do not justify th[e] extraordinary remedy" of an injunction. *E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005); *see Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1041 (Ind. Ct. App. 2002) ("[I]njunctive relief is not to be used simply to eliminate a possibility of a remote future injury."); *Indiana Pacers L. P. v. Leonard*, 436 N.E.2d 315, 318 (Ind. Ct. App. 1982). Nor do "apprehensions or fears . . . unsustained by facts." *Daugherty v. Allen*, 729 N.E.2d 228, 236 (Ind. Ct. App. 2000).

Plaintiffs fail to meet this burden, and indeed do not describe with any specificity what actions they seek to enjoin or explain how enjoining those actions would prevent a RFRA violation. Instead, they vaguely request an injunction "enjo[in]ing [S.B.] 1." Motion for Preliminary Injunction 2. Such an injunction would both exceed the remedies authorized by RFRA, *see* Ind. Code § 34-13-9-10(b)(1) (authorizing only relief that "prevents, restrains, corrects, or abates the

violation of this chapter"), and violate the command of Trial Rule 65 to be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained."

Plaintiffs contend that an "unlawful" action always inflicts irreparable harm "per se." Br. 30 (citations omitted). But that amounts to saying that plaintiffs need never establish irreparable harm independent of establishing unlawful conduct. The Indiana Supreme Court has never endorsed this "per se" rule and has even disclaimed any such rule absent "clearly unlawful" challenged conduct that is "against the public interest." *Indiana Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 & n.3 (Ind. 2002). Nothing here is "clearly unlawful" given that no Plaintiff is even pregnant and the State has a compelling interest in protecting the unborn.

A preliminary injunction is not justified where, as here, the plaintiff has failed to demonstrate "an injury which is certain and irreparable if the injunction is denied." *Wagler Excavating Corp.*, 679 N.E.2d at 157. Although Plaintiffs assert that "[a]n injunction will prevent serious impingement on plaintiffs' religious beliefs," Br. 31, they have not altered any religious beliefs or conduct and are not likely to do anything differently if the Court grants a preliminary injunction. The witness for Hoosier Jews for Choice acknowledged as much when asked whether any members capable of becoming pregnant would likely change their conduct in response to a preliminary injunction: "I doubt it." Ex. 10, Hoosier Jews Dep. 55:9–10. The only potential change if the Court were to grant a preliminary injunction is that some—but certainly not all—Plaintiffs might alter sexual practices or efforts at contraception. Yet even if some were to alter sexual or contraceptive practices, Plaintiffs do not allege that such changes would amount to religious exercise.

Anon. 1: Since S.B. 1 became effective on September 15, 2022, Anon. 1 has felt "anxiety" about the possibility of becoming pregnant. Ex. 4, Anon. 1 Dep. 50:22–51:11, 52:15. Accordingly, she has started "taking birth control" and stopped "having sex with [her] husband." *Id.* at 50:23–

24; 51:2–6. When asked how her behavior would change with a preliminary injunction, Anon. 1 "imagine[s] [she] would resume sexual relations with [her] husband" but "can't say for sure" and ultimately concluded that she did not know how her behavior would change—if at all. *Id.* at 52:16–17, 20, 23. Such uncertainty "is too speculative and not sufficient to meet the standard for showing a threat of imminent harm required for a preliminary injunction." *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 876 (Ind. Ct. App. 2016).

Anon. 2: The only lifestyle changes Anon. 2 would make after a preliminary injunction would be to "go back to [her] normal behavior"—meaning fewer "extra precautions" around ovulation tracking, using a condom less frequently, and having sexual intimacy with her husband more frequently. Ex. 5, Anon. 2 Dep. 59:2–7; *id.* at 55:13–56:16. The only "harm" she has experienced is the "anxiety" that "has resulted in a reduction in physical intimacy between [her] and her husband." Br. 13. But that she is feeling some anxiety and is engaging in "extra precautions" falls well short of demonstrating irreparable harm. Preliminary injunctions are not justified merely to reduce anxiety or other negative emotions and feelings. *Indiana Pacers*, 436 N.E.2d at 318 ("It is axiomatic that injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties.").

Anon. 3: For Anon. 3, should an injunction issue, she would "not be abstinent." Ex. 6, Anon. 3 Dep. 10:18. If she became pregnant before the injunction went away, "would probably try to find . . . some legal avenue . . . to . . . terminate a pregnancy." *Id.* at 70:10–13. Consequently, whether the Court issues an injunction will not necessarily affect Anon. 3's *religious* exercise—even if it would alter, for a time, her sexual practices. Notably, she and her partner used contraceptives before S.B. 1, *Id.* at 67:13–20, and will likely continue using them after an injunction

because she does not want children in the "foreseeable future." *Id.* at 55:16–19. Again, such temporary changes in her sexual practices do not rise to the level of irreparable harm.

Anon. 4 & 5: Sexual and contraceptive practices are not a concern for Anon. 4 and Anon. 5, who are married, but, both being female, do not risk pregnancy through sexual activity with each other. Their plan is for Anon. 4 to get pregnant using artificial insemination or in vitro fertilization, which they have delayed owing to S.B. 1. The concern that prompted them to file this case is that Anon. 4 might want to get an abortion if her physical, mental, or emotional health or wellbeing is endangered during the pregnancy. But realization of that circumstance could take several months (if it happens at all). Accordingly, a mere preliminary injunction would not mean Anon. 4 would feel free to get pregnant. As she fully acknowledged, "I think that I would still be hesitant to get pregnant, because if an appeal went through and [the injunction] was overturned again, then I would be pregnant but in a place where the law was still standing." Ex. 7, Anon. 4 Dep. 25:12–16. Her wife, Anon. 5, has no immediate plans to get pregnant. The remoteness of this potential future harm is therefore far "too speculative . . . for showing a threat of imminent harm." *Hannum Wagle*, 64 N.E.3d at 876.

Hoosier Jews for Choice: Hoosier Jews for Choice has attested that some of its members "are currently altering their sexual practices, birth control practices, and family planning as a result of" S.B. 1. Hoosier Jews Decl. ¶ 7. However, the organization "doubt[s]" that a preliminary injunction would alter these members' new practices because it "might be overturned." Ex. 10, Hoosier Jews Dep. 54:25; 55:9–10. Thus, the requested preliminary injunction is unlikely to address Hoosier Jews for Choice's alleged burden on religious exercise.

Finally, none of the Plaintiffs claims that their sexual or contraceptive practices is itself a religious exercise. None claims, for example, that getting pregnant (or not) is a religious exercise;

that using prophylactics or hormonal birth control (or not) is a religious exercise; or that having sexual relations with any particular frequency (or not) is a religious exercise. So, even if getting an abortion were a religious exercise in some circumstances for these Plaintiffs, none makes a case that a preliminary injunction would prompt them to have an abortion or to undertake *any* religious exercise whatever. This is simply not a case where a preliminary injunction could temporarily remedy an injury to legally protected behavior that is the subject of the suit. That places an injunction beyond courts' power to award. *See* Ind. Code § 34-13-9-10(b)(1) (authorizing only relief that "prevents, restrains, corrects, or abates the violation of this chapter").

BALANCE OF HARMS AND PUBLIC INTEREST FAVOR THE STATE

The balance of harms and public interest weigh heavily against an injunction as well. An injunction here risks the infliction of irreparable harm on unborn Hoosiers whose existence Plaintiffs would seek to terminate in indeterminate circumstances. Br. 23–24; *see* Ex. 1, Sander Lee Decl. ¶ 8. As with ending any life, abortion is an *irreversible* procedure; once an unborn life has been intentionally taken, it cannot be restored. *See* Ex. 3, Snead Decl. ¶¶ 7, 11. Consequently, the state and public interest in preventing the irreparable harms that the Plaintiffs seek to inflict is paramount. As the Indiana Supreme Court has observed, there is a "valid and compelling" interest in protecting prenatal human life at all stages. *Cheaney*, 285 N.E.2d at 270; *see* Ex. 2, Curlin Decl. ¶ 27 ("S.B. 1 aligns with centuries of medical tradition"); Ex. 3, Snead Decl. ¶ 14 (explaining that history vindicates "weighing the interests of the unborn child against those of her mother, and crafting a regulatory framework accordingly").

Plaintiffs say only that violations of RFRA necessarily weigh the balance of harms and public interest in their favor. Br. 31–33. But there is no violation here. Moreover, it is unclear that the Plaintiffs themselves face any risk of harm. Their asserted harms regarding religious exercise

depend on a chain of contingencies that have not yet begun and very well may never come to pass. Their asserted harms regarding changes to their contraceptive and sexual practices do not outweigh the grave consequences of killing an unborn child. Should a future pregnancy threaten their life or pose a serious health risk, abortion remains an option under the statute. *See* Ind. Code § 16-34-2-1(a)(1), (3); Ex. 2, Curlin Decl. ¶¶ 29, 32.

Finally, the legislature has decided what "balance" to strike between "the rights of the unborn child" and "the rights of the mother," *Cheaney,* 285 N.E.2d at 269, and "[t]he laws promulgated by the General Assembly reflect its determination of what is in public interest," *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 121 (Ind. Ct. App. 2004). Moreover, it is in the public interest to enforce the laws duly enacted by the people's representatives. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). The balance of harms and public interest therefore weigh decidedly against granting a preliminary injunction to the named Plaintiffs.

CONCLUSION

The Plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on October 3, 2022, the foregoing document was served upon the following persons using the IEFS:

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