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IN THE
INDIANA SUPREME COURT

Case No. 26S-PL-00128

Individual Members of the Medical Licensing Board of Indiana, in their official capacities, et al. *Appellants-Defendants* v. Anonymous Plaintiff 1, et al., *Appellees-Plaintiffs*	Appeal from Marion County Superior Court 1 Trial Court Cause No. 49D01-2209-PL-31056 Hon. Christina R. Klineman, Judge

BRIEF OF AMICI CURIAE PROFESSORS STEPHANIE HALL BARCLAY AND RICHARD W. GARNETT IN SUPPORT OF APPELLANTS

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Amici are professors Stephanie Hall Barclay and Richard W. Garnett of Georgetown Law School and Notre Dame Law School, respectively.[1] *Amici* are legal scholars whose research and scholarly interests focus on religious liberty and, specifically, the application of strict scrutiny to religious exemptions requests. They have also represented parties and/or *amici* in litigation regarding the Religion Clauses.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that strict scrutiny analysis required the granting of religious exemptions from S.E.A. 1 (Abortion Law) under Indiana's Religious Freedom Restoration Act (RFRA).[2] Even as applied to religious claimants, the Abortion Law is narrowly tailored to serving a compelling interest. As the U.S. Supreme Court recently made clear, states are entitled to define prenatal life as a human life, and to pursue the indisputably compelling interest of protecting additional human lives. And making the Abortion Law less restrictive—by granting religious exemptions—would protect fewer lives. The strict scrutiny analysis should end there.

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[1] Counsel for *amici* acknowledge that Professors Barclay and Garnett drafted this brief for counsel's review and submission.

[2] On March 5, 2026, the trial court, "relying heavily" on the Court of Appeals' decision, entered judgment and a permanent injunction. Order at 8, *Anonymous Plaintiff 1 v. Individual Members of Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056 (Marion Cnty. Super. Ct. Mar. 5, 2026). Accordingly, this brief primarily analyzes the Court of Appeals' decision. *See Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416 (Ind. Ct. App. 2024), *trans. denied*.

Instead, the court held that the Abortion Law flunks the compelling-interest and narrow-tailoring criteria—in both cases assuming, effectively, that if a law makes *any* secular exceptions for any reason, the government cannot satisfy strict scrutiny.

That assumption is wrong. It misreads the purpose of underinclusive analysis in strict scrutiny cases of Indiana courts and the U.S. Supreme Court.[3] Those cases involve evidentiary disputes about whether government could both accomplish its goal and protect religious rights. Here, there is simply no dispute that preventing the requested religious exemption is the only method for Indiana to protect those additional human lives, and thus secular exemptions are simply irrelevant. The Court of Appeals' ruling would also imply that no state could prohibit *any* religiously motivated homicide—stoning, honor killing, child sacrifice—since all states allow killing for some secular ends like self-defense. All laws must have limits, and a law may permissibly exempt some secular conduct even under strict scrutiny, so long as the regulatory lines the State has drawn are adequately explained.

Even if secular exemptions were relevant in this case, the Abortion Law's limited exceptions are not similarly situated to the requested religious exemption. The secular exemptions Indiana allows prevent weighty harms that are not prevented when the state denies religious exemptions. They give courts no basis to doubt that the law's goal and effect are exactly what the State says it is: to save additional

[3] Since Indiana's RFRA "largely tracks" the federal RFRA, "federal caselaw" on the latter "provides some useful guidance," *Blattert v. State*, 190 N.E.3d 417, 421 n.1 (Ind. Ct. App. 2022), as does caselaw on the strict scrutiny test that RFRA borrowed from various First Amendment precedents.

human lives. And there can be no doubt that barring fewer abortions would save fewer lives. Indiana can more than meet its burden under RFRA.

ARGUMENT

I. The Abortion Law easily satisfies strict scrutiny.

Even if it draws strict scrutiny under RFRA,[4] the Abortion Law satisfies it. *First*, precedent leaves no doubt that the interest advanced by the law is compelling. As this Court recently stressed, in a passage *elaborating strict scrutiny*, "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *State v. Katz*, 179 N.E.3d 431, 456 (Ind. 2022) (quoting *Hill v. Colorado*, 530 U.S. 703, 715 (2000)). And perhaps there is no higher compelling interest than saving a human life. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990) ("[T]here can be no gainsaying" the state's "interest in the protection and preservation of human life . . . . [T]he States—indeed all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime."). Here, Indiana has judged that "human physical life" begins at conception. Ind. Code § 16-34-2-1.1(a)(1)(E). And the U.S. Supreme Court has held that states are entitled to make that judgment—that the Constitution does not gainsay a State's "view about if and when prenatal life is entitled to any of the rights enjoyed after birth," including "the most basic human right—to live." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263 (2022). Since Indiana is entitled to determine that human life begins at conception—and since saving a human life is likely the most

[4] *Amici* acknowledge, but set aside in this brief, serious questions about whether the other requirements for relief under RFRA are satisfied.

compelling interest a state can have—Indiana may indisputably protect prenatal lives as a compelling interest.

This Court, too, has identified a "valid and compelling" interest in protecting life from "the moment of conception." *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972). The trial court rejected Indiana's reliance on *Cheaney*, suggesting it was overtaken by *Roe v. Wade*'s holding that this interest is not compelling until fetal viability. *Anonymous Plaintiff 1 v. Individual Members of Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056, 2022 WL 22906464, at *45-48 (Marion Cnty. Super. Ct. Dec. 2, 2022). To sidestep the fact that *Roe* had been overturned in *Dobbs*, the trial court insisted that *Dobbs* had not revised *Roe*'s claim about "the nature of the State's interest." *Id.* at 35. That was error. *Dobbs*, referring *precisely* to *Roe*'s viability line, declared that "[n]othing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt [*Roe*'s] theory of life" over the state's contrary view. 597 U.S. at 263 (quotation omitted). And since *Dobbs* left states free to determine "when prenatal life is entitled to *any* of the rights enjoyed after birth," *id.* (emphasis added), it did not suggest that a state claiming a compelling interest would have to treat the unborn the same as born persons in every respect.

In addition, the Abortion Law prohibits nearly all abortions. While it does not govern the disposition of embryos outside the womb, in *in vitro* fertilization, or bar abortions when the mother's life or health is at risk or in case of rape, incest, or a lethal fetal anomaly (a condition expected to cause death within three months of birth); "abortion" is otherwise prohibited "in all instances." That would include the

overwhelming majority of abortions obtained each year. Thus, there is simply no doubt that this law "actually advance[s]" the compelling interest of saving additional human lives. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Second, the Abortion Law is "the least restrictive means for addressing the government's interest" in saving additional human lives. *Katz*, 179 N.E.3d at 458 (quotation omitted). The law prohibits only "abortion," Ind. Code § 16-34-2-1(a), and defines "abortion" as "the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus," Ind. Code §§ 16-18-1-1, 16-18-2-1. Protecting each individual life is a compelling interest, and thus every abortion that Indiana prevents necessarily advances this interest. It is hard to imagine a tighter link between regulation and state interest.

Thus, by the Court of Appeals' *admission*, the plaintiffs did not attack Indiana's position in the ordinary way—by offering any less restrictive "alternative scheme" for advancing its interest in protecting additional human lives. *Anonymous, 233* N.E.3d at 454 (quoting *Blattert*, 190 N.E.3d at 423). Nor did the plaintiffs or lower courts identify a single application of this law that would *not* advance the goal of protecting additional human lives.

That is unsurprising. In this case, the requested exemption would not simply make it more likely for the harm targeted by the state to occur and would result in fewer human lives being protected. Here the conduct seeking exemption *is* the harm. Again, Plaintiffs seek permission to end prenatal human lives, and the government seeks to prevent the ending of prenatal human lives. In the very limited set of cases

involving such direct conflicts with a properly articulated and truly compelling interest, courts need not look to secular exemptions as evidence of whether there are other less restrictive alternatives for achieving the state's interest.

For example, when a mother claimed a religious right to beat her child, the least restrictive method—and indeed the only method—for the state to vindicate its compelling interest in preventing child abuse was to deny the requested accommodation.[5] Just as the state *must* deny this type of religious accommodation to advance its "compelling interest" in preventing "unreasonable corporal punishment," the state must deny a religious accommodation request for elective abortions to advance its compelling interest in protecting human lives. *Blattert*, 190 N.E.3d at 424.

In short, *Dobbs* entitles Indiana to see a compelling interest in protecting prenatal human lives, and no one doubts that permitting abortions would directly conflict with that interest. *The strict scrutiny analysis should end there*. Other factors—including a law's supposed underinclusiveness, *see infra* Part II—become relevant only when there is uncertainty about whether the government's interest is compelling, and whether less restrictive alternatives are available. Here there is no uncertainty about either of those elements of strict scrutiny.

[5] Vic Ryckaert, *Mom Who Cited Religious Freedom Pleads Guilty*, INDYSTAR (Oct. 28, 2016), https://perma.cc/VK39-E2GZ.

II. The Court of Appeals' analysis misunderstands the case law and would result in a right to religious exemptions from virtually any law.

Ignoring the sufficiency of the case above, the Court of Appeals impugned the law under strict scrutiny just because it makes certain limited exceptions. This approach misreads the doctrine and, if taken seriously, would require absurd outcomes.

A. In the cases relied on by the Court of Appeals, unlike in this case, it was disputed whether the government had less restrictive means of advancing its stated interest.

Rather than ruling for Indiana based on plaintiffs' failure to identify a less restrictive way to protect additional human lives, the Court of Appeals turned the less-restrictive means analysis on its head. It held that the law is not the least restrictive means because it is "*under*inclusive," since it "exempts some abortions from criminal prosecution on secular grounds." *Anonymous, 233* N.E.3d at 454-56 (emphasis added). The *only* features of the law highlighted in the lower court's narrow-tailoring discussion were the law's exceptions. *Id.* at 456.

But in all the cases cited by the Court of Appeals that impugned an underinclusive law, it was disputed whether, as a descriptive matter, the government could *both* achieve its stated goal *and* honor the constitutional claim at issue. For example, in *Holt v. Hobbs*, 574 U.S. 352 (2015), a prison forbade an inmate to grow a ½-inch beard for religious reasons, but the prison's allowance of beards for health reasons suggested the state interest in ensuring prison security "could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id.* at 368.

There, exemptions of related secular conduct revealed that the state's goal could be achieved in less restrictive ways.

Sometimes the same point is proven not simply by a law's exceptions but by a state's lighter *regulations* of some types of conduct compared to the desired religious conduct. That was the crux of *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), where the Supreme Court expressed concern about double standards in pandemic regulations of social gatherings. The only reason underinclusiveness ultimately required a religious exemption there was that it pointed to a less restrictive means:

> Where the government permits other activities to proceed with [risk-mitigating] precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

Id. at 63. In other words, California's allowance of larger secular gatherings if *they* observed certain precautions suggested a less restrictive approach to religious groups: letting them "gather in larger numbers while using [the same] precautions." *Id.* at 64.

In *Tandon*, the regulatory choices turned on empirical assessments of risk. California regulated activities based on their "risk factors" for disease spread. *Id.* at 63. Instead of assessing for itself whether there were narrower ways to mitigate those risks, the Court found a useful benchmark in the State law itself: using the government's *own* treatment of the risk factors in other settings as a guide.

No such benchmarking is necessary (or even legally relevant) when the challenged regulation's goal would *indisputably* result in fewer human lives saved

with every religious exemption granted. Here there is no way to protect a prenatal human life other than to prohibit a requested religious accommodation that, by its very design, would end that life. The cases the Court of Appeals relies on are thus inapposite, and the existence of secular exemptions in this context are irrelevant.

B. Indiana's exemptions to the Abortion Law are not similarly situated to the requested religious exemption, since the exemptions the state allows prevent a weighty harm that would not be prevented when the state grants religious exemptions.

Even if this were the type of case in which the existence of secular exemptions were legally relevant for evidentiary questions about the state's interest or available less restrictive means, the Court of Appeals erred by effectively treating any exceptions as fatal *per se*. In holding that the abortion law failed strict scrutiny, the court relied on a single fact: that Indiana's Abortion Law is limited, as it does not govern *in vitro* fertilization and makes certain narrow exceptions. *Anonymous, 233* N.E.3d at 452-54. But the Supreme Court has "upheld laws—even under strict scrutiny—that could conceivably have restricted even greater amounts of [protected conduct] in service of their stated interests," when the state can adequately explain why the existing exceptions are not similarly situated to the requested accommodations. *Williams-Yulee*, 575 U.S. at 449.

Adequate explanations for why exceptions are not comparable vary. The legislature might have had "ample evidence" of the problem it addressed but "no evidence" that a different potential problem would arise. *Burson v. Freeman*, 504 U.S. 191, 207 (1992). Or a state, "along with most other States, [may have] reasonably concluded that" the regulated conduct "creates a categorically different and more

severe risk." *Williams-Yulee*, 575 U.S. at 449. Or perhaps regulating more broadly would have harmful side effects not applicable to the religious exemption. *See Buckley v. Valeo*, 424 U.S. 1, 105–06 (1976) (allowing underinclusiveness when broader regulation would "implicate[] the policies against" other harms).

For example, in *Humanitarian Law Project v. Holder*, the Supreme Court rejected a free speech challenge to a law that prohibited "training" and "expert advice or assistance" to terrorist groups, even though that law included exceptions for "independent advocacy" or provision of "religious materials" to those terrorist groups. 561 U.S. 1, 35–36 (2010). The plaintiffs there argued that these exemptions demonstrated a lack of even-handedness and were fatal to the law under strict scrutiny. In rejecting that argument, the Court explained that "[t]he Government, when seeking to prevent imminent harms . . . is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." *Id.* at 35. Further, the Court noted that the legislature was protecting other weighty concerns with these exceptions. The Court concluded that it should not replace the legislature's "careful balancing" of "competing interests" with the Court's own judgment. *Id.* at 35–36.

Consistent with *Humanitarian Law Project*, Indiana's exceptions to the Abortion Law are not similarly situated to the requested accommodations—they are included to protect other weighty interests that would not equally compel a religious exemption. For example, protections for maternal life and health are weighty

interests that Indiana is also seeking to protect.[6] And carrying to term in such cases, or in cases of rape or incest, may "implicate[]" other "polic[y]" concerns. *Buckley*, 424 U.S. at 106. Like many other states, Indiana might have determined that such pregnancies could bring psychological pain; that ending them might be excused, by analogy to the duress defense; that juries might thus refuse to convict in such cases; and that limited enforcement resources are therefore better spent elsewhere.

In similarly exempting abortions following a lethal fetal diagnosis, lawmakers may have thought that the harm done when the fetus would have died *in utero* or soon afterward is less "acute"—also a sufficient rationale for differential treatment. *See McConnell v. FEC*, 540 U.S. 93, 208 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

Finally, Indiana could, "along with most [indeed, *all*] other states, . . . reasonably conclude[]" that some aspects of *in vitro* fertilization (IVF) do less "severe" harm to its interest in protecting prenatal life or that regulating IVF would raise knotty enforcement questions best addressed separately. *Williams-Yulee*, 575 U.S. at

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[6] It does not matter that, as the Court of Appeals noted, the plaintiffs think a religious exception would "ha[ve] the same foundation as the narrower exceptions already existing in the Abortion Law," namely, "the interests of the mother outweighing" the interest in prenatal life, with the religious exemption "merely expand[ing] the circumstances in which the pregnant woman's health dictates an abortion." *Anonymous, 233* N.E.3d at 455. Even setting aside this argument's arbitrarily high-level description of the point of Indiana's physical-health exception, the argument would support a right to religious exemptions under RFRA only if it affected the strict scrutiny analysis. But in this case, both elements of that analysis are settled in Indiana's favor on independent grounds: *Dobbs* entitles the state to treat prenatal life as a human life, and no one disputes protecting a human life is a compelling interest and that a religious exemption would save fewer lives that Indiana is seeking to protect.

449; *see also* O. Carter Snead, *What It Means to Be Human: The Case for the Body in Public Bioethics* 201–07 (2020) (detailing near-total absence of IVF regulation in the United States). While embryos are often frozen upon creation, "the vast majority of stored embryos (88.2 percent) are being held for family building," which would comport with the state's interest in preventing their killing and the state's desire to promote human life with respect to children that could be born to an otherwise infertile couple. David I. Hoffman, et al., *How Many Frozen Human Embryos Are Available for Research?*, RAND CORP. (2003).[7] Even for embryos not implanted, the state might see a "categorical[] differen[ce]" between protecting them and protecting those already maturing toward life outside the womb, *Williams-Yulee*, 575 U.S. at 449.

Furthermore, to require implantation might "implicate . . . policies against"—indeed, constitutional rights against—forced medical treatments. *Buckley*, 424 U.S. at 106; *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997) (discussing "the right of a competent individual to refuse medical treatment" (quotation omitted)). And while a state could try proactive steps—*e.g.*, barring anyone from "screening" embryos with a view to discarding some—lawmakers may have had "no evidence" regarding how often this happens, *Burson*, 504 U.S. at 207, apart from efforts to identify embryos unlikely to implant or survive (in which case the practice might pose a less "acute" threat to the state's interest, *McConnell*, 540 U.S. at 208 (quotation omitted)).

[7] Available at: https://www.rand.org/pubs/research_briefs/RB9038.html.

The Court of Appeals' Opinion does not address these different explanations. Rather, its basis for denying that the Abortion Law's exceptions could be adequately explained was just the fact that Indiana was willing to make those exceptions. *Anonymous, 233* N.E.3d at 455-56. This circular reasoning would guarantee that no law with exceptions ever survived strict scrutiny. This approach finds no home in strict scrutiny case law.

Moreover, contrary to the decision below, a state need not "explain how allowing" an exception "advances the State's alleged compelling interest" underlying the challenged regulation. *Id.* at 456. The inquiry is instead whether the existing exceptions *undermine* the government's interest and whether that undermining is justified, e.g., by advancing a competing weighty interest.

Ultimately morally sound or not, the concerns above "adequately explain" Indiana's choices to prioritize more readily identifiable and enforceable forms of prenatal killing of human lives, which include the bulk of lost prenatal lives. *McConnell*, 540 U.S. at 207. The exceptions cast no doubt on the sincerity, efficacy or tailoring of Indiana's effort to protect prenatal human lives or on whether that interest is compelling—which are the only relevant issues.

C. The Court of Appeals' rule, effectively treating secular exceptions as fatal under strict scrutiny, would lead to absurd results.

All laws need limits. For example, "even . . . bans on intentional homicide have exceptions—execution of a lawful sentence, killing in war, police killing of a dangerous fleeing felon, killing in self-defense or in defense of another, and disconnecting life-sustaining equipment at a patient's request." Eugene Volokh, *A*

Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1540 (1999). Criminals can also receive an insanity defense for an otherwise wrongful killing. A *per se* rule that secular exceptions require religious exemptions would mean that religiously motivated killing—honor killing, stoning, child sacrifice—must be permitted because of these exceptions. Yet no court has ever held that religious accommodations are warranted from a homicide law.

Similarly, if the law allowed a doctor to perform an osteotomy (a procedure that requires the breaking of a bone to reshape or realign a bone), a per se rule triggering accommodations based on secular exemptions would mean that a parent could seek a religious accommodation to beat and break the child's bones for religious reasons.

For that matter, the general common-law defense of necessity, *see Walker v. State*, 381 N.E.2d 88, 88–89 (Ind. 1978), would trigger religious exemptions from all criminal laws. After all, the defense effectively gives each criminal law at least one exception, which would then require a religious exemption, by the lower court's logic. That cannot be right and finds no support in the doctrine. The fact that the Court of Appeals' decision would require this result only underscores its error.

CONCLUSION

If this Court reaches the merits and finds a substantial burden on religion, it should hold that denying a religious exemption from the Abortion Law would satisfy strict scrutiny under RFRA, being narrowly tailored to advance a compelling interest in protecting additional human lives.

Dated: May 22, 2026

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I hereby verify that this brief contains no more than 7,000 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word-processing system used to prepare the brief, Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2026, I electronically filed the foregoing document using the Indiana E-filing System. I also certify that on May 22, 2026, I served the foregoing document on the following contacts through the E-Service using the IEFS:

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