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**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

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NO. 22-2748

JANE DOE NO. 1, *et al.*,

*Plaintiffs-Appellees*,

*v.*

TODD ROKITA, ATTORNEY GENERAL OF INDIANA, *et al.*,

*Defendants-Appellants*.

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Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:20-cv-03247-RLY-MJD —
**Richard L. Young**, *Judge*.

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SUBMITTED NOVEMBER 21, 2022 —
DECIDED NOVEMBER 28, 2022

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Before EASTERBROOK, BRENNAN, and SCUDDER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Indiana requires abortion providers to dispose of fetal remains by either burial or cremation. Ind. Code §§ 16-34-3-4(a), 16-41-16-4(d), 16-41-16-5. This mandate applies only to providers; women may choose to take custody of the

remains and dispose of them as they please. Ind. Code §16-34-3-2. The Supreme Court sustained this regimen against a contention that it violates the Equal Protection Clause of the Fourteenth Amendment. *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019). Nonetheless, in this suit the district court held that it violates the First Amendment (applied to the states by the Fourteenth) and enjoined its operation. 2022 WL 5237133 (S.D. Ind. Sept. 26, 2022). The state has appealed and seeks a stay. We find the outcome controlled by precedent. Because the papers the parties have filed cover the merits, we dispense with further briefing and reverse summarily.

Before addressing the merits, we remark on a problem with the remedy. There are four plaintiffs. Two women who had abortions object to the cremation or burial of the fetal remains, which they contend implies the personhood of a pre-viability fetus. Two physicians do not want to tell patients about their statutory options. The case has not been certified as a class action. The district court could have provided full relief to these four plaintiffs by enjoining the application of the statute to them. But instead it barred multiple state officials from applying these laws to *anyone*. 2022 U.S. Dist. LEXIS 185015 (S.D. Ind. Sept. 26, 2022).

Before enactment of these statutes, it had been common for medical providers to place fetal remains in the garbage ("medical waste"). The Supreme Court concluded in *Box* that the state is entitled to end that practice. The district court's needlessly broad injunction treats the statute as invalid across the board (that

is, on its face rather than as applied), which effectively countermands the Supreme Court's decision for the entire population of Indiana. This offends the principle that relief should be no greater than necessary to protect the rights of the prevailing litigants. See, e.g., *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328–30 (2006); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Instead of remanding with instructions to tailor the relief to the violation, we reverse outright—because there is no violation. Statutes that require people to disobey sincerely held religious beliefs can pose difficult analytical challenges. See, e.g., *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020). But Indiana does not require any woman who has obtained an abortion to violate any belief, religious or secular. The cremate-or-bury directive applies only to hospitals and clinics.

What's more, neither of the two plaintiffs who has had an abortion contends that a third party's cremation or burial of fetal remains would cause her to violate any religious principle indirectly. What these two plaintiffs contend is that cremation or burial implies a view—the personhood of an unborn fetus—that they do not hold. They maintain that only human beings are cremated or buried. This is questionable. Dogs, cats, and other pets may be cremated or buried, sometimes as a result of legal requirements not to put animals' bodies in the garbage. See, e.g., Ala. Code §3-1-28; Ga. Code §4-5-5; Iowa Code §167.18(1); Kan. Stat. §47-1219;

Mich. Comp. Laws §287.671(2); Mo. Stat. §269.020; 3 Pa. Stat. §2352(a)(4); Utah Code §4-31-102(1); Wis. Stat. §95.50; Wyo. Stat. §35-10-104. Indiana's statute about fetal remains therefore need not imply anything about the appropriate characterization of a fetus. At all events, a moral objection to one potential implication of the way medical providers handle fetal remains is some distance from a contention that the state compels any woman to violate her own religious tenets.

If the statute reflects anyone's view about fetal person-hood, it is the view of the State of Indiana. Yet units of government are entitled to have, express, and act on, their own views about contestable subjects. See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). See also *Bowen v. Roy*, 476 U.S. 693 (1986) (private party's religious objection to Social Security numbers does not require the government to change its record-keeping system). Whether or not the Supreme Court continues to adhere to *Employment Division v. Smith*, 494 U.S. 872 (1990), which holds that laws neutral with respect to religion may be enforced despite their effects on religious exercise, there is no problem with application of a law that leaves people free to put their own religious beliefs into practice. Nor does Indiana require any woman to speak or engage in expressive conduct.

As for the requirement that physicians and other providers tell patients about the statutory options: no one contends that the required notice is false or misleading. *Planned Parenthood of Southeast Pennsylvania*

*v. Casey*, 505 U.S. 833, 882 (1992), is among many decisions holding that states may require medical providers to give truthful notices. Plaintiffs contend that, because *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overruled *Casey*, the state's authority to require medical providers to provide information has evaporated, so that all such requirements violate the First Amendment unless the state shows a compelling need.

We do not see any such implication in *Dobbs*, which did not discuss that aspect of *Casey*. What has been overruled is *Casey*'s holding that states may not substantially burden a woman's ability to obtain an abortion before a fetus's viability. The norm that units of government may require physicians (and other professionals) to provide accurate information to their clients long predates *Casey* and has not been disturbed since. Physicians must tell patients about drugs' side effects and provide information that enables informed consent to risky procedures such as surgery. Nothing in *Dobbs*, or any other post-*Casey* decision, implies that similar notice requirements violate the Constitution.

*National Institute of Family and Life Associates v. Becerra*, 138 S. Ct. 2361 (2018), which the district court cited, holds that physicians' speech is not exempt from analysis under the First Amendment and that a state may not enforce requirements disconnected from medical care. But it does not question the propriety of requirements that medical professionals alert patients to laws that affect medical choices. To the contrary, *National Institute* cited with approval the portion of *Casey*

holding that a state may require medical professionals to provide information that facilitates patients' choices directly linked to procedures that have been or may be performed. *Id*. at 2373.

The preliminary injunction is reversed, and the case is remanded with instructions to dismiss the suit with prejudice. The injunction is stayed until the issuance of our mandate.

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**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

[SEAL]

Everett McKinley Dirksen
United States Courthouse
Room 2722 -
219 S. Dearborn Street
Chicago, Illinois 60604

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**FINAL JUDGMENT**

November 28, 2022

**Before**

FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

| No. 22-2748 | JANE DOE NO. 1, et al.,<br>Plaintiffs - Appellees<br><br>v.<br><br>TODD ROKITA, ATTORNEY GENERAL OF INDIANA, et al.,<br>Defendants - Appellants |
|---|---|
| **Originating Case Information:** | |
| District Court No: 1:20-cv-03247-RLY-MJD<br>Southern District of Indiana, Indianapolis Division<br>District Judge Richard L. Young | |

The preliminary injunction is **REVERSED**, with costs and the case is **REMANDED** with instructions to dismiss

the suit with prejudice. The injunction is stayed until the issuance of our mandate.

The above is in accordance with the decision of this court entered on this date.

/s/ [Illegible]
Clerk of Court

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| JANE DOE NO. 1, *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 1:20-cv-03247-RLY-MJD |
| ATTORNEY GENERAL OF INDIANA, *et al.*, | ) | |
| Defendants. | ) | |

**ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

(Filed Sep. 26, 2022)

Plaintiffs, Jane Doe No. 1, Jane Doe No. 3, Dr. William Haskell, Cassie Herr, Kelly McKinney, and Women's Med Group, sue Defendants, the Attorney General of Indiana, the Commissioner of the Indiana Department of Health, the Indiana State Board of Nursing, the Marion County Prosecutor, and the members of the Medical Licensing Board of Indiana, for Indiana's enforcement of the fetal disposition and disclosure requirements (Ind. Code §§ 16-21-11-1 to 16-21-11-6; 16-34-2-1.1(a)(2)(H)–(J); 16-34-2-1.1(a)(3)(A); 16-34-2-6(b)–(c);[1] 16-34-3-1 to 16-34-3-6; 16-41-16-4(d);

[1] This particular provision prohibits knowingly transporting an aborted fetus into or out of Indiana except for the purpose of cremation or interment. Plaintiffs do not connect this prohibition to any of their constitutional arguments. For that reason, it is not discussed any further.

16-41-16-5; and 410 Ind. Admin. Code 35-1-1 to 35-2-1). Plaintiffs levy a bevy of constitutional claims against these requirements, namely that the requirements violate the Due Process Clause (Count I), the Equal Protection Clause (Count II), the Free Speech Clause (Count III), the Establishment Clause (Count IV), and the Free Exercise Clause (Count V). Following the close of discovery, both Plaintiffs and Defendants moved for summary judgment. The court, having read and reviewed the parties' submissions, the designated evidence, and the applicable law, now **GRANTS in part and DENIES in part** Plaintiffs' motion for summary judgment and **GRANTS in part and DENIES in part** Defendants' cross motion for summary judgment.

## I. Background

### A. Statutory Background

Indiana law allows medical providers to dispose of human tissue, medical waste, and other infectious material through incineration, steam sterilization, chemical disinfection, thermal inactivation, and irradiation. Ind. Code § 16-41-16-3. Of these options, the standard method for disposing of medical waste is incineration. *See* (Filing No. 77-1, Case Decl. ¶ 19); *see also* (Filing No. 77-1, Haskell Decl. ¶ 7). Prior to the passage of the laws challenged here, Indiana permitted—but did not require—facilities to dispose of fetal tissue just like standard medical waste. (Filing No. 77-1, Defs. Resps. to Pls.' Reqs for Admis. at 5 (Req. 14)). Indiana law also

provided a pregnant woman the "right to determine final disposition of" the aborted fetus, which allowed women to choose whether to bury, cremate, or treat as medical waste the fetal tissue. Ind. Code § 16-34-3-2.

In 2016, Indiana enacted HEA 1337, which imposed particular requirements on the disposition of fetal tissue. Among other changes, the law excluded fetal remains from the definition of infectious and pathological waste, thereby preventing abortion providers from incinerating fetal tissue as with medical waste. Ind. Code §§ 16-41-16-4(d), 16-41-16-5. These laws instead require a healthcare facility to bury or cremate any fetal tissue in its possession. Ind. Code §§ 16-34-3-4(a); 16-21-11-6(b). The requirements apply to fetal tissue "irrespective of gestational age." Ind. Code § 16-18-2-128.7. While these laws did not remove the patient's right to "determine the final disposition of the aborted fetus," Ind. Code § 16-34-3-2(a), the laws require taking the fetal tissue home to exercise that right. (RFA Resps. at 5 (Req. 13–16) (admitting women cannot require abortion providers to dispose of their tissue according to their preference)). Where the patient takes the fetal tissue home, the patient can "dispose of [the tissue] however [they] choose." (Filing No. 77-1, Doe 1 Decl. ¶ 12).[2]

In 2020, Indiana created and clarified disclosure requirements that go along with the fetal disposition

[2] Indiana does not dispute that at home fetal tissue can be treated in any way the patient pleases. Nor does there seem to be any provision of the Indiana code that imposes any restrictions on the treatment of fetal tissue at home.

requirements. These laws require an abortion provider to inform patients orally and in writing that they (1) have a right to determine the disposition of the fetus; (2) they have a right to bury or cremate the fetus; (3) they have a right to require the abortion provider to bury or cremate the fetus; (4) that medication abortion patients will expel an aborted fetus; and (5) that the abortion provider must allow a medication abortion patient to return an aborted fetus. Ind. Code § 16-34-2-1.1(a)(2)(H)–(J). The laws also require the patient to inform the facility that they have received the information and which disposition option they choose for the fetal tissue. *Id.* § 16-34-3-2(b).

### B. Prior Challenges

Following the passage of the fetal disposition requirements in 2016, a district court enjoined the requirements because the laws did not survive rational basis scrutiny. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017). The Seventh Circuit affirmed on the same grounds. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018).

Following a petition for certiorari, the Supreme Court reversed. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The Court held that "Indiana's stated interest in the humane and dignified disposal of human remains" was legitimate and concluded that the requirements were

"rationally related to the State's interest in [the] proper disposal of fetal remains" even if the requirements were "not perfectly tailored to that end." *Id.*

### C. Factual and Evidentiary Background

Plaintiff Women's Med Group is a licensed Indianapolis-based abortion clinic. (Haskell Decl. ¶ 6). Plaintiff Haskell is the clinic's medical director, (*id.* ¶ 3), while Plaintiff McKinney provides nursing care at the clinic, (Filing No. 77-1, McKinney Decl. ¶ 3). These Plaintiffs collectively provide abortion—including first-trimester medication and aspiration abortions—and contraceptive services to women in the Indianapolis area. (Haskell Decl. ¶ 6). As part of that process, Women's Med provides patients with pre-abortion counseling, gives disclosures, and receives informed consent as required by Indiana law. (McKinney Decl. ¶ 13).

These disclosures include information that Plaintiff McKinney finds "stigmatizing," "misleading," and "inaccurate." (*Id.* ¶¶ 20, 21, 25). Specifically, they require the nurse to inform patients about some of their statutory rights following an abortion. (*Id.* ¶ 23). While this includes informing patients of the right to determine the final disposition of the aborted fetus and the right to have the facility take the tissue, it does not specifically include discussing the right to dispose of fetal tissue at home with medication abortion patients. (*Id.* ¶¶ 21–25). According to Plaintiff McKinney's uncontested testimony, these disclosures are "not consistent with the informed consent process used in other

areas of medicine." (*Id.* ¶ 24). Even still, the disclosures were not relevant to the Doe Plaintiffs' decision to get an abortion. (Filing No. 82-13, Doe 1 Dep. 33:23–34:15; Filing No. 82-14, Doe 3 Dep. 38:23–39:17). Nor has there been any evidence submitted showing the disclosures have prevented a woman from receiving an abortion.

Plaintiffs Jane Doe No. 1 and Jane Doe No. 3 had aspiration abortions at Women's Med. (Doe 1 Decl. ¶ 10; Filing No. 77-1, Doe 3 Decl. ¶ 14). Women's Med is storing the tissue from the Plaintiffs' abortions until the final disposition of this case because both believe that treating fetal tissue as anything other than medical waste violates their moral and religious beliefs. (Doe 3 Decl. ¶¶ 24, 28; Doe 1 Decl. ¶¶ 13, 15, 19).

Specifically, Doe 3 explained that as a matter of her Baptist faith she understands the Bible to indicate that "life begins at the first breath, following birth" rather than in the womb. (Doe 3 Decl. ¶¶ 3, 6 (discussing Genesis 2:7)). Accordingly, Doe 3 believes that "burial and cremation are religious rituals reserved for people and animals with souls." (*Id.* ¶ 7). Not only do her religious beliefs prohibit her from "burying or cremating the tissue from my abortion," but they also require "that the tissue should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means." (*Id.* ¶ 24).

Doe 1, alternatively, holds a moral, rather than religious, belief that fetal tissue is not the remains of a person. (Doe 1 Decl. ¶ 15; Filing No. 82-13, Doe 1 Tr.

28:23–29:1 (describing this belief as a moral one)). Consequently, she does not believe that her fetal tissue should "be buried or cremated." (Doe 1 Decl. ¶ 15). Instead, she believes the tissue should be disposed of "using standard medical means" and sued so that she "could have the right to ask Women's Med to dispose of [her] tissue by standard medical means that do not mark it as a person." (*Id.* ¶¶ 15, 19). Both Doe Plaintiffs believe that burying or cremating the tissue signified that the fetal tissue was a person. (*Id.* ¶ 13; Doe 3 Decl. ¶ 7). They further believe that treating the tissue as standard medical waste signifies that the fetal tissue is not a person. (Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 24).

## II. Legal Standard

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). That requires reviewing the record in the "light most favorable to the nonmoving party and draw[ing] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009). The mere existence of an alleged factual dispute is not sufficient to defeat a motion for summary judgment. *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–588 (1986). That is because "[i]t is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence

upon which [it] relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008).

## III. Discussion

### A. Free Exercise and Free Speech (Counts V, III)

The Constitution is a cohesive document. Nowhere is that more apparent than the Free Exercise and Free Speech Clauses of the First Amendment which necessarily "work in tandem." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). While the Free Exercise Clause ensures protection for religious exercise regardless of communicative content, the Free Speech Clause "provides overlapping protection" for religious exercise with a communicative component. *Id.* This result is a necessary consequence of "the framers' distrust of government attempts to regulate religion and suppress dissent," *id.*, because throughout "Anglo-American history, . . . government suppression of speech has . . . commonly been directed *precisely* at religious speech." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis original). This is one such case.

#### 1. Free Exercise (Count V)

The Free Exercise Clause, in part, protects those holding religious beliefs by prohibiting laws requiring them to engage in "the performance of (or abstention from) physical acts." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The Clause does

not, however, prohibit the application of "neutral" or "generally applicable laws" to religious conduct. *Id.* at 872. So a plaintiff bears the initial burden of showing that the limitation on their sincere religious practice is pursuant to a statute that is (1) not neutral because the "object" of the policy is to suppress religious exercise, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); (2) not generally applicable because it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); or (3) accompanied by "official expressions of hostility to religion,"[3] *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n.*, 138 S. Ct. 1719, 1732 (2018)). If any of those deficiencies are shown, the government must satisfy strict scrutiny by demonstrating the law advances a "compelling state interest" and that the law is narrowly tailored to "the least restrictive means" to "justify an

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[3] Plaintiffs argue that the fetal disposition requirements evince official expressions of hostility toward their religious exercise. For that proposition, however, Plaintiffs cite to deposition testimony by a professor of medical humanities, *see* (Filing No. 82-3, Curlin Decl. ¶¶ 28–29, 45), and ex parte statements by a singular lawmaker, *see* Liz Brown, *Sen. Brown: Remains From an Aborted Fetus are Human, Deserve Dignity*, IndyStar (Mar. 1, 2020, 5:00 a.m.), https://www.indystar.com/story/opinion/2020/03/01/sen-brown-remains-aborted-fetus-humandeserve-dignity/4896542002/. These are not the official expressions of hostility considered by *Masterpiece Cakeshop*. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n.*, 138 S. Ct. 1719, 1732 (2018) (explaining the official expressions came from the "commissioners' comments" during adjudicative proceedings).

inroad on religious liberty." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

Plaintiffs have shown that the fetal disposition law is neither generally applicable nor neutral.[4] Strict scrutiny, therefore, applies. As the court explains below, the law fails to sufficiently advance the government's asserted interest and is not tailored to the least restrictive means. For that reason, the fetal disposition requirements violate the Free Exercise Clause.

#### a. Burden on Sincere Religious Belief

As a threshold matter, Plaintiffs have proved the fetal disposition law burdens their sincere religious and moral beliefs of treating aborted fetuses as medical waste.[5]

The Free Exercise Clause protects "sincerely held" religious beliefs, even if those beliefs are not mandated by a particular organization or shared

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[4] Even though, a law need only fail one of these tests to trigger strict scrutiny, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022), "[n]eutrality and general applicability are interrelated, . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Lukumi*, 508 U.S. at 557 (noting "the terms are not only 'interrelated' but substantially overlap") (Scalia, J., concurring) (internal citation omitted).

[5] Under Seventh Circuit precedent, a sincerely held moral belief that "deal[s] with issues of ultimate concern" similar to religious beliefs receives protection under the Free Exercise Clause. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005).

among a congregation. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989). These beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (internal quotation marks omitted). Indeed, the beliefs need not be religious at all: sincerely held moral "beliefs dealing with issues of ultimate concern that . . . occupy a place parallel to that filled by . . . God" also receive protection. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (internal quotation marks omitted).

Jane Doe 3 declared that as a matter of her Baptist beliefs "burial and cremation are religious rituals reserved for people and animals with souls." (Doe 3 Decl. ¶¶ 4, 7). She further clarified her belief that fetal tissue "should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means, like incineration." (*Id.* ¶ 24).

Jane Doe 1 similarly declared that because she did "not believe that an embryo or fetus is a person" she "did not want my embryo from my abortion to be buried or cremated." (Doe 1 Decl. ¶ 15). Under her beliefs, "burial and cremation are religious rituals that signal the death of a person" and are not appropriate for a fetus. (*Id.* ¶ 13). She sued so that she could "dispose of my tissue by standard medical means that do not mark it as a person." (*Id.* ¶ 19). She believed this was a moral decision because "[i]t was based off what [she] believed was correct." (Filing No. 82-13, Doe 1 Tr. 28:23–29:1).

With no evidence to the contrary, this evidence demonstrates the Doe Plaintiffs hold sincere religious and moral beliefs that the fetal tissue is not equivalent to a person and should be disposed of as medical waste.[6] By its plain terms, the fetal disposition law burdens this religious and moral belief by making it more difficult, if not impossible, to dispose of fetal tissue as medical waste. *See* Ind. Code § 16-41-16-4(d) (excluding "an aborted fetus or a miscarried fetus" from the definition of "infectious waste"). After drawing all inferences in favor of Indiana, the Plaintiffs have successfully demonstrated the fetal disposition requirements burden their sincere religious and moral beliefs.[7]

That the Plaintiffs' have demonstrated a sincere religious and moral belief regarding the status of fetal tissue is an unremarkable conclusion. The Supreme Court has consistently recognized that beliefs surrounding abortion and the personhood of fetuses are "ageless," "fundamental moral question[s]." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258

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[6] Indiana's argument that the Plaintiffs' religious and moral beliefs do not require Plaintiffs to "dispose of fetal remains via incineration with other medical waste," (Filing No. 83, Defs.' Br. in Opp. at 24), is belied by the direct testimony of the Doe Plaintiffs. While the Plaintiffs' beliefs do not expressly require incineration, they do require treating fetal tissue as medical waste which utilizes incineration as the standard disposal method. *See* (Case Decl. ¶ 19; Haskell Decl. ¶ 7).

[7] The disclosure requirements do not burden the asserted religious and moral beliefs. Plaintiffs testify the disclosures had no effect on their decisions regarding their abortions. (Doe 1 Dep. 33:23–34:15; Doe 3 Dep. 38:23–39:17).

(2022). In *Roe v. Wade*, the Court explained that even those "trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" regarding "the difficult question of when life begins." 410 U.S. 113, 159 (1973); *see also Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 850 (1992) (explaining some people "always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy"). As "[a]bortion presents a profound moral question," it is no surprise that some will have firmly held religious and moral beliefs as to the status of fetal tissue. *Dobbs*, 142 S. Ct. at 2284.

Indiana's argument to the contrary is not persuasive. In its view, because the fetal disposition requirements allow women to take the fetal tissue home and dispose of it how they please, the law accommodates, rather than burdens, Plaintiffs' religious and moral beliefs. The fetal take-home provision does not stop the law from burdening the Doe Plaintiffs' religious exercise for two reasons. Foremost, Plaintiffs have put forward uncontested evidence that patients do not take standard medical waste home, which is instead incinerated. (RFA Resps. at 7 (Reqs 21) (admitting "[t]he Challenged Laws treat human tissue from an abortion or miscarriage differently from human tissue from all other surgical procedures"); Doe 1 Decl. ¶ 16 ("In the dental practices where I have worked, we do not give patients tissue from their biopsies . . . because it is biohazardous material."); Filing No. 77-1, Hartsock Decl. ¶ 20 (noting "the Disposition Requirement" as a whole "requires clinicians to adhere to standards that are

contrary to the medical standard for disposal of human tissue"); Case Decl. ¶ 20 (explaining "in no other areas" does she "have to bury or cremate tissue resulting from the procedure" and that the "standard methods of medical disposal" include incineration)). As the relevant religious belief is treating the fetal tissue "like any other human tissue resulting from a medical procedure," (Doe 3 Decl. ¶ 24), allowing the Doe Plaintiffs to take their fetal tissue home—something that would not occur were fetal tissue treated like any other human tissue—does not accommodate their religious and moral beliefs.

And even if it did, the take-home fetal tissue option still treats those exercising the religious and moral beliefs at issue differently than those without such beliefs. The Free Exercise Clause protects against unequal treatment toward religious practices. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Because the fetal take-home provision requires more from those seeking to exercise their belief that fetal tissue is like any other human tissue than those who do not, the free exercise of those religious and moral beliefs is, at a minimum, burdened by the statutory scheme.

### b. General Applicability

The fetal disposition requirements are not generally applicable. The requirements are significantly underinclusive so that they do little to advance the state's interests.

A law is not generally applicable where it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Laws selectively impose those prohibitions on "conduct motivated by religious belief" where the government pursues its interests "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. That most obviously occurs where the law is underinclusive of the State's asserted interests. *Id.* at 543. A statute is underinclusive when the statute regulates one aspect of a problem (religious practices) while declining to regulate a different aspect of the problem (secular practices) that affects its stated interest in a comparable way. *See*, *e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015); *see also Lukumi*, 508 U.S. at 543 (noting the general applicability analysis is similar to the Free Speech inquiry).

For example, the law in *Lukumi* that prohibited the killing of animals targeted religious animal sacrifice because it was underinclusive to the State's interest. The State asserted that the purpose of the law was to prevent cruelty to animals, but "[m]any types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision." *Lukumi*, 508 U.S. at 543. Were the law actually designed to prevent cruelty to animals, it would not allow the "[e]xtermination of mice and rats within a home," the "euthanasia of stray, neglected, abandoned, or unwanted animals," the "infliction of pain or suffering" on animals "in the interest of medical science," or the use

of animals "to hunt wild hogs." *Id.* at 543–44. Because the law allowed these "secular killings" but burdened the religious ones even though both fell "within the city's interest in preventing the cruel treatment of animals," the law was underinclusive. *Id.* at 544.

Indiana asserts three interests that justify the fetal disposition requirements: first, allowing patients to select disposition methods that accord with their religious beliefs; second, protecting abortion patients' mental health; and third, the humane and dignified disposal of fetal remains.

The fetal disposition law is plainly underinclusive as to the first two interests. The freedom for religious beliefs interest excludes the religious belief that fetal tissue is equivalent to medical waste. As described above, the fetal disposition requirements changed the statutory scheme to expressly exclude that religious belief. *See* Ind. Code § 16-41-16-4(d). That makes the statute less inclusive and undermines Indiana's asserted freedom of religion interest.

Similarly, after properly drawing the inference for Indiana that requiring burial or cremation benefits patients' mental health, the law is still quite underinclusive to that interest. To truly protect abortion patients' mental health, the laws would have to apply more broadly and require burial or cremation for all fetal tissue not just fetal tissue at medical facilities. Patients taking fetal tissue home undoubtedly feel a strain on their mental health in a comparable way to having an abortion at a clinic. *See* (Case Decl. ¶¶ 17–18 (noting

the laws, including the requirement to take tissue home "are a source of frustration and shame" for patients)). Those patients do not receive the supposed mental health benefits of burying or cremating their fetal tissue. And by not giving those patients the mental health "benefits," the requirements prohibit plaintiffs' religious conduct while declining to regulate nonreligious conduct in the same way. *See Williams-Yulee*, 575 U.S. at 451. What this really means is that the law is not about its mental health benefits; it is about preventing people like Plaintiffs from treating their fetal tissue as medical waste.

The law is also underinclusive with respect to Indiana's interest in the humane and dignified disposal of fetal remains. Under the fetal disposition requirements, the only fetal remains that must be given a humane and dignified disposition are those at medical facilities. The statute allows the disposal of fetal tissue pursuant to at-home medicated abortions and fetal tissue taken home to be done in any way the patient pleases. (McKinney Decl. ¶ 22). And Indiana decided not to apply the fetal disposition requirements to preimplantation embryos resulting from in vitro fertilization, (RFA Resps. at 4 (Reqs 6)), even though that process involves "the fertilization of eggs by sperm to produce embryos" that are then either "implanted . . . or disposed of," (Filing No. 77-1, Maienschein Decl. ¶ 28). Put simply, Indiana does not attempt to pursue this interest in the context of at-home medicated abortions, at-home miscarriages, and in vitro fertilization, all of which involve the same "unique and independent

human physical life" that Indiana asserts as critically important. (Defs.' Br. at 16).

Indiana disputes that in vitro fertilization is a proper comparison for the statute. The court, however, need not decide that issue because even if Indiana were correct that in vitro fertilization is different, the fetal disposition requirements do not materially advance the State's interest because the statute does not care about giving humane and dignified dispositions to fetal tissue passed at home or taken home from the hospital.

Ultimately, the consequence of this statutory scheme is that the fetal disposition requirements are underinclusive when judged against Indiana's asserted interest. That "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring" a particular religious belief. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). After all, it is not truly possible for Indiana to be concerned with the humane and dignified disposal of human remains when its statutory scheme allows some fertilized fetal tissue that is identical to the tissue covered by the statutory scheme to be treated in any way the possessor pleases. This enforcement of interests against only the religious beliefs articulated by the Plaintiffs is the "precise evil" the "requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 546.

### c. Neutrality

Plaintiffs also prevail in demonstrating that the fetal disposition requirements are not neutral because the object of the law is to suppress the Plaintiffs religious conduct. After taking the evidence in the light most favorable to Indiana, Plaintiffs have shown that the object of the statute is to prevent them—and those with similar beliefs—from treating aborted fetuses as medical waste.

In determining whether a law is religiously neutral, courts not only look to whether the law discriminates on its face, but also to the lines drawn by the statute to ensure the statute is not "gerrymandered with care to proscribe" religious conduct. *Lukumi*, 508 U.S. at 540, 542. The Free Exercise Clause forbids even "subtle departures from neutrality." *Gillette v. United States*, 401 U.S. 437, 452 (1971). Thus, the Clause requires a meticulous survey of the circumstances and lines drawn by the statute to ensure neutrality. *Lukumi*, 508 U.S. at 534 (citing *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

For example, in *Lukumi*, the Court explained that "the effect of a law in its real operation is strong evidence of its object" and that courts should look to the "specific series of events leading to the enactment." *Lukumi*, 508 U.S. at 535–38. The Court found the statute in *Lukumi* targeted religion because the legislature narrowed the proscribed category so that it only included the religious conduct at issue. *Id.* at 536. The same problem is present here.

The new fetal disposition requirements only impose burdens on women who have religious or firmly held moral beliefs that aborted fetuses should be treated as medical waste rather than as a person. Prior to the passage of the 2016 fetal disposition requirements, Indiana law allowed patients to require, at their request, burial or cremation for their miscarried or aborted fetuses while at the same time allowing women with differing beliefs to treat the fetal tissue as medical waste. *See* Pub. L. 127-2014, 2014 Ind. Acts 1472–73; *see also* Pub. L. 113-205, 2015 Ind. Acts 829; (RFA Resp. at 5 (Req. 14)). After 2016, Indiana law required burial or cremation for aborted and miscarried fetuses at medical facilities. Ind. Code § 16-34-3-4. The new law also expressly excludes "an aborted or a miscarried fetus" from the definition of infectious medical waste. Ind. Code § 16-41-16-4(d). Both the current and former regime treat women who miscarry or abort their fetus away from a medical facility the same: they can dispose of the tissue how they like, such as by flushing it down the toilet, expelling it into a sanitary napkin, burying it, or cremating the tissue. *See* Ind. Code § 16-34-3-4 (only applying to medical facilities); *see also* (Case Decl. ¶ 9 (noting patients "typically" discharge the tissue into a sanitary napkin or toilet)); (McKinney Decl. ¶ 29 (describing that most patients "expect to pass their pregnancy at home on a toilet or in a sanitary napkin")); (Peters Decl. ¶ 10 (explaining medication abortion plaintiffs "usually expel the tissue into a sanitary napkin or a toilet" but may consider "interring or cremating the tissue")).

All this taken together demonstrates that the object of the law is the suppression of beliefs like Plaintiffs because the suppression of those beliefs is the only effect of the law. The only thing changed by the new fetal disposition requirements is that a woman can no longer require the medical facility to treat the fetal tissue as medical waste. Those who wanted to bury or cremate the fetal tissue could already do so. Those who have a miscarriage or abortion at home, or otherwise take the tissue home, are unaffected. Only those who have an abortion at a clinic and want the tissue treated as medical waste have their choice disregarded. As "the effect of a law in its real operation is strong evidence of its object," *Lukumi*, 508 U.S. at 535–38, this evidence of singular treatment cannot be ignored.

Indiana argues that the Court in *Lukumi* relied on specific evidence of hostility toward religious conduct which is not present here. *Lukumi* was not so narrow. While Justice Kennedy did analyze "evidence [of] significant hostility exhibited by" proponents of the law, that analysis failed to capture a majority of the Court. *Lukumi*, 508 U.S. at 523, 541 (The hostility analysis occurs in Part II-A-2 but Justice Kennedy "delivered the opinion of the Court, except as to Part II-A-2."). The thrust of the *Lukumi* analysis is not that a legislature must display animus for there to be a Free Exercise violation, but rather that strict scrutiny applies where a law has carefully selected its terms such that its impact is narrowly focused on religious conduct. The Court's later reading of *Lukumi* confirms that conclusion because it notes that neutrality and hostility are

two separate inquiries. *Kennedy*, 142 S. Ct. at 2422 n.1 (discussing the *Lukumi* analysis while noting plaintiffs "may also prove a free exercise violation by showing . . . 'official expressions of hostility' ") (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

In conclusion, the fetal disposition requirements are not neutral. The effect of the requirements is to limit only the exercise of religious beliefs like the plaintiffs', which brings the law within the purview of *Lukumi*.

#### d. Scrutiny

Because the court concludes that the fetal disposition requirements are neither neutral nor generally applicable, strict scrutiny applies. The law fails for many of the same reasons discussed above: the law does not appropriately tailor itself to Indiana's asserted interests.

To satisfy strict scrutiny, the statute must advance "interests of the highest order" and be narrowly tailored. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Narrow tailoring requires that the government choose "the least restrictive means of achieving a compelling state interest." *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). This test "really means what it says," and few laws will survive. *Smith*, 494 U.S. at 888. In short, strict scrutiny is "a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v.*

*Newsom*, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.). It is not satisfied here.

Assuming the requirements serve a compelling interest, the law fails the tailoring inquiry for the reasons discussed above. To repeat briefly, the law targets protected conduct unnecessarily because the state could have retained the old scheme which gave patients the choice to treat fetal tissue as medical waste while still allowing for cremation and burial. Because the statute targets conduct that it need not target to further the state's interest, the scheme is not using the least restrictive means. Further, the statute is underinclusive as to each of Indiana's three asserted interests. That deficiency means the law is not actually "protecting an interest" as it "leaves appreciable damage . . . unprohibited." *Lukumi*, 508 U.S. at 547 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment) (citation omitted)).

This does not mean that every law requiring fetal tissue be buried or cremated is unconstitutional or that the Constitution placed the ability to regulate the disposition of fetuses outside the powers of the government. What it does mean is that this is an area where officials must ensure the regulation is not drawn so exclusively as to target a particular set of beliefs. The Constitution prohibits "mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 547. The fetal disposition requirements are contrary to that principle of the Free

Exercise Clause and are void. Therefore, Plaintiffs are entitled to summary judgment.

### 2. Free Speech (Count III)

#### a. Fetal Disposition Requirements

Because the decision to provide certain or no funerary customs is expressive conduct, the Free Speech Clause requires any law that compels or prohibits such conduct be justified by an interest unrelated to the expression. Instead of following that command, Indiana justifies the law by reference to the message communicated by the suppressed conduct. Therefore, the fetal disposition requirements are presumptively unconstitutional and are only valid if they satisfy strict scrutiny. They do not.

While not all conduct can "be labeled 'speech' whenever the person engaging in the conduct intends . . . to express an idea," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Free Speech Clause does protect conduct that is "sufficiently imbued with elements of communication," *Spence*, 418 U.S. at 409. That occurs where a party has "an intent to convey a particularized message" and there is a high likelihood "that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11). The conduct needs to be "inherently expressive" such that the conduct "comprehensively communicate[s] its own message without additional speech." *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (quoting *Rumsfeld v. F. for*

*Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)). If there is no inherently expressive conduct, the First Amendment inquiry is at an end.

But where the conduct is inherently expressive, the court evaluates "whether the State's regulation is related to the suppression of free expression." *Johnson*, 491 U.S. at 403. If it is, the court applies strict scrutiny. *Id.* at 412 (applying "the most exacting scrutiny") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). If it is not, the court applies the more lenient *O'Brien* test.[8] *Johnson*, 491 U.S. at 403.

Plaintiffs have demonstrated they intended to convey a message by treating their fetal tissue as medical waste. Both Doe Plaintiffs indicate that they thought burying or cremating tissue conveyed the message that the fetal tissue was a person and deserved an equivalent amount of respect as a person. (Doe 1 Decl. ¶ 13; Doe 3 Decl. ¶ 7). They sought to incinerate the tissue, just like medical waste, because it signified that the fetal tissue was not a person. (Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 24). Thus, Plaintiffs intended to convey a particular message about whether fetal tissue constitutes

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[8] Under the *O'Brien* test, a limitation on expressive conduct is constitutional so long as the regulation (1) "is within the constitutional power of the Government;" (2) "furthers an important or substantial governmental interest;" (3) the interest "is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

a person and the respect it deserves through treating their fetal tissue as medical waste.

So too have Plaintiffs demonstrated that "the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. "[H]uman communities have uniformly shown respect to human beings by treating their remains respectfully" and affording those persons funerary rites. (Curlin Decl. ¶¶ 14, 15). Providing burial or cremation to fetal tissue conveys the message to any observer that the fetal tissue is equivalent to a person and should receive the same respect. (Maienschein Decl. ¶¶ 8, 12 & n.3; Peters Decl. ¶¶ 11, 13–14, 29–38). The opposite is equally true. Deliberately choosing to not provide funerary rites expresses that the fetal tissue does not require the respect owed to human remains. Thus, the choice to treat fetal tissue as ordinary medical waste instead of human remains necessarily informs onlookers about the patient's disposition toward the status of their fetus. Accordingly, treating fetal tissue as medical waste is expressive conduct that receives First Amendment protection.

Indeed, the performance, or lack thereof, of funerary rites is an inherently expressive activity. The Supreme Court explained that funerary rites "are a sign of the respect a society shows for the deceased and for the surviving family members." *Nat'l Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 168 (2004). And the sign of respect demonstrated by funerary rites is so ubiquitous as to be understood and "respected in almost all civilizations from time immemorial." *Id.* at 167–68. People intuitively understand the messages

conveyed by these rituals as they have "been practiced from the very dawn of human culture" and represent "the conscious cultural forms of one of our most ancient, universal, and unconscious impulses." *Id.* (quoting 26 Encyclopaedia Britannica 851 (15th ed. 1985) and 5 Encyclopedia of Religion 450 (1987)). There can be no question that giving or refusing to give funerary rites inherently conveys a message.

Indiana seemingly agrees. Indiana submits that the purpose of the law is to "ensure[ ] that the remains of unborn humans are buried or cremated in a dignified and respectful manner[.]" (Defs.' Br. at 16). In its view, giving funerary rites to fetal tissue "acknowledge[s] the human dignity of the fetus." (Defs.' Reply Br. at 4). This purpose presupposes that anyone who views, hears of, or takes part in the burial or cremation understands the respect and dignity being given to the fetal tissue. It is simply impossible for a disposition method to acknowledge and respect the human dignity of a fetus while at the same time communicating no message at all. Were Indiana correct that giving (or deciding to not give) funerary rites to fetal tissue communicates no message about the personhood of the fetus or the respect and dignity properly due to the fetal tissue, the fetal disposition requirements would concurrently fail to advance Indiana's asserted interest. Yet Indiana strenuously argues—and puts forward considerable evidence attempting to demonstrate—the opposite. *See*, *e.g.*, (Curlin Decl. ¶¶ 11, 14, 26); *see also* (Filing No. 92-4, Coleman Decl. ¶¶ 10, 51 (noting, among other things, that the disposition requirements

"inherently equate fetal remains with other human remains")).

Indiana's assertion of the law's purpose also demonstrates that the object of the law is directly related to the suppression of free expression. If the purpose of the law is to acknowledge and signify the personhood and dignity given to fetal tissue, which simultaneously prohibits expressing the opposite view, there can be no conclusion other than that the law is squarely aimed at suppressing expression. Thus, strict scrutiny applies. *Johnson*, 491 U.S. at 412. As discussed above, the requirements do not survive strict scrutiny.

Indiana raises three arguments to justify the fetal disposition law. Each of them fails. Foremost, Indiana argues that funerary rites are not expressive conduct because the Supreme Court has only recognized three broad categories of expressive conduct: conduct displaying respect for the flag; demonstrations, parades, and protests; and artistic expression. Such a wooden framework ignores that the Supreme Court finds conduct to be expressive whenever there is "an intent to convey a particularized message" and the "message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. Under that analysis, deciding not to provide funerary rites to fetal tissue is expressive.

Next, Indiana argues that subjecting the fetal disposition requirements to strict scrutiny will subject all burial and cremation laws to the First Amendment and will necessarily trigger strict scrutiny. Not so. This *ipse dixit* drastically oversimplifies the First

Amendment analysis. At the outset, Indiana's fear that burial and cremation requirements will be newly subject to First Amendment scrutiny is gratuitous; these laws were already subject to constitutional scrutiny, First Amendment included. *See*, *e.g.*, *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644, 652–53 (1999) (applying First Amendment scrutiny to government action that prohibited the immediate burial of a body while finding the challenged law did not violate *Smith*).[9] The Free Speech Clause does not create a carve out for laws regulating the disposition of human remains. Far from being beyond the scope of the First Amendment, where disposition requirements regulate speech or expressive conduct, they are subject to First Amendment scrutiny just like any other law that "abridg[es] the freedom of speech." U.S. Const. amend. I.

More concretely, this argument ignores how the fetal disposition requirements are different from other laws regulating the disposition of human remains. Laws requiring the disposition of human remains apply generally to remains regardless of whether those remains are in the home or the hospital, and such laws are justified—as are most statutes regulating the disposition of biohazardous material—by the State's interest in public health. That is not the case here. The

[9] As the Supreme Court explained, free exercise and free speech claims often go hand in hand as the "Clauses work in tandem." *Kennedy*, 142 S. Ct. 2421. For example, there was no question that a silent prayer triggered scrutiny under both the Free Exercise and Free Speech Clauses. *See generally id.* Here too here as well.

fetal disposition requirements prevent one specific way of disposing of the fetal remains to effectuate the government's interest in promoting respect for fetal tissue. Put succinctly, whereas most disposition laws justify themselves without reference to expression, the fetal disposition requirements do not.

That distinction is paramount. Where a legislature draws lines to exclude certain disposition methods because of their potential to create biohazardous waste, their legislative findings on those facts are entitled to great deference. *Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). But where the legislature draws lines based on message, such as based on the respect or dignity communicated by a particular method of disposing of the remains, the law triggers strict scrutiny. *Boos*, 485 U.S. at 322 (subjecting content-based laws to the most exacting scrutiny). Put differently, "while the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995). Most disposition laws do the former; the fetal disposition requirements do the latter.

Lastly, Indiana contends that it may "express[] a preference for childbirth over abortion." *Casey*, 505 U.S.

at 883; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). While this is a superficially correct statement, Indiana's application of that precedent here is misplaced. Just because the government may use its voice to espouse an idea does not mean it can compel other voices to speak its message. *Compare Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 215–17 (2015), *with Wooley v. Maynard*, 430 U.S. 705, 715–16 (1972). And while there are situations where the government can compel speech, Indiana, wisely, does not argue that situation occurs here. *See, e.g., Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005).

The unexceptional, bedrock principle of the Free Speech Clause is that freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld*, 547 U.S. at 61. It thereby also prohibits the government from "compel[ling] conduct that would evince respect" for things a person does not think warrant respect. *Johnson*, 491 U.S. at 415 (holding compelling conduct that evinces respect for the flag unconstitutional); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that compelling a salute demonstrating respect for the flag violated the constitution); *Street v. New York*, 394 U.S. 576, 592–94 (1969) (holding even "defiant or contemptuous" speech on otherwise respected topics is protected so long as they are not fighting words). That principle includes showing respect to whatever the State thinks should be treated

like a person. As the fetal disposition requirements can only justify themselves by compelling Plaintiffs to show respect to fetal tissue that they do not want to respect, while prohibiting them from speaking their message, the fetal disposition requirements offend the Free Speech Clause. Accordingly, Plaintiffs are entitled to summary judgment.

**b. Disclosure Requirements**

Plaintiffs also challenge the requirements that abortion providers give information to patients about their right to bury or cremate fetal tissue under the Free Speech Clause. *National Institute of Family and Life Advocates v. Becerra* squarely controls whether those disclosure requirements trigger strict scrutiny under the Free Speech Clause. 138 S. Ct. 2361 (2018). There, the Court explained that regulations are "plainly" content-based regulations where the regulations compel an individual or organization to speak a message that "alters the content" of their speech. *Id.* at 2371 (quoting *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Such altering occurs when the State compels a party to say something they would not otherwise say. *Id.* at 2371. Those content-based regulations are then subject to strict scrutiny. *Id.*

There are only two narrow situations where "more deferential review" will be applied: first, required disclosures of factual, noncontroversial information in the course of commercial speech, and second, regulations on professional conduct that only "incidentally

involve[] speech." *Id.* at 2372 (collecting cases). The first of those situations applies solely to commercial speech, which is speech that "propos[es] a commercial transaction." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978). That is not applicable here.

Neither is the second category applicable to this case.[10] That category allows the State to regulate "[l]ongstanding torts" by defining the boundaries of professional malpractice. *NIFLA*, 138 S. Ct. at 2373. Thus, laws requiring disclosures to facilitate informed consent relating to medical procedures do not offend the First Amendment. *See Casey*, 505 U.S. at 885 *overruled on other grounds by Dobbs*, 142 S. Ct. 2228.

Even still, courts need to be wary because "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Thus, the reach of the State's ability to regulate in this area is limited by those requirements of informed consent that are "firmly entrenched in American tort law." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). At its most

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[10] Some of the disclosure provisions challenged by Plaintiffs quite obviously regulate conduct and are, thus, constitutional. For example, the provision that requires patients to confirm their receipt of information and mark which disposal option they desire regulates conduct surrounding the procedure rather than speech. *See* Ind. Codes §§ 16-34-2-1.1(a)(3)(A); 16-34-3-4(b)–(f); 16-34-3-5; 16-34-3-6; 410 Ind. Admin. Code 35-2-1(b). These are constitutional. So too are the provisions that merely define words as used in the statute or state when the chapter is effective. *See* Ind. Codes §§ 16-21-11-1 to 16-21-11-3; 16-34-3-1; 410 Admin. Code 35-1-1 to 35-1-5.

firmly rooted point, informed consent requires informing patients of the substantial risks that if disclosed would cause "reasonable persons . . . [to] reject[ ] the proposed treatment." *Spar v. Cha*, 907 N.E.2d 974, 979–80 (Ind. 2009) (quoting Dobbs, *The Law of Torts*, § 250 (2001)). Consequently, the State can only require disclosures that relate to the risks or benefits of the procedure that might affect whether reasonable patients would reject the treatment. *Compare NIFLA*, 138 S. Ct. at 2373–74, *with Casey*, 505 U.S. at 885.

Many of the disclosures required by Indiana law do not relate to the risks and benefits of abortions and are irrelevant to informed consent. While the requirement to disclose that a drug-induced abortion patient "will expel an aborted fetus" relates to the expected consequences of an abortion,[11] Ind. Code § 16-34-2-1.1(a)(2)(J)(i), the rest of the disclosures do not. Instead, those provisions seek to inform women about their statutory rights following an abortion instead of the risks and benefits of the procedure.[12] Indeed,

[11] As this section of the statute is an informed consent requirement, it is constitutional so long as it is truthful and non-misleading. *See Casey*, 505 U.S. at 882. As there is no indication that this statement is untrue or misleading, this disclosure survives constitutional scrutiny.

[12] Subsection (H) requires disclosing that "the pregnant woman has a right to determine the final disposition of the remains." Ind. Code § 16-34-2-1.1(a)(2)(H). Subsection (I) requires disclosing "that the pregnant woman has a right" to "dispose of the remains . . . by interment . . . or cremation" and that the "woman has a right" to "have the health care facility or abortion clinic dispose of the remains of the aborted fetus by interment . . . or cremation." *Id.* § (I)(i), (ii).

Plaintiffs introduce uncontested evidence that the disclosures here are "not consistent with the informed consent process used in other areas of medicine." (McKinney Decl. ¶ 24). There is also uncontested evidence that these disclosures are irrelevant to patients' decisions on whether to get an abortion. (Doe 1 Dep. 33:23–34:15; Doe 3 Dep. 38:23–39:17).

In sum, these disclosures do not relate to the risks and benefits of the procedure, are as a factual matter, inconsistent with other informed consent disclosures, and have no effect on the decision-making process. Instead, they merely inform women of their rights relating to fetal disposition. But requiring disclosures so that patients "know[] their rights and the health care services available to them" is a regulation on speech not professional conduct. *NIFLA*, 138 S. Ct. at 2369. Accordingly, the disclosures "regulate[] speech as speech" and are subject to strict scrutiny under the First Amendment. *NIFLA*, 138 S. Ct. at 2374.

As the court already concluded the requirements do not survive strict scrutiny for failing to tailor themselves to the least restrictive means, the disclosure requirements violate the Free Speech Clause.

### B. Establishment Clause (Count IV)

Next, Plaintiffs challenge the fetal disposition and disclosure requirements as a violation of the Establishment Clause. But because the fetal disposition and disclosure requirements do not establish any religion, the requirements do not violate the Establishment Clause.

That Clause prohibits laws "respecting an establishment of religion." U.S. Const. amend. I. Those words "must be interpreted by reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (plurality opinion)). Whether a law offends the Establishment Clause turns on "the understanding of the Founding Fathers" such that the line between permissible and impermissible "accords with history." *Town of Greece*, 572 U.S. at 577 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

The Establishment Clause has not been historically understood to prohibit laws that only "coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 336 U.S. 420, 442 (1961). For example, just because prohibiting murder "agrees with the dictates of the Judaeo-Christian religions" does not mean the State establishes those religions by criminalizing murder. *Id.* at 442. Similarly, even where a statute promulgates and reflects "traditionalist values toward[ ] abortion," there is no Establishment Clause violation without more. *Harris v. McRae*, 448 U.S. 297, 319–20 (1980).

While the exact boundaries of what more a law needs to do to establish religion are unclear, the court need not reach that issue today. That is because Plaintiffs have not shown anything more than the fetal disposition and disclosure requirements coinciding with certain religious beliefs. On this record, it is uncontroverted that even though some persons hold religious

beliefs surrounding the burial or cremation of human remains, (Maienschein Decl. ¶ 15; Filing No. 77-1, Espada Tr. 70:5–11), many non-religious persons bury or cremate their dead and the respectful treatment of human remains is not strictly religious, (Peters Dep. 43:5–8 (Pls.' Expert); Curlin Decl. ¶ 20 (Defs.' Expert)).[13] Indeed, "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial," because they represent "a sign of the respect a society" shows the deceased even if that person is not religious. *Favish*, 541 U.S. 157, 167–68 (2004). To the extent that the fetal disposition and disclosure requirements do advance "traditionalist values" toward fetal personhood, the laws only coincide or harmonize with religious tenets and do not violate the Establishment Clause. *McRae*, 448 U.S. at 319–20.

The Supreme Court's recent opinion in *Kennedy* belies Plaintiffs' contention that this Court should apply the *Lemon* test or failing that, the coercion test. 142 S. Ct. at 2427. Under the *Lemon* test, the court questions "(1) whether the government activity in question

[13] Curiously, in making this point, Dr. Curlin gives the example that "[i]n Homer's *Iliad*, the gods are outraged when Achilles defiles Hector's corpse" which demonstrates that Greek culture emphasized treating enemies' remains with respect. (Curlin Decl. ¶ 20). For that proposition, Curlin cites "Mistreating the enemy's body: The judgment of Zeus" from the "Law and Religion Forum." *Id.* n.20. Given that the proposition is that respect for the dead is not necessarily religious, citations to the actions of the gods, Zeus, and the Law and Religion forum may not entirely support the point. Regardless, plaintiffs' expert testimony is sufficient to show that the burial or cremation of remains is not strictly a religious practice.

has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether government activity fosters an excessive entanglement with religion." *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). "Governmental action is violative" of the Establishment Clause "if it violates any one of these three prongs." *Id.* However, the Supreme Court "long ago abandoned *Lemon*" and instead applies the historic approach described in *Town of Greece*. *Kennedy*, 142 S. Ct. at 2427. Moreover, the coercion test still requires religious action which, as described above, is absent here. Therefore, Defendants are entitled to summary judgment on Plaintiffs' Establishment Clause claim.

### C. Due Process (Count I)

Plaintiffs contend that the fetal disposition and disclosure requirements substantially burden their fundamental right to abortion under the Due Process Clause. Given the Supreme Court's opinion in *Dobbs*, 142 S. Ct. 2228, the court concludes that the fetal disposition and disclosure requirements do not violate the Due Process Clause of the Fourteenth Amendment.

Laws burdening abortions face "rational-basis review" if attacked on Due Process grounds. *Dobbs*, 142 S. Ct. at 2284. Under that standard, the law must only be "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

The fetal disposition requirements at issue in this case are rationally related to a legitimate government interest. *Box*, 139 S. Ct. at 1782 (explaining that the issue "is whether Indiana's law is rationally related to the State's interest" and concluding "that it is") (upholding the fetal remains requirement).

The disclosure requirements are also rationally related to a legitimate government interest. The State has a legitimate interest in making its citizens aware of its laws and programs. Requiring the disclosures at issue here furthers that legitimate interest.

Defendants are entitled to summary judgment on Plaintiffs' Due Process claims.

### D. Equal Protection (Count II)

Finally, Plaintiffs argue the requirements violate equal protection. Because the Plaintiffs' Equal Protection claims are duplicative of their other Constitutional claims, however, the court holds that the fetal disposition and disclosure requirements do not violate the Equal Protection Clause. The thrust of Plaintiffs' argument is that because the fetal disposition and disclosure requirements apply to individuals exercising fundamental constitutional rights, the requirements violate the Equal Protection Clause. That argument, however, misunderstands the interrelation of fundamental constitutional rights and equal protection.

In relation to other substantive rights, the Equal Protection Clause complements, but does not duplicate.

*See*, *e.g.*, *Obergefell v. Hodges*, 574 U.S. 644, 670–74 (2015) (explaining how the Equal Protection Clause synergizes with but is independent from other substantive rights). To that end, the Equal Protection Clause prohibits excluding or distinguishing between members of a particular class without sufficient justification. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). It is not violated merely when a substantive right is burdened—even where that burden is unconstitutional. Plaintiffs have not cited a case where a court has found an equal protection violation purely because the statute violated the First Amendment as to some class of people.

There is no equal protection violation here because the fetal disposition and disclosure requirements do not distinguish or exclude based on the exercise of a fundamental right. The laws instead only burden fundamental rights. The Equal Protection Clause requires more than parasitic claims. Were it otherwise, every instance where a court found viewpoint discrimination, or a free exercise violation, would require finding a concomitant equal protection violation. That is not how these cases are decided. *See Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 835–37 (1995) (striking down regulation for viewpoint discrimination with no discussion of equal protection); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (discussing viewpoint discrimination but not equal protection); *Lukumi*, 508 U.S. at 533–45 (striking down statutes for targeting only one religion with no equal protection analysis).

The only remaining question, then, is whether the classifications drawn by the fetal disposition and disclosure requirements survive rational basis review. *See Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002) (explaining when "no suspect class or fundamental right is involved, we employ a rational basis test to determine" constitutionality). They do. *See Box*, 139 S. Ct. at 1782; *see also supra* Section III-C. Therefore, Defendants must receive summary judgment on the equal protection claim.

## IV. Conclusion

For the reasons discussed above, the court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Summary Judgment (Filing No. 76) and **GRANTS in part** and **DENIES in part** Defendants' Cross-Motion for Summary Judgment (Filing No. 82). Plaintiff's Motion to Exclude Expert Testimony (Filing No. 88) is **DENIED as moot**.

The disposition of these claims are as follows:

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count I (Due Process).

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count II (Equal Protection).

The court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion for Summary Judgment with respect to Count III (Free Speech).

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count IV (Establishment Clause).

The court **GRANTS** Plaintiffs' Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment with respect to Count V (Free Exercise).

**IT IS SO ORDERED** this 26th day of September 2022.

/s/ Richard L. Young, Judge
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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|---|---|---|
| JANE DOE NO. 1, *et al.*,<br>Plaintiffs,<br>v.<br>ATTORNEY GENERAL OF INDIANA, *et al.*,<br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 1:20-cv-03247-RLY-MJD |

**ORDER ENJOINING ENFORCEMENT OF THE FETAL DISPOSITION AND DISCLOSURE REQUIREMENTS**

(Filed Sep. 26, 2022)

Pursuant to the court's recent entry granting partial summary judgment (Filing No. 98), the court **DECLARES** that Indiana Codes §§ 16-21-11-5(a), 16-21-11-6(b), 16-21-11-6(c), 16-34-2-1.1(a)(2)(H), 16-34-2-1.1(a)(2)(I), 16-34-3-2(b), 16-34-3-4(a), 16-34-3-4(c), 16-34-3-4(d), 16-34-3-4(g), 16-41-16-4(d), 16-41-16-5, 410 Ind. Admin. Code 35-2-1(a), 35-2-2(a), 35-2-2(a)(1), 35-2-2(a)(2), 35-2-2(a)(4), 35-2-2(b)(1), 35-2-2(b)(2) and the laws enforcing those sections violate the Free Exercise and Free Speech Clauses of the First Amendment.

Having found that those provisions and the laws enforcing those sections violate the Plaintiffs' rights under the Free Exercise and the Free Speech Clauses, Defendants and their officers, agents, servants,

employees and attorneys, and those acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Codes §§ 16-21-11-6(b), 16-21-11-6(c), 16-34-2-1.1(a)(2)(H), 16-34-2-1.1(a)(2)(I), 16-34-3-2(b), 16-34-3-4(a), 16-34-3-4(c), 16-34-3-4(d), 16-34-3-4(g), 16-41-16-4(d), 16-41-16-5, 410 Ind. Admin. Code 35-2-1(a), 35-2-2(a), 35-2-2(a)(1), 35-2-2(a)(2), 35-2-2(a)(4), 35-2-2(b)(1), 35-2-2(b)(2).

This Order takes effect on this 26th day of September 2022.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
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| JANE DOE NO. 1, et al.,<br>Plaintiffs,<br>v.<br>ATTORNEY GENERAL OF INDIANA, et al.,<br>Defendants. | ) | No. 1:20-cv-03247-RLY-MJD |

**ENTRY DENYING DEFENDANTS' MOTION FOR STAY PENDING APPEAL**

(Filed Nov. 2, 2022)

On September 26, 2022, this court granted summary judgment to Plaintiffs on their claims that Indiana's fetal disposition and disclosure requirements violated their rights under the First Amendment. (Filing No. 98). Specifically, the court held the fetal disposition requirements—which required the burial or cremation of fetal tissue instead of allowing that tissue to be treated as ordinary medical waste—violated the Free Exercise and Free Speech Clauses. The fetal disposition requirements violated the Free Exercise Clause because they were not generally applicable nor neutral. The requirements also violated the Free Speech Clause because choosing to give or not give funerary rights to fetal tissue in this context is expressive conduct. The court also held the disclosure requirements—which required abortion providers to

inform patients of certain rights they could exercise after the procedure—were not informed consent requirements but regulated speech as speech and, therefore, violated the Free Speech Clause.

Accordingly, the court issued an order declaring these laws unconstitutional under the First Amendment and permanently enjoining their enforcement. (Filing No. 99). Defendants timely appealed that order. (Filing No. 101). They now move to stay that judgment pending appeal under Rule 62(d). (Filing No. 103). As the court concludes Defendants have not met their heavy burden of demonstrating such an extraordinary remedy is warranted, the court **DENIES** Defendants' motion to stay the judgment pending appeal.

## I. Legal Standard

Stays intrude mightily on "the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). As a result, a stay "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *accord Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926) (explaining stays are "not a matter of right, even if irreparable injury might otherwise result to the appellant"); *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973). Thus, "the issuance of a stay is left to the court's discretion." *Nken*, 556 U.S. at 434.

The court's discretion is "guided by sound legal principles," *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005), distilled into a four-factor balancing

test that analyzes: (1) whether the applicant "has made a strong showing that he is likely to succeed on the merits;" (2) "whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The party "seeking a stay pending appeal" carries the burden. *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).

## II. Discussion

### A. Strong Showing of Success

Indiana fails to make a strong showing of success on the merits. Much of its argument readvances the arguments rejected at summary judgment. That is not sufficient to create a strong showing. *See Endress + Hauser, Inc. v. Hawk Measurements Sys. Pty. Ltd.*, 932 F. Supp. 1147, 1149 (S.D. Ind. 1996) (finding no strong showing of success because "mere recitation of arguments previously made and rejected . . . is not nearly enough"); *see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 75 (D.D.C. 2008) (explaining "[m]ere repetition of . . . arguments does not demonstrate" a party is "likely to succeed on the merits of its claims"); *cf. Fed. Ins. v. Cnty. of Westchester*, 921 F. Supp. 1136, 1139 (S.D.N.Y. 1996) (finding no strong showing because argument "consist[ed] of nothing more than a cursory enumeration of the arguments" a party

planned to raise on appeal). A few contentions warrant additional comment.

Foremost, Indiana contends the court's holdings—that the fetal disposition requirements are not neutral and not generally applicable—are inconsistent. Indiana predicates this argument, like many of its arguments, on a misunderstanding of Doe 3's religious and Doe 1's moral beliefs. In its view, the relevant religious and moral belief compels Plaintiffs to avoid the burial or cremation of the aborted fetus. On that conception of Plaintiffs' beliefs, the law works as an accommodation that allows women to take home the tissue to avoid burial or cremation. But that is not what Plaintiffs' beliefs are. As explained in the court's entry, the religious belief is that "fetal tissue . . . should be disposed of as medical waste." (Filing No. 98 at 10). Because the record demonstrated medical waste is not taken home nor buried or cremated, requiring fetal tissue to be taken home, buried, or cremated requires treating fetal tissue differently than medical waste which burdens the religious and moral beliefs of the Plaintiffs. (*Id.*).

Therefore, the court's holdings were consistent because the law allowed every woman to opt out of burying or cremating fetal tissue unless they had this particular religious or moral belief that prohibits Plaintiffs from taking home the tissue. That is not neutral. And it also meant the law was underinclusive as it only required the respectful disposition of fetal remains when this particular religious or moral belief was exercised. That is not generally applicable.

Moreover, Indiana's reading of *Lukumi* is squarely contradicted by the text of that case. (*Compare* Pls.' Reply Br. at 6 (characterizing *Lukumi* as "relying on ordinance's use of religious words . . . and City's resolution expressing commitment to prohibit certain religious practices")), *with Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–35 (1993) (explaining the Court "reject[s] the contention . . . that our inquiry must end with the text of the law at issue" and that "[i]t becomes evident" the law was not neutral once "the ordinances' operation is considered").[1]

Indiana raises no new arguments relating to the Free Speech Clause analysis other than attempting to distinguish some cases. It does so by misstating the court's opinion. (*Compare* Pls.' Br. at 8 (arguing "*Kickapoo Traditional Tribe* lends no support to this [c]ourt's conclusion that *all* burial and cremation laws should be subject to strict scrutiny under the Free Speech Clause") (emphasis in original), *with* Filing No. 98 at 25 ("Indiana argues" this "will subject all burial and cremation laws to the First Amendment and will necessarily trigger strict scrutiny. *Not so*.") (emphasis added). Indiana provides no argument regarding the central issue of the Free Speech analysis: "[i]t is simply impossible for a disposition method to acknowledge and respect the human dignity of a fetus while at the same time communicating no message at all." (Filing No. 98 at 24).

[1] The Supreme Court continued with roughly 5 pages of analysis *after* Indiana submits the neutrality analysis concluded.

Relating to the disclosure requirements, Indiana contends that because the effect of the abortion on the fetus is relevant to informed consent, the disclosure requirements are proper informed consent requirements. But that was why Ind. Code § 16-34-2-1.1(a)(2)(J)(i) was constitutional. The rest of the disclosure requirements were legally and factually distinct from traditional informed consent requirements. (Filing No. 98 at 29–30). That means the required disclosures here landed far afield of informed consent laws that are "firmly entrenched in American tort law," *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990), such that they are part of "the traditional purview of state regulation of professional conduct," *NAACP v. Button*, 371 U.S. 415, 438 (1963). Indiana does not engage with these precedents. Nor does Indiana attempt to ground the disclosures in case law discussing informed consent requirements.

Indiana has not made a strong showing of success on the merits.

### B. Irreparable Injury Absent a Stay

Nor has Indiana shown it will suffer an irreparable injury without a stay. Indiana only cites one case stating, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., as Circuit Justice). Controlling Seventh Circuit precedent on this issue compels the opposite conclusion:

"there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (explaining that prohibiting a school from applying a policy in a way that violates First Amendment rights "is no harm at all").[2]

### C. Injury to the Other Party's Interest

Staying the judgment would also irreparably harm Plaintiffs because it would prohibit them from exercising their constitutional rights for the pendency of the appeal. As the Seventh Circuit explained, "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978). Indiana contends Plaintiffs will not be harmed by the stay because they had previously been complying with the fetal disposition requirements. But that the Plaintiffs previously complied with an, at the time lawful, statute, does not mean the enforcement of the statute after it has been found unconstitutional works no irreparable harm. The opposite is true. *Id.*

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[2] Even if there were irreparable harm here, that would not be sufficient to grant the stay because the other factors, including a strong showing of success on the merits, weigh against Indiana.

### D. Public Interest

A stay also would not serve the public interest. "[I]t is always in the public interest to protect First Amendment liberties." *Joelner*, 378 F.3d at 620. Indiana submits that mootness concerns justify implementing a stay, but these concerns are speculative. Indiana's argument boils down to: if the Indiana Supreme Court upholds Indiana's abortion ban and if the Plaintiffs incinerate the tissue from their abortions, then the case might be moot. Alternatively, a stay would work definite, concrete harm to the public by continuously depriving them of their constitutional rights pending appeal. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (explaining "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The public interest tips toward declining to stay the judgment.

## III. Conclusion

For the reasons discussed above, the court **DENIES** Defendants' Motion to Stay the Judgment Pending Appeal (Filing No. 103).

**IT IS SO ORDERED** this 2nd day of November 2022.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

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**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

December 28, 2022

**Before**

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

<table>
<tr><td>No. 22-2748<br>JANE DOE NO. 1, et al.,<br>Plaintiffs-Appellees,<br><br>v.<br><br>TODD ROKITA, ATTORNEY GENERAL OF INDIANA, et al.,<br>Defendants-Appellants.</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td>Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.<br><br>No. 1:20-cv-03247-RLY-MJD<br><br>Richard L. Young,<br>Judge.</td></tr>
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## ORDER

Plaintiffs-Appellees filed a petition for rehearing and rehearing en banc on December 12, 2022. No judge* in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Circuit Judge Pryor did not participate in the consideration of this petition.

410 IAC 35-2-1

410 IAC 35-2-1 Disposition of aborted remains

Sec. 1. (a) Each abortion clinic and health care facility shall provide for the disposition of an aborted fetus by any of the following methods:

(1) In the earth in an established cemetery pursuant to IC 23-14-34.

(2) Cremation.

(b) The facility must have written policies and procedures for the available method or methods of disposition of aborted fetuses.

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410 IAC 35-2-2

410 IAC 35-2-2 Records

Sec. 2. (a) Each abortion clinic and health care facility must maintain permanent written documentation of the following:

(1) The burial transit permit for each aborted fetus when required by IC 16-34-3-4(a).

(2) The log required by IC 16-34-3-4(c), when applicable.

(3) When a cremation or burial is conducted on behalf of an abortion clinic or health care facility by a licensed funeral home or other authorized person, the contract or agreement between the abortion clinic or health care facility and the

funeral home or other person for the cremation or burial services in accordance with IC 16-34-3-4(b).

(4) A signed statement by the entity receiving fetal remains from an abortion clinic or health care facility attesting that the confirmation required by IC 16-34-3-4(d) was completed and attesting that the number of fetal remains received by the entity matched the burial transit permit and log required by IC 16-34-3-4(c).

(b) Each abortion clinic and health care facility must keep the following in a pregnant woman's medical record:

(1) Written documentation that the notifications required by IC 16-34-2-1.1(a)(2)(H), IC 16-34-2-1.1(a)(2)(I), and IC 16-34-2-1.1(a)(2)(J) were made.

(2) The completed form required by IC 16-34-3-2(b).

(3) Written documentation of the parental consent required by IC 16-34-3-2(c) or written documentation that parental consent was not required.

(4) In the case of an abortion induced by an abortion inducing drug, written documentation indicating whether the pregnant woman returned the aborted fetus to the abortion clinic or health care facility in accordance with IC 16-34-3-2(e).

(c) Where a decision or notification is required to be made by a form, an abortion clinic or health care facility must retain a copy of the completed form that contains the decision or notification.

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IC 16-21-11-5

16-21-11-5 Duty of health care facility to inform parents

Sec. 5. (a) Not more than twenty-four (24) hours after a woman has her miscarried fetus expelled or extracted in a health care facility, the health care facility shall:

(1) disclose to the parent or parents of the miscarried fetus, both orally and in writing, the parent's right to determine the final disposition of the remains of the miscarried fetus;

(2) provide the parent or parents of the miscarried fetus with written information concerning the available options for disposition of the miscarried fetus under section 6 of this chapter and IC 16-41-16-7.6; and

(3) inform the parent or parents of the miscarried fetus of counseling that may be available concerning the death of the miscarried fetus.

(b) The parent or parents of a miscarried fetus shall inform the health care facility of the parent's decision for final disposition of the miscarried fetus after receiving the information required in subsection (a) but before the parent of the miscarried fetus is discharged from the health care facility. The health care facility shall document the parent's decision in the medical record.

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IC 16-21-11-6

16-21-11-6 Final disposition of remains

Sec. 6. (a) If the parent or parents choose a location of final disposition other than the location of final disposition that is usual and customary for the health care facility, the parent or parents are responsible for the costs related to the final disposition of the fetus at the chosen location.

(b) A health care facility having possession of a miscarried fetus shall provide for the final disposition of the miscarried fetus. The burial transit permit requirements under IC 16-37-3 apply to the final disposition of the miscarried fetus, which must be cremated or interred. However:

(1) a person is not required to designate a name for the miscarried fetus on the burial transit permit and the space for a name may remain blank; and

(2) any information submitted under this section that may be used to identify the parent or parents is confidential and must be redacted from any public records maintained under IC 16-37-3.

Miscarried fetuses may be cremated by simultaneous cremation.

(c) The local health officer shall provide the person in charge of interment with a permit for the disposition of the body. A certificate of stillbirth is not required to be issued for a final disposition of a miscarried fetus

having a gestational age of less than twenty (20) weeks.

(d) IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section.

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IC 16-34-2-1.1

16-34-2-1.1 Voluntary and informed consent; fetal ultrasound

Sec. 1.1. (a) An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:

(1) At least eighteen (18) hours before the abortion and in the private, not group, presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice registered nurse (as defined in IC 25-23-1-1(b)), or a certified nurse midwife (as defined in IC 34-18-2-6.5) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has informed the pregnant woman orally and in writing of the following:

(A) The name of the physician performing the abortion, the physician's medical license

number, and an emergency telephone number where the physician or the physician's designee may be contacted on a twenty-four (24) hour a day, seven (7) day a week basis.

(B) That follow-up care by the physician or the physician's designee (if the designee is licensed under IC 25-22.5) is available on an appropriate and timely basis when clinically necessary.

(C) The nature of the proposed procedure or information concerning the abortion inducing drug that includes the following statement: "Some evidence suggests that effects of Mifespristone may be avoided, ceased, or reversed if the second pill, Misoprostol, has not been taken. Immediately contact the following for more information at (insert applicable abortion inducing drug reversal Internet web site and corresponding hotline number)."

(D) Objective scientific information of the risks of and alternatives to the procedure or the use of an abortion inducing drug, including:

(i) the risk of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy; and

(iii) the potential danger of infertility.

(E) That human physical life begins when a human ovum is fertilized by a human sperm.

(F) The probable gestational age of the fetus at the time the abortion is to be performed, including:

(i) a picture of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus;

at this stage of development.

(G) That objective scientific information shows that a fetus can feel pain at or before twenty (20) weeks of postfertilization age.

(H) The medical risks associated with carrying the fetus to term.

(I) The availability of fetal ultrasound imaging and auscultation of fetal heart tone services to enable the pregnant woman to view the image and hear the heartbeat of the fetus and how to obtain access to these services.

(J) That the pregnancy of a child less than fifteen (15) years of age may constitute child abuse under Indiana law if the act included an adult and must be reported to the department of child services or the local law enforcement agency under IC 31-33-5.

(K) That Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability.

(L) That no one has the right to coerce the pregnant woman to have an abortion.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be informed orally and in writing of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of the division of family resources.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(D) That there are physical risks to the pregnant woman in having an abortion, both during the abortion procedure and after.

(E) That Indiana has enacted the safe haven law under IC 31-34-2.5.

(F) The:

(i) Internet web site address of the state department of health's web site; and

(ii) description of the information that will be provided on the web site and that is;

described in section 1.5 of this chapter.

(G) For the facility in which the abortion is to be performed, an emergency telephone number that is available and answered on a twenty-four (24) hour a day, seven (7) day a week basis.

(H) On a form developed by the state department and as described in IC 16-34-3, that the pregnant woman has a right to determine the final disposition of the remains of the aborted fetus.

(I) On a form developed by the state department, that the pregnant woman has a right, after a surgical abortion, to:

> (i) dispose of the remains of the aborted fetus by interment in compliance with IC 23-14-54, or cremation through a licensee (as defined in IC 25-15-2-19) and in compliance with IC 23-14-31; or
>
> (ii) have the health care facility dispose of the remains of the aborted fetus by interment in compliance with IC 23-14-54, or cremation through a licensee (as defined in IC 25-15-2-19) and in compliance with IC 23-14-31, and ask which method of disposition will be used by the health care facility.

(J) On a form developed by the state department:

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IC 16-34-3-2

16-34-3-2 Right to determine final disposition of aborted fetus; parental consent; waiver

Sec. 2. (a) A pregnant woman who has an abortion under this article has the right to have the hospital or ambulatory outpatient surgical center dispose of the aborted fetus by interment in compliance with IC 23-14-54, or cremation through a licensee (as defined in IC 25-15-2-19) and in compliance with IC 23-14-31. The pregnant woman who selects to have the hospital or ambulatory outpatient surgical center dispose of the aborted fetus has the right to ask which method will be used by the hospital or ambulatory outpatient surgical center.

(b) After receiving the notification and information required by IC 16-34-2-1.1(a)(2)(H), IC 16-34-2-1.1(a)(2)(I), and IC 16-34-2-1.1(a)(2)(J), the pregnant woman shall inform the hospital or ambulatory outpatient surgical center:

(1) in writing; and

(2) on a form prescribed by the state department;

of the pregnant woman's decision for final disposition of the aborted fetus by cremation or interment and, in an abortion induced by an abortion inducing drug, whether the pregnant woman will return the aborted fetus to the hospital or ambulatory outpatient surgical center for disposition by interment in compliance with IC 23-14-54, or cremation through a licensee (as

defined in IC 25-15-2-19) and in compliance with IC 23-14-31.

(c) If the pregnant woman is a minor, the hospital or ambulatory outpatient surgical center shall obtain parental consent in the disposition of the aborted fetus unless the minor has received a waiver of parental consent under IC 16-34-2-4.

(d) The hospital or ambulatory outpatient surgical center shall document the pregnant woman's decision concerning disposition of the aborted fetus in the pregnant woman's medical record.

(e) In the case of an abortion induced by an abortion inducing drug, the pregnant woman may return the aborted fetus to the hospital or ambulatory outpatient surgical center for disposition by interment in compliance with IC 23-14-54, or cremation through a licensee (as defined in IC 25-15-2-19) and in compliance with IC 23-14-31.

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IC 16-34-3-4

16-34-3-4 Cremation or interment of aborted fetus; permit; certificate of stillbirth

Sec. 4. (a) A hospital or ambulatory outpatient surgical center having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated. However:

(1) a person is not required to designate a name for the aborted fetus on the burial transit permit and the space for a name may remain blank; and

(2) any information submitted under this section that may be used to identify the pregnant woman is confidential and must be redacted from any public records maintained under IC 16-37-3.

Aborted fetuses may be cremated by simultaneous cremation.

(b) If the hospital or ambulatory outpatient surgical center conducts the cremation of aborted fetal remains on site, the hospital or ambulatory outpatient surgical center must comply with all state laws concerning the cremation of human remains as prescribed in IC 23-14-31. The hospital or ambulatory outpatient surgical center must make the onsite cremation equipment available to the state department for inspection at the time the hospital or ambulatory outpatient surgical center is inspected. When the hospital or ambulatory outpatient surgical center contracts with a licensed funeral home for the disposal of the aborted fetal remains, the contract must be made available for review by the state department at the time the hospital or ambulatory outpatient surgical center is inspected.

(c) Except in extraordinary circumstances where the required information is unavailable or unknown, a burial transit permit issued under IC 16-37-3 that includes multiple fetal remains must be accompanied by a log prescribed by the state department containing

the following information about each fetus included under the burial transit permit:

(1) The date of the abortion.

(2) Whether the abortion was surgical or induced by an abortion inducing drug.

(3) The name of the funeral director licensee who will be retrieving the aborted fetus.

(4) In the case of an abortion induced by an abortion inducing drug:

(A) whether the pregnant woman will cremate or inter the fetus, or will return the fetus to the hospital or ambulatory outpatient surgical center for disposition; and

(B) if the pregnant woman returns the fetus to the hospital or ambulatory outpatient surgical center, whether the returned fetus is included in the burial transit permit.

The hospital or ambulatory outpatient surgical center must keep a copy of the burial transit permit and accompanying log in a permanent file.

(d) Each time the fetal remains are transported from one entity to another for disposition, the entity receiving the fetal remains must confirm that the number of fetal remains matches the information contained in the burial transit permit and accompanying log. After final disposition, a copy of the log will be sent back to the hospital or ambulatory outpatient surgical center. The final log will be attached to the original log described in subsection (c) and will be made available for

review by the state department at the time of inspection.

(e) A hospital or ambulatory outpatient surgical center is responsible for demonstrating to the state department that the hospital or ambulatory outpatient surgical center has complied with the protocol provided in this section.

(f) A certificate of stillbirth is not required to be issued for an aborted fetus with a gestational age of less than twenty (20) weeks of age.

(g) IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section.

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IC 16-41-16-4

16-41-16-4 Infectious waste

Sec. 4. (a) Except as provided in subsections (c) and (d), as used in this chapter, "infectious waste" means waste that epidemiologic evidence indicates is capable of transmitting a serious communicable disease (as set forth in the list published under IC 16-41-2-1).

(b) The term includes the following:

(1) Pathological wastes.

(2) Biological cultures and associated biologicals.

(3) Contaminated sharps.

(4) Infectious agent stock and associated biologicals.

(5) Blood and blood products in liquid or semiliquid form.

(6) Laboratory animal carcasses, body parts, and bedding.

(7) Wastes (as described under section x of this chapter).

(c) "Infectious waste", as the term applies to a:

(1) home health agency; or

(2) hospice service delivered in the home of a hospice patient; includes only contaminated sharps.

(d) The term does not include an aborted fetus or a miscarried fetus.

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IC 16-41-16-5

16-41-16-5 Pathological waste

Sec. 5. As used in this chapter, "pathological waste" includes:

(1) tissues;

(2) organs;

(3) body parts; and

(4) blood or body fluids in liquid or semiliquid form;

that are removed during surgery, biopsy, or autopsy. The term does not include an aborted fetus or a miscarried fetus.

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**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION**

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| JANE DOE NO. 1; JANE DOE NO. 3; WILLIAM MUDD MARTIN HASKELL, M.D.; KELLY MCKINNEY, N.P.; and WOMEN'S MED GROUP PROFESSIONAL CORPORATION,<br><br>Plaintiffs,<br><br>v.<br><br>ATTORNEY GENERAL OF INDIANA; COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH; THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA; THE INDIVIDUAL MEMBERS OF THE INDIANA STATE BOARD OF NURSING; and MARION COUNTY PROSECUTOR,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. 1:20-CV-3247-RLY-MJD<br><br>CIVIL ACTION |

## DECLARATION OF JANE DOE NO. 1 IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

JANE DOE NO. 1 hereby declares under penalty of perjury that the following statements are true and correct:

1. I am a plaintiff in this lawsuit, and I provide the following information based on my personal knowledge.

### My Background

2. I am a life-long resident of Indiana.

3. I am currently employed as a pediatric dental assistant.

4. I am a mother to five children and stepchildren, ages two, five, seven, thirteen, and fourteen. I coparent all five of my children with my fiancé.

5. I am a cervical cancer survivor. I was first diagnosed with cervical cancer in 2016. At that time, my physician removed as much of the cancerous tissue as he could. I received treatment for my cancer again in 2019. I have been cancer free since May 2020.

### My Pregnancy History

6. I have carried three pregnancies to term and given birth to three children.

7. All three of my pregnancies were classified as high-risk. I understood this to mean that there was an increased chance of complications that could threaten my or my baby's health or life. My first pregnancy was classified as high risk because it impinged on my sciatic nerve, which exacerbated an existing back injury. As a result, I was bedridden throughout the pregnancy. My last two pregnancies were classified as high risk because of my cervical cancer diagnosis.

8. In December 2020, I sought a tubal ligation because I did not want to have any more children given the medical risks. However, my doctor at the time refused to perform the procedure because he thought I was too young and might regret it in the future.

9. I became pregnant at the end of 2020. Because of the high-risk nature of my prior pregnancies, I was afraid of developing life-threatening complications. I did not want to put my children in jeopardy of losing their mother. I decided that an abortion was the best decision for my children and me.

**My Abortion Experience**

10. In December 2020, when I was six weeks' pregnant, I received an aspiration abortion at the Women's Med Clinic in Indianapolis ("Women's Med").

11. Eighteen hours before my abortion, a Women's Med nurse went over a variety of information with me, including some information that she was required to give me by the State of Indiana.

12. The nurse reviewed a form with me where I had to mark how I wanted my tissue to be disposed of. The form had me choose whether I wanted to have the clinic bury or cremate my tissue, or whether I would take the tissue home to bury or cremate it myself. The form did not identify any disposition options besides burial and cremation. After I inquired about the option of taking the tissue home, the nurse helped clarify that if I take the tissue home with me then I can dispose of it however I choose. I found the form and process to be disconcerting. I did not understand why I needed to bury or cremate my tissue, instead of treating the tissue using standard medical means.

13. This form and the information on tissue disposition the nurse was required to give me made me feel like the State was trying to impose the belief on me that an embryo or fetus is a person. To me, burial and cremation are religious rituals that signal the death of a person who has lived and died. By requiring that I consent to the burial or cremation of my embryonic and fetal tissue, I felt that the State was forcing me to act according to the belief that tissue from an abortion is equivalent to a deceased person.

14. The State's tissue disposition requirements made me feel ashamed and like I was being judged for doing something wrong. I felt that the State was trying to make me feel like I was a bad mother for choosing to have an abortion, even though my decision to end my pregnancy was in large part to make sure my children did not face the possibility of growing up without a mother.

15. I do not believe that an embryo or fetus is a person. Therefore, I did not want my embryo from my abortion to be buried or cremated. However, I did not have the option of having the clinic dispose of my embryonic tissue using standard medical means.

16. Moreover, I did not feel comfortable taking the tissue home to dispose of it myself because it is biohazardous material that is subject to special laws and has the potential to create a public health hazard. In the dental practices where I have worked, we do not give patients tissue from their biopsies to dispose of at home because it is biohazardous material. We have specific protocols in place to dispose of the tissue from dental biopsies. Therefore, I knew that it would be inappropriate for me to take the tissue from my abortion home without knowing how to transport and dispose of it in a sanitary and safe manner.

17. The idea of disposing of the tissue on my own, without the help of the abortion clinic, caused me anguish and anxiety because I did not want the tissue to be buried or cremated, but I did not have the knowledge or resources required to dispose of it in a medically appropriate manner.

18. Until my own abortion, I considered myself opposed to abortion. This was because I was raised in a family that staunchly believed that abortion was immoral. My own experiences showed me that every person has a unique set of circumstances and people should have the choice of whether to become a parent or not without anyone else interfering in their decision.

For me, the possibility that I would not be there for my children was a guiding factor in deciding to terminate my pregnancy. Since all three of my prior pregnancies were high risk, I knew of the very real chance that something could happen to me during my fourth pregnancy that would leave my children without a mother. That was not a reality I wanted my children to have to face.

19. I brought this case so that I could have the right to ask Women's Med to dispose of my tissue by standard medical means that do not mark it as a person, and so that other individuals receiving abortion care in Indiana would not have to agree to burial or cremation of their embryonic and fetal tissue as a condition of ending their pregnancies. I do not believe that the State should be able to impose its views about personhood and the morality of abortion on individuals receiving critical medical care.

Dated: January 6, 2022

DocuSigned by:

/s/ Jane Doe 1

Jane Doe CR0DF69F14914D0...

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**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION**

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|---|---|---|
| JANE DOE NO. 1; JANE DOE NO. 3; WILLIAM MUDD MARTIN HASKELL, M.D.; KELLY MCKINNEY, N.P.; and WOMEN'S MED GROUP PROFESSIONAL CORPORATION,<br>Plaintiffs,<br>v.<br>ATTORNEY GENERAL OF INDIANA; COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH; THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA; THE INDIVIDUAL MEMBERS OF THE INDIANA STATE BOARD OF NURSING; and MARION COUNTY PROSECUTOR,<br>Defendants. | ) | CASE NO. 1:20-CV-3247-RLY-MJD<br>CIVIL ACTION |

**DECLARATION OF JANE DOE NO. 3
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

JANE DOE NO. 3 hereby declares under penalty of perjury that the following statements are true and correct:

1. I am a plaintiff in this case, and I provide the following information based on my personal knowledge.

**My Background and Beliefs**

2. I am an Indiana resident.

3. I currently work as a manufacturing operator.

4. My religious identity is very important to me. I have identified as a Baptist my entire life. I was baptized twice, once as a baby and again at age 17.

5. I practice my faith by trying to act in accordance with my religious beliefs every day and behaving in a way that feels religiously and morally sound. In addition, I read passages from the Bible and seek out interpretations of passages that interest me.

6. As a matter of religious conviction, I believe that a developing embryo or fetus is not a person until birth. I hold this religious belief based on my understanding of how a pregnancy develops in the womb and based on my reading of scripture. For instance, Genesis 2:7 states that, after God formed man, He "breathed into his nostrils the breath of life and it was then that

the man became a living being." I have interpreted this as meaning that life begins at the first breath, following birth.

7. As a matter of religious conviction, I believe that burial and cremation are religious rituals reserved for people and animals with souls.

8. In addition, it is my conscientious belief that human tissue should be handled with respect. I do not believe that disposing of embryonic and fetal tissue by standard medical means such as incineration is disrespectful. In fact, I believe that disposal of embryonic and fetal tissue by incineration is both dignified and appropriate.

9. I strongly support abortion rights. To me, this means that people should have access to safe and legal abortion care.

**My Pregnancy**

10. I learned I was pregnant in late 2020. Many factors contributed to my decision to have an abortion.

11. First, I do not want to have children.

12. Second, I experienced side effects from the pregnancy including severe nausea, fatigue, and anxiety. These side effects made it impossible for me to work most days and very hard to work on other days. At the time, I was working as a cosmetologist, a job that required me to be on my feet all day.

13. Third, a few years ago, I was diagnosed with cervical intraepithelial neoplasia. The treatment for this precancerous condition left me with a short, compromised cervix. I developed complications following the procedure that required treatment in a hospital emergency department for excessive bleeding. When I later became pregnant, my gynecologist diagnosed my pregnancy as high risk because of the condition of my cervix. My gynecologist recommended cervical cerclage, a surgical procedure that involves using sutures or synthetic tape to reinforce the cervix if I wanted to continue my pregnancy. I did not want to have the procedure nor continue the pregnancy.

**My Abortion at Women's Med**

14. In December 2020, I had an aspiration abortion at the Women's Med Clinic in Indianapolis ("Women's Med"). I was approximately six weeks pregnant at the time of my abortion.

15. I chose to get my abortion at Women's Med because the wait time for an appointment was the shortest of the clinics that I called. One clinic did not have any available appointments for a month.

16. Although I had health insurance, it did not cover the abortion care I received at Women's Med, so I had to pay out of pocket. I used a credit card.

17. I had to drive more than ninety minutes each way to get to Women's Med. Because of in-person

counseling requirements imposed by State law, I had to make that trip twice in order to obtain my abortion.

18. To enter the clinic for my procedure, I had to walk past a group of aggressive, antiabortion protesters. The protesters made me feel unsafe.

19. After obtaining my abortion, I felt relieved and hopeful about my future. I do not regret my abortion.

## My Experience With the Tissue Disposition Laws

20. I learned about the Tissue Disposition Laws[1] during my counseling appointment at Women's Med, which took place three days before my abortion procedure.

21. I remember going over the informed consent materials during the counseling appointment with a healthcare provider at Women's Med. The materials included a form published by the Indiana Department of Health titled Disposition of Aborted Fetuses Certification (the "Form").

22. Looking at the Form and hearing about the tissue disposition requirements stopped me in my tracks. I found them to be bizarre, disturbing, and gross. In particular, I felt that the State was compelling me to certify that my abortion would end the life of a

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[1] I am referring to the laws codified at Ind. Code §§ 16-21-11-1 to 16-21-11-6; 16-34-2- 1. 1 (a)(2)(H)-(J); 16-34-2-1.1(a)(3)(A); 16-34-2-6(b)-(c); 16-34-3-1 to 16-34-3-6; 16-41-16-4(d); 16-41-16-5; 410 Ind. Admin. Code 35-1-1 to 35-2-1.

person, a message that I believe to be false and intentionally stigmatizing. I felt angry that the State was trying to make me feel that I was ending the life of a person when I knew that I was not.

23. I felt that, by requiring me to have the tissue from my abortion buried or cremated, the State was imposing on me religious views based on a version of Christianity that I don't agree with – in particular, the view that life begins at conception and that abortion ends a human life. It felt to me like the State was prioritizing its own religious views over my religious views and turning a medical procedure into an affirmation of religious principles. This made me deeply uncomfortable.

24. The Tissue Disposition Laws require me to act in violation of my religious and conscientious beliefs by burying or cremating the tissue from my abortion. As noted above, I believe as a matter of religious conviction that life begins at birth and that burial and cremation should be reserved for people and animals with souls. It would violate my religious beliefs to have to treat tissue from my abortion as if it were a deceased person. Instead, I believe that the tissue should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means, like incineration.

25. Taking the tissue from my abortion home was not a viable option for me. In fact, I was shocked that taking the tissue home was presented as a possibility. I felt that it would be dangerous and impractical

for me to take tissue home. I did not know the proper way to dispose of untreated human tissue and was concerned about disposing of it an unsanitary way. I thought that having to be responsible for the tissue was strange and disturbing. In addition, I felt that having to walk past the crowd of anti-abortion protesters while carrying the untreated tissue would be shameful and insulting to me.

26. I also felt that the State was treating abortion differently from other medical procedures. A patient obtaining any other kind of medical procedure where human tissue is removed, like an appendectomy, would not be forced to choose between authorizing the healthcare provider to treat the tissue like a deceased person or bearing all of the risk and expense of disposition on their own.

27. Because I did not have the expertise or resources needed to dispose of the tissue on my own, I chose the option on the Form that would allow Women's Med to arrange for disposition by "burial/cremation."

28. At my request, Women's Med is storing the tissue from my abortion while this lawsuit is pending. A judgment allowing me to direct Women's Med to dispose of the tissue through standard medical means would affirm my right to make decisions about my

pregnancy that are in alignment with my religious and conscientious beliefs.

Dated: 1/6/2022

DocuSigned by:

/s/ Jane Doe No. 3
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Jane Doe No. 3