No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF INDIANA, IN HIS OFFICIAL CAPACITY; *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Doe Plaintiffs believe as a matter of religious and moral conviction that an embryo should not be treated like a person and that the embryonic tissue from their lawful abortion procedures should be disposed of according to standard medical protocols. But Indiana law prohibits standard medical disposition of such tissue, instead requiring abortion patients to consent to its burial or cremation or to dispose of it on their own, outside the healthcare system. After the district court held that the challenged laws violate the Free Exercise and Free Speech Clauses, the Seventh Circuit summarily reversed, without affording Plaintiffs the opportunity to file a merits brief and without applying the First Amendment standards set forth in this Court's precedents to the facts of the case.

The question presented is: Whether, following *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), this Court's First Amendment precedents continue to apply to free exercise and free speech claims concerning abortion-related activities and expression.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners were appellees in the court of appeals. They are: 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. Women's Med Group Professional Corporation has no stock, and no parent or publicly held companies have any ownership interest in it.

Respondents were appellees in the court of appeals. They are the: Attorney General of Indiana; Commissioner of the Indiana State Department of Health; Individual Members of the Medical Licensing Board of Indiana; Individual Members of the Indiana State Board of Nursing; and the Marion County Prosecutor.

RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

> *Jane Doe No. 1, et al. v. Attorney General of Indiana, et al.*, No. 20-cv-03247. Judgment entered September 26, 2022.
>
> *Jane Doe No. 1, et al. v. Attorney General of Indiana, et al.*, No. 20-cv-03247. Judgment entered November 2, 2022.

United States Court of Appeals (7th Cir.):

> *Jane Doe No. 1, et al. v. Attorney General of Indiana*, *et al.*, No. 22-2748. Judgment entered November 28, 2022.

RELATED PROCEEDINGS—Continued

Jane Doe No. 1, et al. v. Attorney General of Indiana, et al., No. 22-2748. Judgment entered December 28, 2022.

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OPINIONS BELOW

The Seventh Circuit's decision is reported at 54 F.4th 518 (7th Cir. 2022), and reprinted in the Appendix ("App.") at App. 1–6. The district court's decision denying Respondents' motion for stay pending appeal has not yet been published, but is reprinted at App. 53–61. The district court's decision entering judgment on the parties' cross-motions for summary judgment has not yet been published, but is reported at 2022 WL 5237133, and reprinted at App. 9–50.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment on November 28, 2022, and denied Petitioners' petition for rehearing en banc on December 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

The challenged laws appear at App. 63–78.

INTRODUCTION

There is no dispute that the Doe Plaintiffs sincerely believe as a matter of religious and moral conviction that: 1) an embryo is not a person, and 2) burial or cremation of the embryonic tissue from their abortion procedures would signify that it is. *See*, *e.g.*, App. 14 ("Doe 3 . . . understands the Bible to indicate that 'life begins at the first breath, following birth' . . . . [She] believes that 'burial and cremation are religious rituals reserved for people and animals with souls.'"); App. 14 ("[Doe 3's] religious beliefs . . . require 'that the tissue [from her abortion] should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means.'").

Until 2016, Indiana healthcare facilities disposed of all human tissue from medical procedures according to standard medical protocols. *See* Pub. L. 213-2016, § 25, 2016 Ind. Acts 3118. That year, Indiana banned use of those protocols for embryonic and fetal tissue from abortion and miscarriage procedures, and began requiring abortion and miscarriage patients either to consent in writing to burial or cremation of their tissue or to assume responsibility for its transportation and disposition without the help of a healthcare provider despite its biohazardous nature. *See* Pub. L. 213-2016, 2016 Ind. Acts 3099 (codified at Ind. Code §§ 16-34-3-4, 16-21-11-6) ("2016 Tissue Disposition Requirements"). In doing so, Indiana unjustifiably burdened the religious exercise and expressive conduct of individuals, including the Doe Plaintiffs, who believe that the rituals of burial and cremation are appropriate for people,

and that an embryo or fetus should not be treated like a person. *See* App. 35 ("In [Indiana's] view, giving funerary rites to fetal tissue 'acknowledge[s] the human dignity of the fetus.'") (citing Defs.' Reply Br. at 4).

In 2019, this Court held that the 2016 Tissue Disposition Requirements met rational basis review, but expressly declined to consider whether they violated any fundamental rights. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The following year, Indiana enacted additional Tissue Disposition Requirements, which apply rules that govern the disposition of deceased people's remains in Indiana to tissue from abortion procedures. Pub. L. 77-2020, 2020 Ind. Acts 465 (codified at Ind. Code §§ 16-34-2-1.1(a)(2)(I)-(J), 16-34-3-2(a)-(b), (e), 16-34-3-4(b)-(e)).

In a careful and thorough opinion based on undisputed record evidence, the district court correctly held that the Tissue Disposition Requirements violate the Free Exercise Clause of the First Amendment because they burden the religious practice of people like the Doe Plaintiffs who believe that an embryo or fetus should not be treated like a person. App. 29–30. Likewise, the district court correctly held that the Tissue Disposition Requirements violate the Free Speech Clause of the First Amendment in two ways: by compelling Plaintiffs and those who share their convictions to affirm a contrary message about when life begins, App. 38–39, and by impeding them from expressing their own message because of its content, App. 33–35. *See* App. 35 ("There can be no question that giving or

refusing to give funerary rites inherently conveys a message.").

As the district court recognized, although *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2283–84 (2022), permits states to ban abortion in most circumstances, it does not permit states to coerce religious exercise or speech concerning abortion. *See* App. 38–39. This Court's First Amendment precedents continue to protect people's ability to think and speak freely on matters of conscience, *see infra* at 22–23, and *Dobbs* itself acknowledged that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views." 142 S. Ct. at 2240.

On November 28, 2022, in a cursory opinion, the Seventh Circuit summarily reversed the district court's permanent injunction against the Tissue Disposition Requirements. *See* App. 49. Remarkably, it did so in response to Indiana's motion to stay the injunction pending appeal, before Plaintiffs filed their merits brief, and without the benefit of oral argument on the complex constitutional issues under review. The court of appeals erroneously presumed that *Box* controls the outcome of the case, even though Plaintiffs here assert—and the district court held—that the Tissue Disposition Requirements violate fundamental First Amendment rights. *See* App. 5–6.

Plenary review by this Court is warranted because the Seventh Circuit's slipshod, deeply flawed decision signals that the Constitution's long-cherished protections for free exercise and free expression rise or fall

with a government's approval of the beliefs or messages at stake. This violates eighty years of this Court's precedent. *See*, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."). Alternatively, this Court should grant the petition, vacate the Seventh Circuit's judgment, and remand to the court of appeals for reconsideration of the complex First Amendment questions at issue following full briefing on the merits.

STATEMENT OF THE CASE

A. Overview

Indiana burdens the religious and moral convictions and free expression of individuals like the Doe Plaintiffs, who sincerely believe that an embryo should not be treated like a person, by prohibiting their healthcare providers from disposing of embryonic or fetal tissue from abortion procedures according to standard medical protocols. As a result, the Doe Plaintiffs faced a Hobson's choice: provide written consent to burial or cremation of their tissue in violation of their beliefs or take custody of the tissue and attempt to dispose of it safely at their own expense. Instead, they joined their healthcare providers in filing this lawsuit to vindicate their rights and the rights of similarly

situated patients and providers under the Free Exercise and Free Speech Clauses of the First Amendment.

Based on undisputed record evidence, the district court determined that the Tissue Disposition Requirements violate the Free Exercise and Free Speech Clauses of the First Amendment and are therefore unenforceable against anyone. App. 9–50. In a cursory opinion and without full briefing on the merits, the Seventh Circuit summarily reversed the district court and remanded the case with instructions to dismiss with prejudice. App. 1–6.

B. Views About Personhood Vary Widely and Are Deeply Influenced by Religious and Moral Convictions.

Whether an embryo or fetus is a person—or otherwise warrants special status—is a deeply contested religious and philosophical question that is closely tied to religious teachings and beliefs about the morality of abortion. App. to Pls.' Mem. of Law in Supp. of Mot. for Summ. J. (Dist. Ct. ECF No. 77-1) ("MSJ App.") 48–49, 95–96. For example, Jewish law defines personhood as beginning at birth with the first breath, and 70% of Jews support legal access to abortion in all or most cases. MSJ App. 96. Conversely, White evangelicals generally believe that personhood begins in the early stages of pregnancy and oppose legal abortion. *See* MSJ App. 98–99. Similarly, burial and cremation are rituals associated with deceased persons and often

reflect people's religious or spiritual beliefs about death. MSJ App. 91–93, 100–02, 158–59.

C. The Tissue Disposition Requirements

1. Background

In contemporary medicine, the standard method for treating and disposing of human tissue is incineration. MSJ App. 54, 84. Indiana law also permits human tissue to be treated by steam sterilization, chemical disinfection, thermal inactivation, and irradiation. Ind. Code § 16-41-16-3. Until 2016, Indiana permitted embryonic and fetal tissue from an abortion procedure to be treated and disposed of like all other human tissue from a medical procedure. *See* Pub. L. 213-2016, § 25, 2016 Ind. Acts 3118. In 2014, Indiana passed a law giving miscarriage patients the right to arrange for burial or cremation following a pregnancy loss at any gestational age. Pub. L. 127-2014, 2014 Ind. Acts 1472. The following year, the State extended an analogous right to abortion patients. Pub. L. 113-2015, 2015 Ind. Acts 829. It directed the Indiana State Department of Health to adopt rules "specifying the disposal methods to be used by abortion clinics and healthcare facilities to dispose of aborted fetuses." *Id.* § 4, 2015 Ind. Acts at 830. The adopted rules permitted such facilities to utilize "incineration as authorized for infectious and pathological waste" to treat and dispose of embryonic and fetal tissue. 410 Ind. Admin. Code 35-1-3 (2015). Patients who believed as a matter of religious or moral conviction that this is the most appropriate way to

dispose of embryonic and fetal tissue could rely on their healthcare providers to effectuate their wishes without encountering logistical burdens or additional costs.

2. 2016 Enactments

In 2016, Indiana enacted the first Tissue Disposition Requirements. Pub. L. 213-2016, 2016 Ind. Acts 3099 (codified at Ind. Code §§ 16-34-3-4, 16-21-11-6). The laws require "an abortion clinic or healthcare facility" "having possession of an aborted fetus"[1] to dispose of it through cremation or interment. Ind. Code § 16-34-3-4(a). They impose the same requirement on healthcare facilities possessing "a miscarried fetus." Ind. Code § 16-21-11-6(b). Indiana defines "cremation" as "disposition by a crematory authority," 410 Ind. Admin. Code 35-1-3, which is a "legal entity or the entity's authorized representative . . . registered . . . to operate a crematory and to perform cremations," Ind. Code § 23-14-31-12. Indiana defines "interment" as "any lawful disposition in the earth of the remains of a deceased individual," Ind. Code § 23-14-33-22, which for

[1] In the early stages of pregnancy, the developing entity is known as an "embryo." MSJ App. 47–48. The embryo becomes a "fetus" when organ systems begin to emerge in rudimentary form, typically around ten weeks' gestation as measured from the first day of a pregnant person's last menstrual period ("lmp"). MSJ App. 47–48. Nonetheless, the Tissue Disposition Requirements define "fetus" as an "unborn child, irrespective of gestational age." Ind. Code § 16-18-2-128.7. In 2020, nearly 70% of Indiana abortions occurred at or before eight weeks lmp, during the embryonic stage of pregnancy. MSJ App. 186.

abortion patients is limited to disposition in "an established cemetery" and for others includes a mausoleum, garden crypt, or columbarium. 410 Ind. Admin. Code 35-2-1(a)(1); *see* Ind. Code § 23-14-54-1. Consequently, Indiana healthcare facilities can no longer arrange for medical incineration of tissue from abortion or miscarriage procedures.

In 2017, a district court in the Southern District of Indiana enjoined enforcement of the 2016 Tissue Disposition Requirements before they took effect, holding that they lacked a rational basis. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 870–72 (S.D. Ind. 2017). The Seventh Circuit affirmed the injunction. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018). This Court subsequently reversed on the limited ground that the laws satisfied rational basis review. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The 2016 Tissue Disposition Requirements took effect following this Court's decision in September 2019. *Id.*

3. 2020 Enactments

In 2020, Indiana enacted additional Tissue Disposition Requirements that apply rules that govern disposition of deceased people's remains in Indiana to embryonic and fetal tissue from abortion procedures.[2]

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[2] *See*, *e.g.*, Ind. Code § 16-34-3-4(a) ("The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an

Pub. L. 77-2020, 2020 Ind. Acts 465 (codified at Ind. Code §§ 16-34-2-1.1(a)(2)(I)-(J), 16-34-3-2(a)-(b), (e), 16-34-3-4(b)-(e)). That year, Indiana also adopted disclosure and certification mandates related to the Tissue Disposition Requirements. *See* Pub. L. 77-2020, 2020 Ind. Acts 465 (codified in relevant part at Ind. Code § 16-34-2-1.1(a)(2)(H)-(J)). Under these mandates, patients must, among other things, certify in writing using a prescribed form their "decision for final disposition of the aborted fetus by cremation or interment." Ind. Code § 16-34-3-2(b)-(e).[3]

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aborted fetus . . . ."); Ind. Code § 16-34-3-4(g) (incorporating by reference Ind. Code §§ 23-14-31-26, 23-14-55-2, 25-15-9-18, 29-2-19-17); Ind. Code § 23-14-31-26 (prescribing the circumstances in which a person may authorize cremation of a "decedent"); Ind. Code § 23-14-55-2 (prescribing the authority of a cemetery owner to "inter, entomb, or inurn the body or cremated remains of a deceased human"); Ind. Code § 25-15-9-18 (prescribing the priority of people who "have the authority to designate the manner, type, and selection of the final disposition of human remains, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death"); Ind. Code § 29-2-19-17 (prescribing who has "[t]he right to control the disposition of a decedent's body, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death").

[3] The form itself lists three options: (i) "Abortion clinic/health care facility will arrange for burial/cremation of the aborted fetus with a crematorium or funeral home"; (ii) "I am choosing a method or location for burial/cremation of the aborted fetus that is different than the abortion clinic/health care facility arrangements and will be responsible for the costs of the burial or cremation, if any"; and (iii) "(For medication abortions only) I am planning to return the aborted fetus to the abortion clinic/health care facility, which will arrange for burial/cremation of the aborted fetus with a crematorium or funeral home." MSJ App. 47.

D. Proceedings Below

Women's Med Group Professional Corporation ("Women's Med") operates a licensed abortion clinic (the "Clinic") in Indianapolis, Indiana. MSJ App. 41. Dr. William Mudd Martin Haskell is its Medical Director, MSJ App. 40–41, and Kelly McKinney is a nurse practitioner there, MSJ App. 81. Jane Doe No. 1 and Jane Doe No. 3 each had an aspiration abortion at the Clinic in December 2020, when they were six weeks pregnant. MSJ App. 11, 17.

Jane Doe No. 1 believes as a matter of moral conviction that an embryo is not a person and should not be treated like one. MSJ App. 12. Jane Doe No. 3 shares this belief as a matter of religious conviction. MSJ App. 16, 18–19. Without this lawsuit, the Tissue Disposition Requirements would have forced them to authorize the Clinic to treat their embryonic tissue like the remains of a deceased person contrary to their deeply held beliefs unless they were willing to take possession of the biohazardous tissue and dispose of it at their own expense. MSJ App. 12–13, 16, 18–19. Neither Doe Plaintiff was willing or able to dispose of her embryonic tissue on her own because neither knew how to transport and dispose of untreated human tissue safely. MSJ App. 12–13, 19. At the Doe Plaintiffs' request, Women's Med stored the tissue from their abortions at the Clinic during the proceedings in the district court. MSJ App. 20; *see* MSJ App. 13.

On September 26, 2022, the district court granted summary judgment to Plaintiffs on their free exercise

and free speech claims, denied Indiana's motion for summary judgment on those claims, and permanently enjoined the Tissue Disposition Requirements. App. 9-50. On September 30, 2022, the State filed a Notice of Appeal (Dist. Ct. ECF No. 105) and moved the district court for a stay pending appeal. Defs.' Mot. for Stay Pending Appeal (Dist. Ct. ECF No. 103). On November 2, 2022, the district court denied the motion. App. 53–61. A week later, on November 9, 2022, the State filed its opening brief on the merits in the Seventh Circuit. Appellants' Br. (7th Cir. ECF No. 12). The next day, the State moved the Seventh Circuit for a stay pending appeal. Appellants' Mot. for Stay Pending Appeal (7th Cir. ECF No. 14-1) ("Indiana's Stay Mot.").

After the district court denied the State's motion for a stay pending appeal, and before the State moved the Seventh Circuit for a stay pending appeal, Women's Med arranged for the embryonic tissue from the Doe Plaintiffs' abortions to be incinerated, as authorized by the district court's injunction.

On November 28, 2022, before Plaintiffs had the opportunity to file their merits brief in the court of appeals, the motion panel found "the outcome controlled by" *Box* and "dispense[d] with further briefing and reverse[d] summarily" the district court's order. App. 2. Notwithstanding the Hobson's choice that the Tissue Disposition Requirements put to the Doe Plaintiffs, the panel held that "Indiana does not require any woman who has obtained an abortion to violate any belief, religious or secular" because the directive to cremate or bury "applies only to hospitals and clinics." App. 3.

As to whether the Tissue Disposition Requirements impermissibly burden free expression, an issue to which the district court devoted pages of thoughtful analysis, the panel simply declared that Indiana does not "require any woman to speak or engage in expressive conduct," without even mentioning—much less applying—the applicable constitutional standards. App. 4.

On December 12, 2022, Plaintiffs filed a Petition for Rehearing En Banc. 7th Cir. ECF No. 22. On December 28, 2022, the Seventh Circuit denied the petition for rehearing. App. 62.

REASONS FOR GRANTING CERTIORARI

In 2019, this Court granted certiorari in a case considering the 2016 Tissue Disposition Requirements under the "deferential test" of "ordinary rational basis review." *Box*, 139 S. Ct. at 1781–82 (noting that the standard puts "'the burden . . . on the one attacking the legislative arrangement to negative every *conceivable* basis which *might* support it'" (quoting *Armour v. Indianapolis*, 566 U.S. 673, 685 (2012))). Consequently, this Court had no opportunity to examine whether the requirements violate any fundamental right. *Id.* at 1782. After *Box*, Indiana expanded the Tissue Disposition Requirements, applying rules for the disposition of deceased people's remains in Indiana to tissue from abortion procedures. *Supra* at 3.

This Court can and should invalidate the Tissue Disposition Requirements now because they toss aside protections under its precedents for our most cherished constitutional rights—religious liberty and free expression. Importantly, leaving the Seventh Circuit's decision intact would fuel a national trend to enact similar laws because the decision purports to be controlled by *Box*.[4] App. 2. Leaving the Seventh Circuit's decision intact would also create confusion about the proper application of First Amendment standards in that circuit. This is because the decision turns this Court's free exercise and free speech precedents on their head by: 1) questioning the logic of the Doe

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[4] *See* La. Stat. Ann. § 40:1061.25 (2022) (requiring an abortion provider to ensure that embryonic and fetal tissue is disposed of by cremation or interment); Ariz. Rev. Stat. Ann. § 36-449.03(F)(1) (2021) (requiring final disposition of tissue from a surgical abortion to be by cremation or interment); Tenn. Code Ann. § 39-15-219(b)(1) (2021) (same); Ohio Rev. Code Ann. § 3726.02(A) (2021) (same; preliminarily enjoined by *Planned Parenthood Southwest Ohio Region v. Ohio Dep't of Health*, No. A 2100870 (Ohio Ct. of Common Pleas Jan. 31, 2022)); Utah Code Ann. § 26-21-33(2)(a) (2020) (requiring an abortion provider to dispose of embryonic and fetal tissue by cremation or interment); Tex. Health & Safety Code Ann. § 697.004(a) (2017) (requiring an abortion provider to dispose of embryonic and fetal tissue by interment, cremation, incineration followed by interment, or steam disinfection followed by interment); Ga. Code Ann. § 16-12-141.1 (2017) (requiring an abortion provider to dispose of embryonic and fetal tissue by cremation, interment, or other manner approved by the commissioner of public health); N.C. Gen. Stat. § 130A-131.10 (2015) (requiring abortion providers or laboratories to dispose of fetal tissue by cremation or interment); Minn. Stat. § 145.1621, subd. 4 (1987) (requiring abortion providers and laboratories to dispose of fetal tissue by cremation, interment, or in a manner directed by the commissioner of health).

Plaintiffs' sincerely held beliefs, 2) erecting a requirement that a challenged law categorically prevent a free exercise plaintiff from practicing their faith to infringe religious liberty, and 3) resolving the complex issue of whether the Tissue Disposition Requirements compel or impede expressive conduct without reference to the applicable First Amendment standard. This Court's intervention is needed to secure the Constitution's protections for religious liberty and free expression concerning beliefs disfavored by the government. At a minimum, this Court should grant the petition, vacate the Seventh Circuit's judgment, and remand the case for reconsideration following full briefing on the merits.

I. The Seventh Circuit's Cursory Decision Invites States to Undermine Religious Liberty and Free Speech Rights.

A. The Seventh Circuit's Decision Interrogates the Sincerely Held Beliefs of Free Exercise Plaintiffs and Ignores Burdens on Religious Conduct in Violation of This Court's Free Exercise Precedent.

The Seventh Circuit's decision jettisons the cornerstone of this Court's free exercise jurisprudence by disputing the Doe Plaintiffs' sincerely held beliefs. *See*, *e.g.*, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). In addition to impermissibly drawing lines between "valid" and "invalid" religious tenets, the Seventh Circuit creates from whole cloth a threshold

requirement that a challenged law categorically prevent a free exercise plaintiff from practicing their faith. This too is fundamentally at odds with this Court's free exercise holdings. *See*, *e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021).

The Free Exercise Clause protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life" through their actions. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). Sincerely held moral beliefs about existential questions are entitled to the same protection as religious beliefs under the Free Exercise Clause. *See Welsh v. United States*, 398 U.S. 333, 339–40 (1970).

This Court has repeatedly held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others . . . to merit . . . protection." *Thomas*, 450 U.S. at 714; *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of those creeds."). In *Fulton*, for example, Catholic Social Services ("CSS") asserted a sincere belief that certifying same-sex couples as foster parents required it to endorse same-sex relationships contrary to its faith. 141 S. Ct. at 1876. This Court rejected the defendant's contention that certification was merely an assessment that a couple met statutory criteria and not an endorsement of a couple's relationship. Instead, the Court deferred to CSS's belief that "certification is tantamount to endorsement" based on longstanding precedent. *Id.* (citing *Thomas*, 450 U.S. at 714).

Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*, closely held companies asserted a sincere belief that providing insurance coverage to their employees for contraceptives was sufficiently connected to destroying an embryo that it violated their faith. 573 U.S. 682, 723–24 (2014). This Court accepted the companies' belief at face value and refused to answer the "religious and philosophical question" of when "it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* at 724. As this Court explained, "'[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.'" *Id.* (quoting *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990)).

Yet this is exactly what the Seventh Circuit did in this case. Indiana has not disputed, and the district court rightly found, that the Doe Plaintiffs sincerely believe as a matter of religious or moral conviction that: 1) an embryo is not a person, and 2) consenting to burial or cremation of their embryonic tissue would signify that it is. *See*, *e.g.*, App. 14 ("Doe 3 . . . understands the Bible to indicate that 'life begins at the first breath, following birth' . . . . [She] believes that 'burial and cremation are religious rituals reserved for people and animals with souls.'"); App. 14 ("[Doe 3's] religious beliefs . . . require 'that the tissue [from her abortion] should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means.'"); App. 14 ("Doe 1 . . . holds a

moral . . . belief that fetal tissue is not the remains of a person."); App. 15 ("Under [Doe 1's] beliefs, 'burial and cremation are religious rituals that signal the death of a person' and are not appropriate for a fetus . . . . She 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.'").[5] The Seventh Circuit repudiates this, disclaiming that the Tissue Disposition Requirements "imply anything about the appropriate characterization of a fetus" because "[d]ogs, cats, and other pets may be cremated or buried."[6] App. 3. It also disclaims that abortion patients' "religious tenets" can include "the way medical providers" as opposed to the patients themselves "handle fetal remains." App. 4. This flies in the face of *Burwell*, where this Court balked at resolving the religious and philosophical question of when facilitating an immoral act by another is itself immoral and accepted a sincerely held belief that it is. 573 U.S. at 724–25 (citing *Smith*, 494 U.S. at 887; *Hernandez*, 490 U.S. at 699; *Thomas*, 450 U.S. at 715).

Additionally, this Court has established that free exercise plaintiffs need show only that a law *burdens*

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[5] The Doe Plaintiffs' uncontested testimony belies the Seventh Circuit's careless determination that "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." App. 3.

[6] Notably, Indiana neither mandates nor prohibits burial or cremation of pets. Instead, it allows pet owners to choose a disposition method that accords with their view of a pet's spiritual status.

their religious practice to demonstrate it infringes their religious liberty; they need not show that a law *prohibits* their religious practice or makes it impossible. *See*, *e.g.*, *Fulton*, 141 S. Ct. at 1876 ("Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible."). The Court has recognized a variety of such burdens. In *Burwell*, it treated the Hobson's choice between facilitating what the companies believed to be immoral conduct by others and bearing the economic costs of dropping insurance coverage altogether as an infringement on the companies' religious liberty. 573 U.S. at 720. In *Fulton*, it held that "putting [CSS] to the choice of curtailing its mission or approving relationships inconsistent with its beliefs" burdened its religious exercise and thus presented a free exercise question. 141 S. Ct. at 1876. And in *Kennedy*, this Court held that a policy that prevented a football coach from praying at midfield after games—even though it allowed him to pray in other nearby locations—burdened his religious conduct and thus infringed his free exercise rights. 142 S. Ct. at 2416–18, 2422.

In defiance of these holdings, the Seventh Circuit dismissed the Doe Plaintiffs' free exercise claim because "Indiana does not require any [abortion patient] to violate any belief"; specifically, "women may choose to take custody of the remains and dispose of them as they please." App. 1–3. In fact, and as the district court held, the Tissue Disposition Requirements burden the Doe Plaintiffs' religious conduct in a manner that infringes their religious liberty under this Court's

precedents. Until 2016, patients who believed that the embryonic or fetal tissue from their abortion procedures should be disposed of like human tissue from any other medical procedure could rely on their medical providers to effectuate their wishes. *Supra* at 2. For these adherents, the Tissue Disposition Requirements impose an unjust choice. They can authorize in writing the burial or cremation of their tissue contrary to their deeply held beliefs. *See*, *e.g.*, App. 89–90 ("I felt that the State was compelling me to certify that my abortion would end the life of a person . . . . It felt to me like the State was prioritizing its own religious views over my religious views."). Or they can dispose of the tissue themselves, at their own expense, even though they lack the expertise to safely dispose of infectious human tissue in a way that honors their beliefs. App. 82–84, 90–92. Unsurprisingly, the record reflects that no patient of Plaintiff Women's Med has ever chosen to take personal custody of their tissue. MSJ App. 41–42. Such dilemmas clearly present a free exercise question under this Court's precedents. *See Fulton*, 141 S. Ct. at 1876; *Burwell*, 573 U.S. at 720.

Because the Seventh Circuit refused to acknowledge that the Tissue Disposition Requirements burden the Doe Plaintiffs' religious conduct, it never analyzed whether the Constitution permits that burden. *See Kennedy*, 142 S. Ct. at 2421–22.

The fallout of the Seventh Circuit's decision has been swift and extensive. Each day, abortion and miscarriage patients in Indiana who believe as a matter of religious conviction that an embryo or fetus is not a

person must nonetheless treat it like one simply because their government disagrees with them. *Contra Barnette*, 319 U.S. at 642. Nor are the effects of the Seventh Circuit's decision limited to Indiana. Its profound departures from this Court's free exercise precedent emboldens states in that circuit to skirt the Free Exercise Clause's protections whenever they disapprove of a religious practice. Under the Seventh Circuit's decision, a state could *bar* healthcare facilities from burying or cremating embryonic or fetal tissue, even at the religiously motivated request of an abortion patient, in a misguided attempt to avoid stigmatizing any abortion patient. After all, "the way medical providers handle fetal remains" cannot infringe patients' religious liberty, App. 3–4, and the state could assure the constitutionality of the law by permitting the patients to take responsibility for their tissue's transportation and disposition, App. 1–2.

The Seventh Circuit's indifference to this Court's religious liberty holdings also invites states in that circuit to enact laws unrelated to tissue disposition that burden religious conduct for no reason other than the state dislikes it. Under the Seventh Circuit's decision, a state could require medical providers to document that they have informed certain terminally ill patients of options for medical aid in dying despite the providers' religious or moral objections to suicide. The decision enables a court to uphold the requirement if it disagrees that a *patient's* actions to end their life could burden a provider's convictions. The Seventh Circuit's decision also enables a court to uphold the

requirement if the requirement permits an alternative, however impracticable, such as allowing providers to transfer to a practice serving non-terminally ill patients no matter the providers' dedication to terminally ill patients.

That is, under the Seventh Circuit's decision, a state can encumber free exercise for the sake of encumbering free exercise without even having to defend a law as neutral and generally applicable. *See Kennedy*, 142 S. Ct. at 2421–22. Thus, certiorari is needed in this case to preserve the Free Exercise Clause's protections for all.

B. The Seventh Circuit's Decision Withdraws Protection from Expression that States Deem Offensive in Violation of This Court's Free Speech Precedent.

In a careful and detailed opinion befitting the importance and complexity of the issues before it, the district court held that the Tissue Disposition Requirements violate the Free Speech Clause by: 1) compelling abortion patients and providers to express Indiana's message that life begins at conception through burial or cremation of embryonic and fetal tissue, and 2) suppressing their ability to express a contrary message through disposition of that tissue like all other human tissue. *See* App. 32–35. By contrast, the Seventh Circuit's decision rebuffs this holding in a lone sentence lacking any citations. App. 4–5. Not only does this insult the diligence of the district court, but it also

devalues this Court's protections for the freedom of expression and disregards controlling precedent.

"The right to speak and . . . right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637); *see Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."). This Court has established that "[c]ompelling individuals to mouth support for views they find objectionable" on "controversial public issues" should be "universally condemned" because it is "demeaning" and defies a "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018). In *Wooley*, for example, the Court held that requiring state residents to display "Live Free or Die" on their license plates impinged on the Free Speech Clause because the motto offended some residents' moral, religious, or political ideals. 430 U.S. at 707, 715.

Conduct intended to convey a message likely to be understood by those who view it is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In *Tinker v. Des Moines Independent Community School District*, for instance, this Court held that students wearing black armbands

to school during the height of public tensions over the Vietnam War successfully conveyed an objection to the U.S.'s participation in the war such that the Free Speech Clause protected their conduct. 393 U.S. 503, 510–11, 510 n.4, 514 (1969).

Over the past century, this Court has recognized a wide array of expressive conduct protected by the Free Speech Clause, prioritizing the purpose and context of the conduct over particular categories of behavior. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (marching in a parade); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (nude dancing); *Johnson*, 491 U.S. at 405–06 (burning an American flag during a political and economic protest); *Spence*, 418 U.S. at 409–11 (displaying an upside-down American flag affixed with a peace symbol during controversial foreign and domestic events); *Schacht v. United States*, 398 U.S. 58, 62–63 (1970) (wearing a military uniform in a play); *Tinker*, 393 U.S. at 505–06 (1969) (wearing a black armband to school during a war); *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (opinion of Fortas, J., announcing the judgment of the Court) (participating in a silent sit-in at a public library); *Barnette*, 319 U.S. at 633–34 (saluting the American flag); *Stromberg v. California*, 283 U.S. 359, 360–62, 369–70 (1931) (flying a red flag resembling that of the Soviet Union at summer camp).

In *Barnette*, this Court's compelled speech and expressive conduct doctrines famously combined to prohibit a state from requiring public school students to salute the American flag. 319 U.S. at 633, 642; *see*

Dobbs, 142 S. Ct. at 2263 (highlighting the Court's "recognition that its earlier decision [to the contrary] had been seriously wrong"). The Court held that the mandatory salute infringed on the Free Speech Clause because it amounted to a "ceremony of assent" to political beliefs that at least some students rejected. *Barnette*, 319 U.S. at 634, 640–42. The Court was concerned, more broadly, that "the action of the local authorities in compelling the flag salute . . . invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *Id.* at 642.

As the district court recognized, *see* App. 33–34, like requiring students to salute the American flag to attend public school, requiring abortion patients and providers to facilitate the burial or cremation of the patients' embryonic and fetal tissue unless the patients dispose of it themselves compels them to affirm beliefs that are unacceptable to them. *Barnette*, 319 U.S. at 630, 633, 637. The Tissue Disposition Requirements satisfy both criteria for expressive conduct because Indiana intended to enlist abortion patients and providers to convey a message likely to be understood by those who view it. *See Johnson*, 491 U.S. at 404.

First, Indiana has all but admitted that the object of the requirements is to ensure that abortion patients and providers acknowledge that: 1) an embryo or fetus is a person, and 2) embryonic and fetal tissue from abortion procedures—unlike other human tissue—therefore requires funerary rites associated with deceased people to be respectfully disposed of. *See*, *e.g.*,

App. 35 ("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.'") (citing Defs.' Br. at 16); App. 35 ("In [Indiana's] view, giving funerary rites to fetal tissue 'acknowledge[s] the human dignity of the fetus.'") (citing Defs.' Reply Br. at 4); Indiana's Stay Mot. at 15–16 (claiming a state interest in "reducing dismay at the [previous] lack of respectful treatment of fetal remains"); *see Johnson*, 491 U.S. at 404.

Second, because burial and cremation are rituals generally associated with deceased persons, *see* App. 33–34, requiring them for embryonic and fetal tissue in fact conveys the deeply controversial message that embryos and fetuses have the same moral standing as persons—or at the very least, have a spiritual significance different from other kinds of human tissue, App. 34–35; *see Johnson*, 491 U.S. at 404. This message is reinforced by the Tissue Disposition Requirements' application of rules for the disposition of deceased people's remains in Indiana to tissue from abortion procedures. *Supra* at 3. The Seventh Circuit's presumption that "Indiana [does not] require any woman to . . . engage in expressive conduct" is, therefore, entirely unfounded. App. 4.

Further, the district court properly held that the Tissue Disposition Requirements prevent abortion patients and providers from engaging in expressive conduct themselves. App. 33–34. Plaintiffs "intended to convey a particular message about whether fetal tissue constitutes a person . . . through treating their fetal

tissue as medical waste" and "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." App. 34; *see Johnson*, 491 U.S. at 404.

As the district court's opinion illustrates, faithfully applying this Court's free speech precedents to Indiana's Tissue Disposition Requirements raises a host of important and complex First Amendment issues, with which the district court grappled at length. *See*, *e.g.*, App. 38–39 ("Just because the government may use its voice to espouse an idea does not mean it can compel other voices to speak its message."); App. 36–38 (considering the critical difference between Indiana's Tissue Disposition Requirements, which "draw[] lines based on message," and tissue disposition requirements that are justified by public health). By contrast, in rushing to judgment without the benefit of Plaintiffs' merits brief, and with no footing in the undisputed record of the case or any legal authority, the Seventh Circuit squarely ignores these important and complex First Amendment issues.

Certiorari is needed because the Seventh Circuit's deviation from standard operating procedures and legal norms not only enables Indiana to continue violating fundamental rights, but it also turns free speech rights on their head. That is, it transforms a message's offensiveness from a reason for protecting that message into a reason for withdrawing protection from it, leaving the government a gatekeeper for ideas and striking "[a]t the heart of the First Amendment."

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994); *accord Hustler Mag. v. Falwell*, 485 U.S. 46, 55 (1988); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring) ("States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."). Consequently, the Seventh Circuit's disregard of this Court's free speech holdings threatens to inject confusion into the jurisprudence and invites states in that circuit to unjustifiably compel or hinder free expression in infinite ways.

II. Alternatively, a GVR Order is Appropriate to Allow the Seventh Circuit to Fully Consider the Complex First Amendment Issues Underlying This Case.

As an alternative to plenary review, this Court should grant the petition for a writ of certiorari, vacate the Seventh Circuit's cursory decision, and remand this case for reconsideration of the novel and complex First Amendment issues it presents following full briefing on the merits.

This Court has read 28 U.S.C. § 2106 "to confer upon [it] a broad power to [grant certiorari, vacate the judgment below, and remand the case ("GVR")]" and noted that the "GVR order has . . . become an integral part of this Court's practice." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). In addition to enabling lower courts to consider intervening legal and factual

developments, *id.* at 167, this Court has issued GVR orders to allow lower courts to address important issues that were fairly presented, but unexamined below. *See*, *e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) ("If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue."); *Solimine v. United States*, 429 U.S. 990 (1976) (mem.) (issuing a GVR order so that the Sixth Circuit could consider a claim raised by the petitioner, but unaddressed by that court, that his convictions and sentences warranted the same treatment as the similar convictions and sentences of his co-defendant).

A GVR order is appropriate here because the Seventh Circuit rushed to judgment without the benefit of Plaintiffs' merits brief and in so doing neglected to apply the proper constitutional standards to Plaintiffs' claims. Notably, the court of appeals failed to adequately consider the novel and complex First Amendment questions at issue, including: 1) whether the Tissue Disposition Requirements burden the religious conduct of the Doe Plaintiffs and other abortion patients, *supra* at 20; 2) whether the Tissue Disposition Requirements are religiously neutral and generally applicable even though they privilege one set of beliefs about embryonic and fetal personhood while burdening others, *supra* at 22; and 3) whether the Tissue Disposition Requirements compel or hinder expressive conduct based on the message it conveys, *supra* at 22.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, the decision below should be vacated, and the case should be remanded to the Seventh Circuit to fully consider the merits of Plaintiffs' claims after giving Plaintiffs a full and fair opportunity to brief the issues to the court.

Respectfully submitted,

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