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

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, Plaintiffs, v. 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, Defendants.	)	CASE NO. 1:20-CV-3247-RLY-MJD CIVIL ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Challenged Laws, which require healthcare facilities to bury or cremate embryonic and fetal tissue from abortion and miscarriage patients regardless of the patients' wishes, violate fundamental tenets of the First and Fourteenth Amendments. These laws convey a message that spiritually significant life begins at conception, and they require abortion and miscarriage patients and their healthcare providers to amplify it through speech and expressive conduct. By equating embryonic and fetal tissue with deceased persons, the laws also imply that someone who has had an abortion is responsible for killing a person, causing many abortion patients—including the Jane Doe Plaintiffs—to experience shame, stigma, anguish, and anger. Indiana's effort to create orthodoxy on these deeply polarizing issues, which implicate the most profound aspects of religion, culture, and personal belief, is constitutionally prohibited. Plaintiffs respectfully move for summary judgment on their claims that the Challenged Laws violate the rights to freedom of speech, religious liberty, and religious neutrality protected by the First Amendment, and the rights to abortion and equal protection of the laws guaranteed by the Fourteenth Amendment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. PLAINTIFFS

Women's Med Group Professional Corporation operates a licensed abortion clinic in Indianapolis ("Women's Med"). Haskell Decl. ¶ 6. Dr. William Mudd Martin Haskell is its Medical Director, *id.* ¶ 3, and Kelly McKinney is a nurse practitioner who works there, McKinney Decl. ¶¶ 2-3.

Jane Doe No. 1 had an aspiration abortion at Women's Med in December 2020, when she was six weeks' pregnant. Doe 1 Decl. ¶ 10. Indiana laws requiring Women's Med to bury or cremate the embryonic tissue from Ms. Doe No. 1's abortion—unless Ms. Doe No. 1 was willing

to dispose of it on her own at her own expense—led her to feel shame and anguish because they implied that the embryo had been a person and she was a bad mother. *Id.* ¶¶ 12-14, 17. These feelings were exacerbated by the requirement that she complete and execute a certification form containing misleading information about her disposition options. *Id.* ¶¶ 12, 15-17. Jane Doe No. 3 likewise had an aspiration abortion at Women's Med in December 2020, when she was six weeks' pregnant. Doe 3 Decl. ¶ 14. The tissue disposition laws made Ms. Doe No. 3 angry because they conveyed a message that her embryonic tissue should be treated like a deceased person, which is contrary to her religious beliefs. *Id.* ¶¶ 4-7, 21-24. Neither Doe Plaintiff was willing or able to transport her embryonic tissue out of the clinic and dispose of it on her own because neither knew how to transport and dispose of untreated human tissue safely. Doe 1 Decl. ¶¶16-17; Doe 3 Decl. ¶¶ 25-27.

At the Doe Plaintiffs' request, Women's Med is currently storing the tissue from their abortions. *See* Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 28. If Plaintiffs prevail in this lawsuit, Women's Med will dispose of it by standard medical means rather than burial and cremation. *See* Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 28; Haskell Decl. ¶ 11.

II. ENACTMENT OF THE CHALLENGED LAWS

A. Background

In contemporary medicine, the standard method for treating and disposing of human tissue and other infectious material is incineration. *See* Case Decl. ¶ 19; Haskell Decl. ¶ 7. 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 to be treated and disposed of like all other human tissue. *See* Pub.

L. 213-2016, §25, 2016 Ind. Acts 3118; Defs.' Combined Resps. & Objs. to Pls.' Reqs. for Admis. ("RFA Resps.") at 5 (Req. 14).

In 2014, Indiana enacted a law giving miscarriage patients the right to arrange for a burial or cremation following a pregnancy loss at any gestational age and clarified what permits and other paperwork would be necessary. 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 ("Health Department") 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. Patients who believed 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.

In 2016 and again in 2020, Indiana adopted requirements that were significantly more burdensome. *See* Pub. L. 213-2016, 2016 Ind. Acts 3099; Pub. L. 77-2020, 2020 Ind. Acts 465. Collectively, these enactments prohibit standard medical disposition of embryonic and fetal tissue by healthcare facilities, instead requiring them to cremate or inter the tissue, and make it difficult and costly for abortion and miscarriage patients to choose a disposition method that does not signify personhood. *See* Pub. L. 213-2016, 2016 Ind. Acts 3099; Pub. L. 77-2020, 2020 Ind. Acts 465; RFA Resps. at 5 (Req. 13).

As explained in more detail below, these laws have two principal components: (1) treatment and disposition requirements for tissue from abortions and miscarriages (the "Tissue Disposition Requirements"); and (2) mandatory counseling and certifications for abortion patients

(the "State-Mandated Counseling Requirements") (collectively, the "Challenged Laws"). The Challenged Laws do not regulate the disposition of tissue from in vitro fertilization ("IVF"), and no comparable requirements are imposed on patients or healthcare providers who utilize IVF.[1]

B. 2016 Enactments

Indiana enacted the first Tissue Disposition Requirements in 2016. 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" 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).

In the early stages of pregnancy, the developing entity is known as an "embryo." Maienschein Decl. ¶ 13. 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"). *Id.* Nonetheless, the Tissue Disposition Requirements define "fetus" as an "unborn child, irrespective of gestational age." Ind. Code § 16-18-2-128.7; *see* Kent Tr. at 66:2-67:16, 75:8-15. Last year, nearly 70% of Indiana abortions occurred at or before eight weeks lmp, during the embryonic stage of pregnancy. Ind. Dep't of Health, 2020 Terminated Pregnancy Report 2 (2021).

Indiana defines "cremation" as "incineration by a crematory, or incineration as authorized for infectious and pathological waste." 410 Ind. Admin. Code 35-1-3. Before the Tissue Disposition Requirements, Indiana classified "fetal tissue" as "pathological waste," a category that includes tissue, organs, body parts, and blood or body fluids that are removed during surgery. Pub.

[1] IVF is a method of assisted reproduction that combines an egg with sperm to produce an embryo in a laboratory dish. Maienschein Decl. ¶ 28. These embryos can either be discarded or implanted in a patient to produce a pregnancy. *Id.*

L. 213-2016, §25, 2016 Ind. Acts at 3118. The Tissue Disposition Requirements removed "fetal tissue" from that category. *Id.* Consequently, healthcare facilities cannot arrange for medical incineration of tissue from abortion or miscarriage procedures; they can only arrange for cremation by a crematory. The Tissue Disposition Requirements do, however, permit "simultaneous cremation," Ind. Code §§ 16-34-3-4(a), 16-21-11-6(b), which is the cremation of tissue from more than one embryo or fetus at a time, Kent Tr. at 27:14-17. Indiana defines "interment" as "any lawful disposition in the earth of remains of a deceased individual," Ind. Code § 23-14-33-22, which for 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. In addition, the Tissue Disposition Requirements subject healthcare facilities that must cremate or inter embryonic and fetal tissue to laws governing the disposition of deceased people's bodies.[2]

A District Court in this District 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), but the

[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 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").

Supreme Court reversed, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The Supreme Court confined its decision to the limited issue of whether the laws satisfied rational basis scrutiny, expressly declining to consider whether the laws violated any fundamental rights. *Id.* The 2016 Tissue Disposition Requirements took effect following the Supreme Court's decision in September 2019. *Id.*

C. 2020 Enactments

In March 2020, Indiana enacted additional Tissue Disposition Requirements and related State-Mandated Counseling Requirements. Pub. L. 77-2020, 2020 Ind. Acts 465 (codified at Ind. Code §§ 16-34-2-1.1(a)(2)(H)-(J), 16-34-3-2(b)-(e), 16-34-3-4). These laws require burial transit permits for tissue from abortions to be accompanied by a log containing the following information:

> (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 health care facility or abortion clinic for disposition; and (B) if the pregnant woman returns the fetus to the health care facility or abortion clinic, whether the returned fetus is included in the burial transit permit.

Ind. Code § 16-34-3-4(c); Abortion Disposition Log (State Form 56981). There is no similar requirement for miscarriage patients. *See* Pub. L. 77-2020, 2020 Ind. Acts 465. Each time that tissue is transported, the entity receiving it must confirm that the number of "fetal remains" matches the entries in the burial transit permit and accompanying log. Ind. Code § 16-34-3-4(d).

After final disposition of the tissue, a copy of the final log must be sent to the healthcare facility, which must keep it and the original log in a permanent file "for review by the [Health Department] at the time of inspection." Ind. Code § 16-34-3-4(c)-(d). The healthcare facility "is responsible for demonstrating" its compliance with the Tissue Disposition Requirements to the Health Department. Ind. Code § 16-34-3-4(e); *see* 410 Ind. Admin. Code 35-2-1(b) ("The facility

must have written policies and procedures for the available method or methods of disposition of aborted fetuses."); 410 Ind. Admin. Code 35-2-2 (imposing recordkeeping requirements).

Reckless violation of the Tissue Disposition Requirements constitutes a Class B misdemeanor. Ind. Code § 16-41-16-11. Any violation is punishable by civil penalties of up to $1,000 per day. Ind. Code § 16-41-16-10(a). Additionally, the Health Department may take action against the license of a healthcare facility for violating the Tissue Disposition Requirements and impose a civil penalty of up to $10,000 per day. *See* Ind. Code § 16-41-16-10(b); *see also* Ind. Code 16-21-3-1; 410 Ind. Admin. Code 26-2-8(a). Licensed healthcare practitioners, including physicians and nurse practitioners, are subject to professional discipline for violating the Tissue Disposition Requirements.

The State-Mandated Counseling Requirements enacted in 2020 amended the State's informed consent requirements for abortion. *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)). The laws require abortion providers to inform patients orally and via a form issued by the Health Department ("Tissue Disposition Form"): (1) that they have "a right to determine the final disposition of the remains of the aborted fetus"; (2) that surgical abortion patients have the "right" to bury or cremate their tissue; (3) that surgical abortion patients have the "right" to have the abortion provider bury or cremate their tissue, and to ask the provider which method it will use; (4) that medication abortion patients will "expel an aborted fetus"; and (5) of the abortion provider's disposition policy, which must allow a medication abortion patient to "return the aborted fetus" for burial or cremation. Ind. Code § 16-34-2-1.1(a)(2)(H)-(J); Case Decl. Ex. A.

Contrary to the disclosures, many abortions in Indiana occur during the embryonic stage of pregnancy, before a fetus has developed, *see supra* 4; patients do not have the right to direct

abortion providers to dispose of their tissue through standard medical means, RFA Resps. at 5 (Req. 13); patients have no right to have an abortion provider utilize burial over cremation, or vice-versa; *see* Kent Tr. at 80:11-81:7; and absent court order, patients who are minors cannot choose a disposal method unless a parent or guardian consents to that method; *see id.* 14:3-15:12; Ind. Code § 16-34-3-2(a), (c). Even when abortion providers explain these inaccuracies to their patients, the laws anger and confuse abortion patients and undermine their trust in the provider. *See* Case Decl. ¶¶ 17-18, 22; Hartsock Decl. ¶¶ 8, 20; Doe 3 Decl. ¶¶ 22, 25; Doe 1 Decl. ¶¶ 12, 16-17; McKinney Decl. ¶¶ 27-29; Haskell Decl. ¶ 8.

In addition, the State-Mandated Counseling Requirements compel abortion patients to certify in writing using the Tissue Disposition Form that (1) their receipt of the required information, and (2) their "decision for final disposition of the aborted fetus by cremation or interment." Ind. Code § 16-34-3-2(b)-(e). 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."

Case Decl. Ex. A. The form's language gives the misleading impression that burial or cremation is required, *id.*, even though patients purportedly have "a right to determine the final disposition of the remains of the aborted fetus," Ind. Code § 16-34-2-1.1(a)(2)(H). Similarly, there is no logical option for medication abortion patients who intend to discharge the tissue into the toilet or onto a sanitary napkin that is then put in the trash, which is virtually all of them. *See* Case Decl. ¶¶ 8-9; Maienschein Decl. ¶ 31; Peters Decl. ¶ 10.

Knowingly and intentionally providing an abortion without satisfying the State-Mandated Counseling Requirements constitutes a Class A infraction, Ind. Code § 16-34-2-7(c), which is punishable by a judgment of up to $10,000, Ind. Code § 34-28-5-4(a). The Health Department may take action against the license of a healthcare facility for permitting, aiding, or abetting violations of the State-Mandated Counseling Requirements, or impose a civil penalty on the facility. *See* Ind. Code § 16-41-16-10(b); *see also* Ind. Code 16-21-3-1; 410 Ind. Admin. Code 26-2-8. Licensed healthcare practitioners, including physicians and nurse practitioners, are subject to professional discipline for violating the State-Mandated Counseling Requirements. Ind. Code § 25-1-9-4(a)(3).

D. Beliefs About Developing Human Life

People hold diverse beliefs about the status of developing human life, including the point at which a developing entity becomes a "person" or assumes a special status. Maienschein Decl. ¶¶ 14-34; Peters Decl. ¶¶ 18-28, 35-36; *see* Doe 3 Decl. ¶¶ 6-8; RFA Resps. at 2 (Reqs. 4-5). People's views about developing human life are influenced by many factors, including religion, culture, science, technology, and personal experience with pregnancy. Maienschein Decl. ¶¶ 14, 28, 30-34. There is a wide range of beliefs about the status of embryos and fetuses not just among religious denominations, but within them. Maienschein Decl. ¶¶ 18- 26; Peters Decl. ¶¶ 15, 17, 19-28.

Whether an embryo or fetus is a person, or 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 itself. Maienschein Decl. ¶¶ 16-18; Peters Decl. ¶¶ 18-19; Peters Tr. at 30:22-31:15. 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. Peters Decl. ¶ 20. Conversely,

White evangelical denominational leaders generally oppose legal abortion access and promote a narrow doctrinal position endorsing fetal personhood. Peters Decl. ¶ 25.

Interment and cremation are rituals associated with deceased persons and often reflect people's religious or spiritual beliefs about death. Kent Tr. at 86:1-87:14; Peters Decl. ¶¶ 11, 14, 29-38. For instance, Christians have historically avoided cremation in favor of burial based on the conviction that physical bodies are needed for resurrection after the Second Coming of Christ. *Id.*¶ 30. Similarly, Islamic religious teachings have strong prohibitions against cremation. *Id.*¶ 33.

When abortion or miscarriage happen in a medical setting, most people prefer that the healthcare facility dispose of the tissue using standard protocols. Maienschein Decl. ¶ 36. Some seek special disposition, but that is not the norm. *Id.*; Haskell Tr. at 34:20-35:8, 39:18-40:8. Even when given an explicit choice of how to dispose of embryonic or fetal tissue, few patients select anything other than standard medical disposition. Maienschein Decl. ¶¶ 36-37 & n. 20.

LEGAL STANDARD

Summary judgment is appropriate when "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). The moving party has the initial burden of identifying "those specific portions of the record that it believes demonstrate the absence of a genuine issue of material fact." *Logan v. Com. Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996). "Once the moving party satisfies this burden, the nonmovant must 'set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (citing Fed. R. Civ. P. 56(e)).

ARGUMENT

I. THE CHALLENGED LAWS VIOLATE FREEDOM OF SPEECH.

There is no question that the First Amendment protects individuals from governmental coercion in matters of personal belief and conscience. *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."). The Challenged Laws violate the freedom of speech protected by the First Amendment for two reasons. First, the Tissue Disposition Requirements compel abortion patients and providers to engage in expressive conduct that they oppose. Second, the State-Mandated Counseling Requirements compel abortion patients and providers to engage in speech that they oppose.

A. The Tissue Disposition Requirements

1. The Tissue Disposition Requirements Compel Abortion Patients and Providers to Engage in Expressive Conduct.

"The [First Amendment] 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 633-34). Accordingly, a state cannot "compel affirmance of a belief with which the speaker disagrees" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). In *Wooley*, for example, the Court held that requiring residents to display "Live Free or Die" on their license plates infringed on the free speech clause of the First Amendment because the motto was repugnant to some people's moral, religious, and political beliefs. 430 U.S. at 707, 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.").

The Supreme Court has long recognized that the free speech clause's protection "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). 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[]." *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569-70. Instead, the Supreme Court has recognized a wide array of expressive conduct that is subject to the free speech clause's mandate. *Id.* at 569 (marching in a parade); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (nude dancing); *Johnson*, 491 U.S. at 405-406 (burning an American flag); *Spence v. Washington*, 418 U.S. 405, 406, 409-411 (1974) (per curiam) (displaying an upside-down American flag affixed with a peace symbol); *Schacht v. United States*, 398 U.S. 58, 62-63 (1970) (wearing a military uniform in a play); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-506 (1969) (wearing a black armband to school); *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966) (opinion of Fortas, J., announcing the judgment of the Court) (participating in a silent sit-in at public library); *Barnette*, 319 U.S. at 633-634 (saluting the American flag); *Stromberg v. California*, 283 U.S. 359, 360-61, 369 (1931) (flying a red flag).

In *Barnette*, the compelled speech and expressive conduct doctrines combined to bar a state from requiring public school students to salute the American flag. 319 U.S. at 633, 642. The Supreme Court held that the mandatory salute infringed on the free speech clause because it amounted to a "ceremony of assent" to political beliefs and attitudes that at least some students rejected. *Id.* at 634, 640-42 ("We think the action of the local authorities in compelling the flag salute . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.") The Court noted that the requirement conditioned access

to public education on that assent. *Id.* at 630-31; *see also Wooley*, 430 U.S. at 715 (noting that the compelled speech at issue in that case was "an infringement upon personal liberties" because it was "a condition to driving an automobile[,] a virtual necessity for most Americans"). In this way, the Court established that the free speech clause forbids governments from requiring individuals to engage in conduct affirming a belief they find objectionable.

The burial or cremation of tissue required by the Tissue Disposition Requirements is analogous to the mandatory flag salute in *Barnette*. Like requiring students to salute the flag as a condition of attending public school, requiring abortion providers and abortion patients to facilitate the burial or cremation of embryonic and fetal tissue compels them to affirm beliefs that are unacceptable to them as a condition to providing or obtaining abortion care. *Barnette*, 319 U.S. at 630, 633, 637.

The Tissue Disposition Requirements force abortion patients and providers to affirm two beliefs that are unacceptable to them. First, because interment and cremation are rituals associated with deceased persons, requiring interment or cremation of abortion tissue conveys the message that embryos and fetuses are persons, or have equivalent moral standing, *see* Maienschein Decl. ¶¶ 8-9, 12 & n. 3; Peters Decl. ¶¶ 11, 13-14, 29-38, which is a controversial view with religious underpinnings, *see* Peters Decl. ¶¶ 11, 13-19; Maienschein Decl. ¶¶ 15-18, 20-26; Doe 3 Decl. ¶¶ 6, 23-24. This message is reinforced by the Tissue Disposition Requirements' application of rules governing the disposition of deceased people's remains to tissue from abortion procedures. *Supra* 4-7. Second, and by extension, the rituals signify that abortion ends a person's life and is therefore akin to homicide, which is another deeply controversial belief. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

2. The Tissue Disposition Requirements Fail Strict Scrutiny.

Laws that compel speech or expressive conduct are subject to strict scrutiny.[3] *Nat'l Inst. for Fam. & Life Advocs.* ("*NIFLA*") *v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Accordingly, they "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

In an interrogatory response, Indiana identified three interests in the Tissue Disposition Requirements: (1) preventing "inhumane treatment of fetal remains," which it claims "negatively effects [sic] the mental and social wellbeing of the population of Indiana"; (2) "treating the remains of unborn children with dignity and respect, thereby protecting public health"; and (3) "giv[ing] women a choice about the disposition of the remains of their aborted or miscarried fetuses in accordance with the women's religious and spiritual beliefs, which supports the women's emotional closure as it relates to the fetal death." Defs.' Combined Resps. & Objs. to Pls.' First Set of Interrogs. ("ROG Resps.") at 3 (Interrog. 3). As explained below, none is sufficient to sustain the laws.

First, Indiana's stated interest in preventing inhumane treatment of fetal remains for the sake of its residents' well-being is neither valid nor compelling. It improperly assumes that: (1) tissue from an abortion should be treated like the remains of a person, and (2) Indiana residents generally share this view. *See supra* 9-10. The State has introduced no evidence to support this purported interest, which essentially boils down to a value judgement that abortion is distasteful.

[3] This is not a case in which the regulation of conduct is unrelated to its expressive content. *See Johnson*, 491 U.S. at 406-07. Indiana admits that the Challenged Laws are intended to convey a message of respect for embryonic and fetal tissue. ROG Resps. at 3 (Interrog. 3).

Moreover, the Supreme Court has repeatedly held that prescribing what is offensive or disagreeable—even when there is societal consensus—cannot justify an infringement on the freedom of speech. *Johnson*, 491 U.S. at 414 (describing this as a "bedrock principle underlying the First Amendment") (collecting cases); *see 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."). "A contrary rule would allow the government to stamp out virtually any speech at will" because "much political and religious speech might be perceived as offensive to some." *Id.* "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for *according* it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (emphasis added) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)). In *Matal v. Tam*, the Supreme Court even rejected an interest in preventing "[s]peech that demeans on the basis of race" because the First Amendment "protect[s] the freedom to express 'the thought that we hate.'" 137 S. Ct. 1744, 1764 (2017) (citation omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down a ban on certain forms of hate speech and related conduct). Conversely, the First Amendment protects an individual's freedom *not* to express thoughts that others favor. *Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Second, Indiana fails to demonstrate that the Tissue Disposition Laws actually serve its asserted interest in "treating the remains of unborn children with dignity and respect, thereby protecting public health." As an initial matter, dignity and respect are subjective concepts. The record demonstrates that people hold widely divergent beliefs about what constitutes respectful disposition of embryonic and human tissue. *See, e.g.*, Maienschein Decl. ¶¶ 35-37; Peters Decl. ¶

34; Doe 3 Decl. ¶¶ 7-8. Some, including the State's own witness, consider cremation to be a disrespectful method of disposition. Dyksen Tr. at 28:3-21. Others, including Plaintiff Jane Doe No. 3, view standard medical disposition as both dignified and respectful. Doe 3 Decl. ¶ 8. Further, the State has not shown that treating embryonic and fetal tissue with dignity and respect—whatever meaning is ascribed to those concepts—serves in any way to promote public health.

Third, while Indiana has a compelling interest in ensuring that abortion and miscarriage patients can elect disposition methods that accord with their religious or spiritual beliefs, the Tissue Disposition Requirements fail to advance this interest. To the contrary, they actively undermine it. The Tissue Disposition Requirements make it difficult, if not impossible, for patients to dispose of their tissue by any method other than burial or cremation by prohibiting healthcare facilities from utilizing alternative methods. *Supra* 3; Doe 1 Decl. ¶¶ 17, 19; Doe 3 Decl. ¶¶ 24-25. But burial and cremation are anathema to the religious beliefs of many patients, particularly those who reject the view that an embryo or fetus has the attributes of personhood. *See* Doe 3 Decl. ¶¶ 4-8, 24; McKinney Decl. ¶ 31; Peters Decl. ¶¶ 11-14, 18-34.

In conclusion, Indiana has failed to carry its burden of proving that the Tissue Disposition Requirements satisfy strict scrutiny. *See Reed*, 576 U.S. at 163.

B. The State-Mandated Counseling Requirements

1. The State-*Mandated* Counseling Requirements Compel Speech by Abortion Patients and Providers.

The State-Mandated Counseling Requirements compel abortion providers to make certain disclosures to their patients, and they compel abortion patients to certify certain information in writing. Thus, they compel speech by both abortion providers and patients.

Indiana characterizes the State-Mandated Counseling Requirements as informed consent laws. *See generally* Ind. Code 16-34-2-1.1. In *Casey*, the Supreme Court held that a "physician's

First Amendment rights not to speak are implicated" by pre-abortion disclosure requirements, but they are moderated, to some extent, by a State's authority to regulate "the practice of medicine." 505 U.S. at 884 (citations omitted). The Supreme Court later clarified that, to the extent that such requirements relate to physicians' informed consent obligations, they regulate physicians' *conduct* in providing medical care while incidentally burdening their speech. *See NIFLA*, 138 S. Ct. at 2372-73 (citing *Casey*, 505 U.S. at 884). The standard of review applicable to regulations of conduct that incidentally burden speech is set forth in *United States v. O'Brien*: such a regulation is permissible only if (1) "it is within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) "the governmental 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." 391 U.S. 367, 377 (1968); *accord Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1059 (7th Cir. 2004). However, when a law that compels speech by physicians "is not an informed-consent requirement or any other regulation of professional conduct," it "regulates speech as speech," *NIFLA*, 138 S. Ct. 2373-74, and is subject to strict scrutiny, *see id.* at 2371-72.[4] Here, although the State-Mandated Counseling Requirements are not proper informed consent requirements, *see* Hartsock

[4] Some circuit courts have conflated the free speech inquiry with the inquiry required by the Due Process Clause, holding that a pre-abortion disclosure requirement satisfies the First Amendment if it is truthful, not misleading, and relevant to a patient's abortion decision. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 428-29 (6th Cir. 2019); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008). *Casey* makes clear, however, that the First Amendment and Due Process Clauses offer distinct protections to the speech of abortion providers, 505 U.S. at 881-84, and *NIFLA* states explicitly that informed consent requirements are regulations of physician conduct that incidentally burden speech, making them subject to the *O'Brien* test. *See NIFLA*, 138 S. Ct. at 2372-73; *O'Brien*, 391 U.S. at 376-77. Nevertheless, should this Court adopt the test applied by the Sixth and Eighth Circuits, Plaintiffs satisfy it because the speech compelled by the State-Mandated Counseling Requirements is false and misleading. *Infra* 30-31.

Decl. ¶¶ 13-17, 20, the Court need not decide which standard to apply because the laws fail even under *O'Brien*'s formulation of intermediate scrutiny.

2. The State-Mandated Counseling Requirements Fail Intermediate Scrutiny.

The State-Mandated Counseling Requirements cannot satisfy the *O'Brien* test for the same reason that they cannot satisfy strict scrutiny: they fail to serve any valid state interest. *O'Brien*, 391 U.S. at 377. Because the State lacks a valid interest in enforcing the Tissue Disposition Requirements, *see supra* 14-15; *see also infra* 28-30, it follows that no valid interest is served by compelling abortion providers to discuss the requirements with their patients—particularly in a manner that is misleading, *infra* 31—or by compelling abortion patients to certify their compliance with the requirements.

Because the State-Mandated Counseling Requirements fail to serve a valid state interest, they cannot withstand any level of First Amendment scrutiny.

II. THE CHALLENGED LAWS VIOLATE THE FREE EXERCISE CLAUSE.

Pursuant to the Free Exercise Clause, the government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. "Free-exercise problems usually arise when a law, regulation, or some action of a public official interferes with a religiously motivated practice, forbearance, or other conduct." *Korte v. Sebelius*, 735 F.3d 654, 676 (7th Cir. 2013).

"[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular

litigants' interpretations of those creeds."). Nor is the free exercise of religion "limited to beliefs which are shared by all of the members of a religious sect." *Thomas*, 450 U.S. at 715-16. Moreover, sincerely held moral beliefs are entitled to the same protection as religious beliefs for the purposes of the Free Exercise Clause. *See Welsh v. United States*, 398 U.S. 333, 339-40 (1970). As the Seventh Circuit explained, "[W]e have suggested in the past that when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion." *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (quoting *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 688 n. 5 (7th Cir.1994) (quoting *Welsh*, 398 U.S. at 340)).

Although "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990), laws that embody "hostility to a religion or religious viewpoint" run afoul of the First Amendment. *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993). The Challenged Laws are not neutral laws of general applicability because they selectively burden people who believe as a matter of religious or moral conviction that an embryo or fetus is not a person and should not be treated like a person. Indeed, although the State contends that one purpose of the laws is to give "women a choice about the disposition" of embryonic and fetal tissue "in accordance with the women's religious and spiritual beliefs," ROG Resps. at 3 (Interrog. 3), the laws clearly disfavor patients, like the Doe Plaintiffs, who believe that embryonic and fetal tissue deserves no more or less respect than other kinds of human tissue removed from the body during a medical procedure.

For instance, Jane Doe No. 3 firmly believes that a developing fetus is not a person and should not receive the same rites as a person. *See* Doe 3 Decl. ¶¶ 4-8. A Baptist who strives to live in accordance with the tenets of her faith, she testified that her view that personhood begins at birth is based on her reading of scripture, including Genesis 2:7, which 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." *Id.* ¶ 6. She further testified that, "in my religion, burial and cremation is meant for a human being" not "the contents of the uterus" after an abortion. Doe 3 Tr. at 30:11-16. Similarly, Jane Doe No. 1 holds a conscientious and moral belief that the embryo she carried was not a person and that a fetus becomes a person "once they're born." Doe 1 Decl. ¶¶ 13,15; Doe 1 Tr. at 22:19-23:1.

The Challenged Laws disfavor the Doe Plaintiffs and those who share their views by preventing them from relying on their healthcare providers to dispose of their tissue in accordance with their wishes. RFA Resps. at 5 (Req. 13). Instead, they must either acquiesce to burial or cremation or dispose of their tissue on their own at their own expense, even though they lack the expertise and resources needed to safely dispose of infectious human tissue. Doe 1 Decl. ¶¶ 13-17, 19; Doe 3 Decl. ¶¶ 23-28. This differential treatment of people who believe that embryonic and fetal tissue lacks special spiritual significance violates the principles of neutrality and general applicability and manifests hostility toward the Doe Plaintiffs' religious and moral viewpoints. *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *see* Peters Decl. ¶¶ 11-14.

Because the Challenged Laws are not neutral and generally applicable, the State must demonstrate that they satisfy strict scrutiny. *Lukumi*, 508 U.S. at 546. For the reasons set forth above, it cannot make this showing. *See supra* 14-16, 18.

Plaintiffs are entitled to summary judgment on their free exercise claim for an additional reason. Beyond requiring abortion patients like Jane Doe No. 3 to violate their sincerely held religious beliefs, *see supra* 19-20, the Challenged Laws also infringe on the right to free speech, *see supra* 11-18; the right to privacy, *see infra* 26-31; and the right to equal protection of the laws, *see infra* 31-35. Accordingly, Plaintiffs have set forth a "hybrid" free exercise claim. *See Smith*, 494 U.S. at 881-82. This claim is subject to strict scrutiny even if the court concludes that the Challenged Laws are neutral and generally applicable. *See id.*; *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J, dissenting) ("[U]nder this Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where (as here) a plaintiff presents a 'hybrid' claim—meaning a claim involving the violation of the right to free exercise *and* another right, such as the right of parents 'to direct the education of their children'" (citing *Smith*, 494 U.S. at 881)). Because the State cannot satisfy strict scrutiny, *see supra* 14-16,18, Plaintiffs prevail on their hybrid free exercise claim.

III. THE CHALLENGED LAWS VIOLATE THE ESTABLISHMENT CLAUSE.

The establishment clause prohibits the government from endorsing or advancing religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Although it has been criticized, the "*Lemon* test" continues to govern most establishment clause actions. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2081-82 (2019) (refraining from abolishing the test while declining to apply it to "longstanding [religious] monuments, symbols, and practices"); *Freedom from Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1046-50 (7th Cir. 2018) (applying the *Lemon* test to a school nativity scene). Pursuant to the *Lemon* test, a governmental practice violates the establishment clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of

advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion. *See Lemon,* 403 U.S. at 612–13.

In addition to the *Lemon* test, the Supreme Court has also applied a "coercion test"—whether a challenged law threatens to coerce non-adherents into supporting or participating in religion—to determine if the establishment clause has been violated. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000) (holding that student-initiated prayer at public school football games violated the establishment clause by forcing students to choose between religious practice and not attending); *Lee v. Weisman,* 505 U.S. 577, 593-94 (1992) (holding that non-sectarian prayer at a public school graduation violated the establishment clause by exerting "subtle and indirect pressure" on students to stand or remain silent)."Where the coercion test belongs in relation to the *Lemon* test is less clear," but "it is evident that if the state coerces anyone to support or participate in religion or its exercise, an establishment clause violation has occurred." *Doe v. Elmbrook Sch. Dist.,* 687 F.3d 840, 850 (7th Cir. 2012) (internal quotations and citations omitted).

As set forth below, the Challenged Laws fail the first and second prongs of the *Lemon* test. In addition, the Challenged Laws coerce participation in religion.

A. The Challenged Laws Lack a Legitimate Secular Purpose.

To satisfy the establishment clause, a law must have a legitimate secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty. v. ACLU,* 545 U.S. 844, 864 (2005). In scrutinizing a purported secular purpose to determine if it is genuine or a sham, courts look to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, ...

and the specific sequence of events leading to [its] passage." *Id.* at 862, 864 (citing *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987)).

Compelling abortion patients and providers to treat embryonic and fetal tissue differently from other human tissue, in a way that marks it as special, serves no secular purpose. Instead, it promotes the religious belief that spiritually significant human life begins at conception. *See* Peters Decl. ¶¶ 11-14. Indeed, the author of the State-Mandated Counseling Requirements declared in an op-ed that "SB 299 makes it harder for the pro-choice crowd" to "dehumanize life at its earliest stages."[5]

The State's assertion that the purpose of the Challenged Laws is to ensure dignified disposition or give women a choice about the disposition, *see* ROG Resps. at 3 (Interrog. 3), falls flat for two reasons. First, in this context, "dignified" disposition is simply a euphemism for religiously sanctioned disposition. *See* Espada Tr. at 143: 2-9 (testifying that Catholic Hospitals and cemeteries treat "fetal remains" "as the remains of a person who is important and demands respect and dignity" which means "in accordance with Catholic beliefs and teachings"); Peters Decl. ¶¶ 11-14, 18-19, 29; Maienschein Decl. ¶¶ 35-37; Doe 3 Decl. ¶¶ 7-8. Second, instead of providing additional choices to patients, the Challenged Laws remove options and harm patients who do not hold the religious conviction that spiritually significant human life begins at conception. *See supra* 7-8, 19-20. Accordingly, the Challenged Laws lack a legitimate secular purpose.

[5] 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-fetushuman-deserve-dignity/4896542002.

B. The Challenged Laws Have the Primary Effect of Advancing Religion

The Challenged Laws have the primary effect of advancing religion because they have the "purpose or effect of 'endorsing' religion." *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989) (collecting cases); *Freedom from Religion Found, Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). Under this prong of the *Lemon* test, courts must determine whether, "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement." *Freedom from Religion Found.*, 203 F.3d at 493 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 517 (7th Cir. 2010). To do so, courts consider the "totality of the circumstances surrounding the challenged conduct from the perspective of a reasonable observer." *Concord Cmty. Schs.*, 885 F.3d 1038, 1046 (7th Cir. 2018). "The reasonable observer is aware of a situation's history and context and encompasses the views of adherents and non-adherents alike." *Id.* "When we find that a reasonable person could perceive that a government action conveys the message that religion or a particular religious belief is *favored* or *preferred*, the establishment clause has been violated." *Freedom from Religion Found.*, 203 F.3d at 493; *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 528 (7th Cir. 2009).

By requiring that embryonic and fetal tissue be treated like the body of a deceased person, the Challenged Laws endorse the view that spiritually significant human life begins at conception, which takes sides in a religious debate. *See* Peters Decl. ¶¶ 11-14, 18-28; *Roe v. Wade*, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). The laws also convey religiously motivated disapproval

of abortion by equating it to homicide. *See* Peters Decl. ¶ 6, 11-14, 37-38; Doe 3 Decl. ¶¶ 22-24. For example, Dr. Curlin, one of the State's experts, testified that the Tissue Disposition Form required by the Challenged Laws is "consistent with the fact that abortion involves the killing of a human being"; *see also* Espada Tr. at 70: 5-11 ("Catholic social teaching says that when you respect the dignity of life, it is from conception to natural death . . . When someone dies by abortion, [it is] not a natural death.").

A "reasonable observer" would perceive the religious message because the Challenged Laws draw on religious ideas that are pervasive in our society. *See Concord Cmty. Schs.*, 885 F.3d at 1046; Peters Decl. ¶¶ 6, 11-14, 18-30, 34-38; Maienschein Decl. ¶¶ 14-18, 20-26, 35-37. In addition, the reasonable observer would take into account that, in 2016, then-Governor Mike Pence signed the Tissue Disposition Requirements with a prayer, stating, "I sign this legislation with a prayer that God would continue to bless these precious children, mothers and families."[6] Likewise, the reasonable observer would be aware of Senator Brown's op-ed. *Supra* 23.

Further, the reactions of Indiana abortion patients show that they perceive a religious message in the Challenged Laws. Kelly McKinney, who provides the disclosures mandated by the Challenged Laws to abortion patients at Women's Med, testified that the process "brings up feelings related to religion" for her patients, explaining that: "Often patients become defensive about their religious beliefs and will start explaining to me how they feel about – religion, about conception, about the concept of personhood." McKinney Tr. at 56-57:4, 57: 16-24. Jane Doe No. 1, who does not consider herself to be religious, testified that she felt the State was imposing a religious belief on her by pressuring her to agree to burial or cremation. Doe 1 Tr. at 12:1-12, 30:2-

[6] Chelsea Schneider & Tony Cook, *Pence signs new abortion restrictions into law with a prayer*, IndyStar (Mar. 24, 2016, 8:18 p.m.), https://www.indystar.com/story/news/politics/2016/03/24/pence-signs-new-abortion-restrictions-into-law-prayer/82225890/.

8; Doe 1 Decl. ¶ 13. Similarly, Jane Doe No. 3 felt that the State was "imposing . . . religious views based on a version of Christianity that" she does not "agree with." Doe 3 Decl. ¶ 23.

Because a reasonable observer would perceive that the Challenged Laws convey a religious message about pregnancy, personhood, and abortion, the laws violate the establishment clause has been violated.

C. The Challenged Laws Fail the Coercion Test

The Challenged Laws also fail the "coercion test" because they coerce abortion patients into participating in religiously motivated disposition practices. In *Elmbrook School District*, the en banc Seventh Circuit held that a reasonable non-Christian would infer that the school district favored Christianity from the practice of holding high school graduations, which are "not truly optional," at a church that contained a Latin cross, religious materials, and school paraphernalia during the ceremonies. 687 F.3d at 853-54. The Court held that the practice indirectly pressured non-Christians to conform to Christianity even though they did not have to do anything other than participate in or view the ceremony. *Id.* at 855. Here, pregnant patients are unable to obtain abortion care without certifying their compliance with the Challenged Laws, which pressure patients into agreeing to treat their embryonic or fetal tissue as the remains of a deceased person by making disposition methods other than burial or cremation difficult, if not impossible. Doe 1 Decl. ¶¶ 13, 15-17; Doe 3 Decl. ¶¶ 22-27. Additionally, abortion is essential, time-sensitive medical care and for those who have chosen to terminate their pregnancies, it is much less optional than a high school graduation. As in *Elmbrook*, the Challenged Laws pressure abortion patients to participate in activities infused with religious meaning, thus running afoul of the coercion test.

IV. THE CHALLENGED LAWS VIOLATE THE RIGHT TO ABORTION.

In an unbroken line of precedent spanning nearly five decades, the Supreme Court has held that the right to end a pregnancy is a fundamental component of the liberty protected by the Due Process Clause. *See, e.g.*, *June Med. Servs., L.L.C. v. Russo*, __ U.S. __, 140 S. Ct. 2103, 2112 (2020) (plurality); *id.* at 2134-35 (Roberts, C.J., concurring); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016); *Lawrence v. Texas*, 539 U.S. 558, 565, 573-74 (2003); *Casey*, 505 U.S. at 851-53; *Roe*, 410 U.S. at 152-54. The right encompasses not merely the right to obtain an abortion, but also, more broadly, "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. Laws that infringe on this right are subject to the undue burden standard, which provides that a law is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The standard "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. When the burdens exceed the benefits, they are undue. *See id.* at 2300, 2310.

A court applying the undue burden standard must conduct a two-step analysis. First the court must determine whether the challenged law is reasonably related to a legitimate state interest, such that it actually furthers that interest. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 916 (7th Cir. 2015) (holding that a statute failed the undue burden test because it did "not 'further[] the legitimate interest' of the state in advancing women's health, and it was not 'reasonable for [the legislature] to think' that it would" (alterations in the original)); *see also June Med.*, 140 S. Ct. at 2138 (Roberts, CJ., concurring) (describing this step as a "threshold requirement" set forth in *Casey*). Second, the court must determine whether the law imposes

burdens on abortion access that outweigh its benefits. *Whole Woman's Health*, 136 S. Ct. at 2309-10. If a law fails either step, it is unconstitutional.

A. The Challenged Laws Are Not Reasonably Related to a Legitimate State Interest.

The Challenged Laws fail the first prong of the undue burden standard because they are not reasonably related to any legitimate state interest. Although the Supreme Court has held that the State has a valid interest in showing respect for potential life, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007), that interest does not permit the State to impose its views about personhood on its residents. In *Casey*, the Supreme Court made clear that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." 505 U.S. at 877. Such means respect patients' dignity by treating them as autonomous moral agents. *Casey* explained that, when the State seeks to advance an interest in potential life through means that are not calculated to inform, it acts with a "purpose [that] is invalid." *Id.* Accordingly, the State's interest in potential life permits it to take measures to persuade individuals to adopt its views about personhood and abortion, but not to compel its residents to adopt those views or act in accordance with them. *See id.* at 878 ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated *as long as their purpose is to persuade* the woman to choose childbirth over abortion." (emphasis added)).

This limitation on advancing the interest in potential life reflects *Casey*'s careful effort to reconcile "the State's interest with the woman's constitutionally protected liberty." *Id.* at 876. It also accords with bedrock constitutional principles concerning the impermissibility of government coercion in matters of personal belief and conscience. It is well settled that the State does not have

a valid interest in taking sides in a religious debate, prescribing a moral code, or stigmatizing people whose personal belief systems differ from those of the majority. *See, e.g., Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."); *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 …."). Thus, the Challenged Laws do not serve a legitimate interest by coercing pregnant patients to act in accordance with the State's views on personhood as a condition of obtaining constitutionally protected medical care.

Nor does the State advance a valid interest by elevating one set of beliefs about personhood and dignity over another. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."); *Casey*, 505 U.S. at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code."). Notably, burial and cremation are not inherently dignified rituals. Rather, their meaning is derived on an individual basis. As undisputed evidence shows, people hold widely divergent beliefs about the value and nature of burial and cremation and when these rituals should be utilized. *See, e.g.*, Peters Decl. ¶¶ 11, 29-38, Maienschein Decl. ¶¶ 35-37; Doe 3 Decl. ¶¶ 7-8. For some,

burial but not cremation, is a respectful way of disposing of human tissue. Dyksen Tr. at 28:3-21. For others, standard medical disposition is both dignified and respectful. Doe 3 Decl. ¶ 8. What qualifies as respectful in this context is therefore subjective and varies based on people's values, beliefs, and lived experiences. *See* Maienschein Decl. ¶¶ 35-37; Peters Decl. ¶¶ 29-38.

Accordingly, the State has failed to demonstrate that the Challenged Laws are reasonably related to any other legitimate interest.

B. The Challenged Laws Impose Burdens on Abortion Patients That Are Not Justified by Proportional Benefits.

Although the Challenged Laws provide few if any benefits, they impose significant burdens on people seeking abortion care in Indiana. By equating embryos and fetuses with persons and abortion with homicide, the Challenged Laws cause many abortion patients to experience grief, shame and stigma. *See* McKinney Decl. ¶¶ 27-28, 30-31; Haskell Decl. ¶ 8; Doe 1 Decl. ¶ 14; Doe 3 Decl. ¶¶ 22-23. Further, by coercing abortion patients to agree to burial or cremation of their embryonic and fetal tissue, the Challenged Laws inflict irreparable harm on the dignity and moral agency of patients who find these disposal methods improper, offensive, or contrary to their religious beliefs. *See, e.g.*, Doe 1 Decl. ¶¶ 13-15; Doe 3 Decl. ¶¶ 22-24; Peters Decl. ¶¶ 11-14, 45. Because the burdens imposed by the Challenged Laws are not offset by proportional benefits, the laws fail to satisfy the undue burden standard. *Schimel*, 806 F.3d at 919-20.

C. The State Mandated Disclosures Are Untruthful and Misleading.

In *Casey*, the Supreme Court explained that, "as with any medical procedure, the State may require a woman to give her written informed consent to an abortion," but it recognized that pre-abortion disclosure requirements implicate—and are circumscribed by—a patient's fundamental right to abortion. *Casey*, 505 U.S. at 881-84. The Court held that, for a pre-abortion disclosure requirement to satisfy the Due Process Clause, the required disclosure must, at a minimum, be

truthful and not misleading. *Id.* at 882 ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

The disclosures required by the State-Mandated Counseling Requirements fail to satisfy these criteria. At a minimum, they are profoundly misleading. For example, the required disclosures make no mention of patients' option to dispose of tissue on their own, *supra* 7-8, imply that most patients' pregnancies are farther along than they are, *supra* 4,7, and suggest that medication abortion patients must return their tissue to the provider for burial or cremation, *supra* 7-8. The misleading nature of the disclosures not only confuses patients and undermines the provider-patient relationship, but it forces abortion providers to breach medical ethics. *See* Hartsock Decl. ¶¶ 10-15, 17-18, 20; *NIFLA*, 138 S. Ct. at 2374 ("Doctors help patients make deeply personal decisions, and their candor is crucial." (internal quotations and citation omitted)).

Accordingly, the State-Mandated Counseling Requirements violate the right to abortion protected by the due process clause.

V. THE CHALLENGED LAWS VIOLATE EQUAL PROTECTION

The Challenged Laws violate the Equal Protection Clause because they establish legislative classifications that discriminate against individuals exercising fundamental rights without a weighty justification. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In particular, the Tissue Disposition Requirements target abortion patients for differential treatment that burdens their First Amendment and reproductive rights. Likewise, the State-Mandated Counseling Requirements target abortion patients and providers for differential treatment that burdens their First Amendment and reproductive rights. Because the classifications embodied in these laws cannot satisfy rigorous constitutional scrutiny, the Challenged Laws violate the Constitution's equal protection guarantee.

A. Equal Protection Standards

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which essentially is a direction that all persons similarly situated should be treated alike." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) (citing U.S. Const. amend. XIV). States may not establish legislative classifications discriminating against individuals exercising a fundamental constitutional right absent an exceedingly weighty justification. *See City of Cleburne*, 473 U.S. at 440; *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that classifications which burden fundamental rights such as marriage and procreation are subject to strict scrutiny); *Obergefell v. Hodges*, 576 U.S. 644, 670-74 (2015) (discussing the interplay between the Due Process Clause and the Equal Protection Clause when fundamental rights are at stake).

The classifications made by the Challenged Laws are subject to heightened scrutiny because they implicate two fundamental rights: (1) abortion patients' and providers' free speech and religious liberty rights under the First Amendment, and (2) abortion patients' right to end a pregnancy, which includes the right to define one's own concept of life, meaning, and individual place in the world. *See supra* 11-14, 26-27. Insofar as they burden First Amendment rights, the classifications embodied in the Challenged Laws are subject to strict scrutiny. *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 101 (1972) ("The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."). Insofar as they burden the right to abortion, those classifications are subject to the undue burden standard. *See Whole Woman's Health All. v. Rokita*, No. 1:18-cv-01904-SEB-MJD, __ F. Supp. 3d __, 2021

WL 3508211, *0-41 (Aug. 10, 2021), *appeal filed*, Nos. 21-2480, 21-2573 (7th Cir. Aug. 11, 2021).

B. The Challenged Laws Impermissibly Treat Abortion Patients and Providers Differently from Similarly Situated Patients and Healthcare Providers.

The Challenged Laws target abortion patients and providers for disfavored treatment. First, the Tissue Disposition Requirements compel abortion patients and providers to engage in expressive conduct by treating embryonic and fetal tissue like deceased persons, but they do not apply to similarly situated patients and healthcare providers that dispose of other kinds of human tissue, and they do not apply to patients and healthcare providers that dispose of pre-implantation embryos from IVF procedures. *See supra* 3-4.

The standard method for treating and disposing of human tissue is incineration. *See* Case Decl. ¶ 19; *see generally* Ind. Code § 16-41-16-3 (identifying incineration as one of five "effective treatment" methods for infectious waste). Prior to the Tissue Disposition Requirements, healthcare providers could dispose of embryonic and fetal tissue with all other human tissue. *Supra* 2-4. But the requirements distinguish embryonic and fetal tissue from all other human tissue, holding that it, alone, may not be treated and disposed of through standard medical means like incineration. *Supra* 4-9. The only evidence the State has put forth to explain the differential treatment is related to the State's viewpoint on personhood and what the State views as dignified disposal of embryonic and fetal tissue. S*ee, e.g.*, Coleman Tr. at 174:1-3 ("You either believe it's a human being or you believe it's tissue or, you know, something else"). However, "a state does not have a valid interest in taking sides in a religious debate or prescribing a moral code." *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 626 (W.D. Tex. 2018) (collecting cases), *appeal filed*, No. 18-50730 (5th Cir. Sept. 7, 2018); *supra* 28-30.

Moreover, even if the State had a valid interest in treating embryonic and fetal tissue differently from all other human tissue, the Tissue Disposition Requirements are underinclusive because they do not apply to embryos created in connection with IVF. There is no legitimate state interest in distinguishing between embryonic tissue resulting from abortion and embryonic tissue resulting from IVF because the tissue is identical. *See Smith*, 338 F. Supp. 3d at 641-42 (holding that a similar classification in Texas law was irrational). As the court explained, "[r]egardless of a state's ability to express respect for potential life via dignified disposition, the State may not compel its philosophical or religious answer concerning the degree of life present in pre-implantation compared to post-implantation embryos under current law." *Id* at 642 (citing *Barnette*, 319 U.S. at 642).

Second, the State-Mandated Counseling Requirements single out abortion patients and providers for disclosure and certification requirements that are not imposed on other patients and healthcare providers. *Supra* 2-9. The harms of these disclosure requirements are documented throughout this brief. *Supra* 16-18, 25-26, 30-31. Not only has the State failed to identify a legitimate interest in treating disposition of embryonic and fetal tissue differently than disposition of other kinds of human tissue, it has failed to identify a valid reason for imposing the disclosure and certification requirements on abortion patients and providers, but not other patients and providers responsible for disposing of embryonic and fetal tissue—like those involved in IVF and miscarriage management. Indeed, the State's expert, Dr. Curlin, confirmed that there is no "significant" or "appreciable" difference between tissue from a miscarriage or abortion – the only difference he could articulate was based on a personal religious or spiritual value placed on the tissue and whether the patient believes it to be a person or not. Curlin Tr. at 100:9-14; *see also* Coleman Tr. at 174:1-3.

In sum, the classifications embodied in the Tissue Disposition and State-Mandated Counseling Requirements fail strict scrutiny because they are not substantially related to the achievement of valid State objectives.[7]

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs' motion for summary judgment.

[7] The classifications also fail to satisfy the undue burden standard because they impose burdens on abortion patients that far outweigh any benefits they provide. *Supra* 27-31.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Rupali Sharma
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