IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-2748

JANE DOE NO. 1, et al.,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL OF INDIANA, et al.,

Defendants-Appellants,

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:20-cv-03247-RLY-MJD
The Honorable Richard L. Young, Judge

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS

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INTRODUCTION

Indiana requires abortion *providers* to dispose of fetal remains by burial or cremation but affords abortion *patients* a "[r]ight to determine" the final disposition of the aborted fetus. Ind. Code § 16-34-3-2(a). The "burial or cremation" requirement mirrors the laws for disposing of born-alive human remains, which likewise must be buried or cremated. *See* Ind. Code § 12-20-16-12(b); *id.* § 36-2-14-16(c). No one doubts the legality of those statutes, and, as the U.S. Supreme Court held in rejecting a prior constitutional challenge, the fetal-remains law promotes the State's important and "legitimate interest in the proper disposal of fetal remains." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (quoting *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U. S. 416, 452, n.45 (1983)).

Despite the State's obvious secular (and legitimate) rationale for its fetal-disposition statute, the district court held that it violates the free-exercise and free-speech rights of plaintiffs Jane Doe 1 and Jane Doe 3 by preventing them from directing abortion clinics to incinerate fetal remains as regular medical waste. But incinerating human remains is not inherently expressive conduct, and Jane Doe 1 and Jane Doe 3 cannot invoke the First Amendment to exempt abortion providers—who have no religious objections themselves—from complying with a state medical regulation that is neutral and generally applicable on its face. Besides, the fetal-disposition requirement *accommodates* women who prefer to take possession of their aborted fetal remains and dispose of the remains as they see fit—by burial in a private religious ceremony, incineration with non-medical waste, or some other method.

Indiana's fetal-disposition law impinges First Amendment rights no more than garden-variety laws requiring respectful disposition of human remains. And, finally, if Indiana can require respectful disposition unless the woman prefers another option, it can require that women be told of that requirement.

JURISDICTIONAL STATEMENT

Plaintiffs Jane Doe 1, Jane Doe 3, Women's Med Group Professional Corporation, William Mudd Martin Haskell, M.D., and Kelly McKinney, N.P., filed this action for declaratory and injunctive relief against Defendants 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 the Marion County Prosecutor (collectively, the State), in their official capacities. A1–3. The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the complaint alleges that Indiana statutes and regulations violate federal law, specifically, the First and Fourteenth Amendments of the U.S. Constitution, and seeks to redress the deprivation of federal constitutional rights under color of state law. A36–39.

On September 26, 2022, the district court entered its final judgment, SA40, and orders granting in part and denying in part Plaintiffs' and Defendants' Motions for Summary Judgment, SA1–37, and permanently enjoining Defendants from enforcing Indiana Code §§ 16-21-11-6(b), 16-21-11-6(c), 16-34-2-1.1(a)(2)(H), 16-34-2-1.1(a)(2)(I), 16-34-3-2(b), 16-34-3-4(a), 16-34-3-4(c), 16-34-3-4(d), 16-34-3-4(g), 16-41-16-4(d), 16-41-16-5, 410 Ind. Admin. Code 35-2-1(a), 35-2-2(a), 35-2-2(a)(1), 35-2-

2(a)(2), 35-2-2(a)(4), 35-2-2(b)(1), 35-2-2(b)(2), "and the laws enforcing those sections," SA38–39. On September 30, 2022, the State filed a timely notice of appeal. A253. This Court has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291.

At this point, it is unclear whether Women's Med still has the frozen aborted fetal remains that were the principal subject of this case or whether it has incinerated them as authorized by the district court's injunction. In response to the State's motion for stay filed in the district court, ECF No. 103, Women's Med did not give a clear answer. *See* ECF No. 108 at 19. If Women's Med has disposed of the remains, a question of mootness arises, which may require vacatur of the judgment (and injunction) under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

STATEMENT OF THE ISSUES

1. **Free Exercise**: Whether, consistent with the Free Exercise Clause, a State may require abortion providers to bury or cremate fetal remains, while permitting abortion patients the option to dispose of the remains as they see fit.

2. **Free Speech**: Whether, consistent with the Free Speech Clause, a State may require abortion providers to bury or cremate fetal remains, while permitting abortion patients the option to dispose of the remains as they see fit.

3. **Free Speech**: Whether, consistent with the Free Speech Clause, a State may require abortion providers to tell a pregnant woman seeking an abortion the legal options for disposing of aborted fetal remains.

STATEMENT OF THE CASE

I. The Disposition of Fetal Remains in Indiana

A. Respectful disposition of human remains is universal

Abortion results in the death and expulsion of the remains of a human embryo or fetus. *See* A21. Those remains are the subject of this lawsuit. Respectful disposition of human remains by burial or cremation is a universal feature of human culture and civilization. "Treating human remains with respect is affirmed across multiple cultures, religious and otherwise, and is affirmed in professional and ethical standards expounded by national and international advisory bodies." A50 ¶ 11; *see also* A165 (agreeing that "nonreligious people . . . also bury or cremate their dead"). As Dr. Farr Curlin, a bioethics professor and licensed medical doctor, explained, one of "the central norms of mainstream bioethics [is] the concern to show due respect to *all* human beings . . . including [in] our treatment of their remains." A49 ¶ 11. In contrast, no tradition—at least not in Dr. Curlin's or the plaintiffs' knowledge—holds that human remains must be disposed of in the same place and manner as waste. A53.

In addition, abortion is a significant procedure with grave consequences. Naturally, before the abortion, providers make clear to patients the nature of the procedure, including that abortion ends a pregnancy and results in the death of the fetus. Ind. Code §§ 16-34-2-1.1(a)(1)(C), (2)(J)(i) ("after an abortion induced by an abortion inducing drug, [the patient] will expel an aborted fetus"). In that vein, it is reasonable for women to know the legal options for disposing of those remains. Providing preg-

nant women information about the disposition of the inevitable fetal remains "increase[s] women's choices," "allow[s] women to give express consent for how the fetal remains will be handled," and "allow[s] for that consent to be more informed." A63 ¶¶ 32–34. This knowledge and choice are important not only for informed consent but also for mental health outcomes.

Women who have had abortions may experience "feelings of grief or loss" as a result. A174. Dr. Priscilla Coleman, a developmental research psychologist with decades of experience and dozens of peer-reviewed publications, explained the knowledge that the remains of an abortion had been buried rather than simply disposed of as "medical waste" can give comfort to a person who experienced "at least some degree of attachment" to the fetus during pregnancy or feels a sense of loss after the abortion. A112–22. Serena Dykson's experience of having an abortion led her to believe that burial or cremation of fetal remains would have benefitted her, and if given the opportunity, she "would have wanted to bury [her] baby to give dignity to [her] child." A181 ¶ 23.

Of course, not every woman views and experiences abortion in the same way. "When abortion patients do not consider the fetus human, feel any connection to the fetus, or express fetal-directed concern before or after demise," disposition requirements for the fetal remains "will likely have no demonstrative impact on such women." A102 ¶ 12. Critically, though, it will "increase[] the comfort of many women who *do* experience fetal-directed concern or attachment notwithstanding their decision to have an abortion." *Id.* (emphasis added). So fetal-disposition regulations "are

likely psychologically beneficial to a significant percentage of women undergoing abortions." *Id.*

B. Indiana laws and regulations governing the disposition of aborted fetal remains

In accord with the universal ethic of handling human remains with respect, and out of concern for giving women information that may be relevant for their abortion-related decisions and, ultimately, their mental health, Indiana laws and regulations prescribe the appropriate disposition of aborted fetal remains. Indiana law provides that "[a] pregnant woman who has an abortion" has the "[r]ight to determine final disposition of [her] aborted fetus." Ind. Code § 16-34-3-2 (2022). If the woman elects for the abortion provider to dispose of the fetal remains, the provider "having possession of [the] aborted fetus shall provide for the final disposition of the aborted fetus," "which must be interred or cremated." *Id.* § 16-34-3-4(a); *see* 410 Ind. Admin. Code 35-2-1(a).

The provider may dispose of the remains "on site" or "contract[] with a licensed funeral home for the disposal of the aborted fetal remains." Ind. Code § 16-34-3-4(b). If the provider chooses cremation, it must be done in accordance with Indiana's laws governing cremation. *Id.* § 16-34-3-2(a); *see also id.* § 16-41-16-4(d) (expressly excluding "an aborted fetus or a miscarried fetus" from the definition of "infectious waste" that may be incinerated). Except, "[a]borted fetuses may be cremated by simultaneous cremation." *Id.* § 16-34-3-4(a).

Abortion providers must follow certain documentation provisions, including "[t]he burial transit permit requirements of IC 16-37-3," Ind. Code § 16-34-3-4(a), and

the "log prescribed by the state department" containing information about the remains from the burial transit permit, *id.* § 16-34-3-4(c)–(d). A "burial transit permit" is "a permit for the transportation and disposition of a dead human body required under IC 16-37-3-10 or IC 16-37-3-12." *Id.* § 23-14-31-5. For aborted fetal remains, however, "a person is not required to designate a name for the aborted fetus," *id.* § 16-34-3-4(a)(1), and "any information submitted under this section that may be used to identify the pregnant woman is confidential and must be redacted from any public records maintained under IC 16-37-3," *id.* § 16-34-2-4(a)(2).

Meanwhile, the log of information about the abortion includes the date and method of the abortion, the name of the funeral director licensee retrieving the remains, and, for medication abortions, whether the women will return the fetus or dispose of it herself. Ind. Code § 16-34-3-4(c); A42. The entity receiving the remains must confirm that the number of fetal remains matches the entries in the permit and log. Ind. Code § 16-34-3-4(d). The abortion provider must retain the original log and a copy of the final log. *Id.* § 16-34-3-4(c)–(d). The provider must also "have written policies and procedures for the available method or methods of disposition of aborted fetuses." 410 Ind. Admin. Code 35-2-1(b).

During a patient's pre-abortion counseling, abortion providers must provide information orally and in writing about the disposition of the aborted fetal remains. Ind. Code § 16-34-2-1.1(a)(2)(H)–(J). These disclosures include that the pregnant woman "has a right to determine the final disposition of the fetal remains," *id.* § 16-34-2-1.1(a)(2)(H), she "has a right . . . to . . . have the health care facility dispose of

the remains of the aborted fetus by interment . . . or cremation . . . and to ask which method of disposition will be used," *id.* § 16-34-2-1.1(a)(2)(I), "after an abortion induced by an abortion inducing drug, [the patient] will expel an aborted fetus," *id.* § 16-34-2-1.1(a)(2)(J)(i), and she is "allow[ed] . . . to return the aborted fetus to the health care facility for disposition by interment . . . or cremation," *id.* § 16-34-2-1.1(a)(2)(J)(ii). Abortion patients must inform the facility in writing that they have received the required information and which disposition option they have chosen, *id.* § 16-34-3-2(b).

An abortion patient's decision concerning final disposition of aborted fetal remains is documented on State Form 56114. A43–45. The top of the form explains that, "[i]f you decide for the provider to be responsible for disposition, the provider may dispose of the aborted fetus by burial or cremation," and it informs the woman that she may ask the provider about the method and location. A43. And "[i]f you wish to choose a different method or location for disposition of the aborted fetus, you have the right to choose that option and will be responsible for the costs of the burial or cremation, if any." *Id.* For medication abortions, it provides that "[i]f you expel the fetus somewhere other than the provider's facility, you have the right if you wish to return the fetus to the provider for disposition by burial or cremation" and may ask about the method or location. *Id.*

Under the "Patient Certification," the patient certifies that she is at least eighteen years old, that the provider informed her orally and in writing about her right to determine the final disposition of the aborted fetus, and that the provider gave her

information about the available options for disposition. A45. She also certifies that she "ha[s] decided to dispose of the aborted fetus by:" (1) "Abortion clinic / health care facility will arrange for burial/cremation of the aborted fetus with a crematorium or funeral home," (2) "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," or (3) "*(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." *Id.*

C. The Supreme Court upholds Indiana's fetal-remains law

In an earlier lawsuit, a district court enjoined enforcement of Indiana's requirement that abortion providers dispose of fetal remains by cremation or burial after concluding that it did not pass rational-basis scrutiny. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017) (raising substantive due process and equal protection claims).

A Seventh Circuit panel affirmed, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018), and, although it initially granted the State's petition for rehearing en banc, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 727 F. App'x 208 (7th Cir. 2018) (Mem.), this Court ultimately denied *en banc* review after one judge recused. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532 (7th Cir. 2018) (Mem.).

In dissent from the denial of rehearing en banc, Judge Easterbrook observed that the fetal-remains-disposition requirement cannot be "beyond regulatory authority" under the reasoning that the fetus is not unequivocally "a person." *Id.* at 537 (Easterbrook, J., dissenting). In the animal-welfare context, for example, "[m]any states have laws that prescribe how animals' remains must be handled," and states may regulate in that area, "not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare." *Id.* Thus, "a ban on slaughtering horses for human consumption is rationally related to the goal of reducing dismay at poor treatment of these creatures." *Id.* This is "equally true of a statute about fetal remains." *Id.* Judge Easterbrook added that, although "[t]he panel . . . observed that the disposal statute does not prevent a woman from taking possession of the fetal remains and disposing of them as she pleases, . . . [a] state need not regulate comprehensively in order to regulate at all." *Id.* at 537–38.

The Supreme Court reversed the decision invalidating the fetal-disposition law, concluding that the law satisfied rational-basis review. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The Court rejected Planned Parenthood's argument that "Indiana's stated interest in the humane and dignified disposal of human remains was not legitimate." *Id.* (quoting *Planned Parenthood*, 888 F.3d at 309) (cleaned up). It stated that "[t]he Seventh Circuit clearly erred in failing to recognize that interest as a permissible basis for Indi-

ana's disposition law." *Id.* Finally, it concluded that Indiana's law was rationally related to that interest. *Id.* at 1782 (quoting *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 452 n.45 (1983)).

II. This Case: Alternative Theories to Challenge Indiana's Fetal Disposition Law

A. Plaintiffs' allegations

Plaintiffs Jane Doe 1, Jane Doe 3, Women's Med Group Professional Corporation, William Mudd Martin Haskell, M.D., and Kelly McKinney, N.P., filed this action for declaratory and injunctive relief against Defendants 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 the Marion County Prosecutor (collectively, the State), in their official capacities. A1–41. The plaintiffs challenged Indiana's fetal-disposition laws and regulations, alleging they violate the First and Fourteenth Amendments—under the Free Exercise Clause, Establishment Clause, Free Speech Clause, Due Process Clause, and Equal Protection Clause—and requesting declaratory and injunctive relief. A1–3 ¶¶ 1–6.

Two of the plaintiffs are women who had abortions in Indiana while Indiana's fetal-disposition laws were in effect—Jane Doe 1 and Jane Doe 3. Both had an aspiration abortion at Women's Med Group in Indianapolis and received the counseling information and disclosures, including State Form 56114. A4–7 ¶¶ 11, 28. They each selected the first option, which provides that the clinic will dispose of the aborted

fetus by burial or cremation. *Id.* Jane Doe 1 and Jane Doe 3 alleged that Indiana's fetal-disposition requirement violated their free exercise and free speech rights because they would prefer the abortion provider use "standard medical means" of disposition, instead of burial or cremation. A26 ¶ 119; ECF No. 77-1 at 12 ¶ 15; ECF No. 77-1 at 19 ¶ 24.

The remaining plaintiffs are abortion providers. Women's Med Group has operated a licensed abortion clinic in Indianapolis for twenty years. ECF No. 77-1 at 41, Haskell Decl. ¶ 6. It stores aborted fetal remains "for a period of time" until picked up quarterly for cremation. A191. William Mudd Martin Haskell, M.D., is a physician licensed to practice medicine in Indiana and Ohio and the owner and Medical Director of Women's Med. A9–10. Kelly McKinney, N.P., is a nurse practitioner licensed to practice in Indiana who works part-time at Women's Med. A10, 244. She conducts pre-abortion counseling and ensures that the patient receives the fetal-disposition information orally and in writing, reviews State Form 56114, and answers patients' questions. A232–36. The abortion providers allege that the fetal-disposition disclosure requirements violate their free speech rights. A36–38.

Women's Med has been storing the remains of Jane Doe 1's and Jane Doe 3's abortions in a freezer in Women's Med Center. A233. Plaintiffs' briefing says Women's Med stored the remains at the Does' requests, ECF No. 77, Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment 2, but both Jane Doe 1 and Jane Doe 3 said that medical staff at the clinic suggested preservation until the conclusion of the case. *See* A215–16; 229–30. Regardless, Dr. Haskell stated that,

if the plaintiffs prevail, Women's Med would "send it off to be incinerated." A191. And if the plaintiffs lost, they would "look at the[] charts and see what [Jane Doe 1 and Jane Doe 3] elected on the state form." *Id.*

B. Proceedings below

The plaintiffs and the State moved for summary judgment on all claims. ECF No. 76; ECF No. 82. The district court ruled for the State on the plaintiffs' Establishment Clause, Due Process Clause, and Equal Protection Clause claims and some of the multiple claims under the Free Speech Clause. SA29 n.10; SA36. But it ruled for the plaintiffs on their core free-exercise and free-speech claims concerning disposal of the remains and physician disclosures of the options for disposal. *See* SA36.

In its free-exercise analysis, the district court stated, "Plaintiffs have proved the fetal disposition law burdens their sincere religious and moral beliefs of treating aborted fetuses as medical waste." SA9. The court further concluded that "[t]he fetal disposition requirements are not generally applicable" because "[t]he requirements are significantly underinclusive so that they do little to advance the state's interests." SA13. The court determined the law is "less inclusive" because it "allow[s] patients to select disposition methods that accord with their religious beliefs" since the law "expressly exclude[s] that religious belief." SA14. As to "protecting abortion patients' mental health," the court "dr[ew] the inference for Indiana that requiring burial or cremation benefits patients' mental health." *Id.* Without a broader regulation, the court stated, "the law is not about its mental health benefits; it is about preventing people like Plaintiffs from treating their fetal tissue as medical waste." SA15. Finally,

the court concluded that "[t]he law is also underinclusive with respect to Indiana's interest in the humane and dignified disposal of fetal remains" because it does not apply "in the context of at-home medicated abortions, at-home miscarriages, and in vitro fertilization." *Id.* But the court ultimately determined that it "need not decide" whether "in vitro fertilization is a proper comparison for the statute." *Id.*

The court then stated that the law is "not neutral because the object of the law is to suppress the Plaintiffs['] religious conduct." SA16. It concluded that "[t]he new fetal disposition requirements only impose burdens on women who have religious or firmly held moral beliefs that aborted fetuses should be treated as medical waste rather than as a person." SA17.

Applying strict scrutiny, the court "assum[ed] the requirements serve a compelling interest," SA20, but concluded that "the law fails to sufficiently advance the government's asserted interest and is not tailored to the least restrictive means," SA9. The court stated that "the law targets protected conduct unnecessarily because the state could have retained the old scheme which gave patients the choice to treat fetal tissue as medical waste while still allowing for cremation and burial." SA20. And "[b]ecause the statute targets conduct that it need not target to further the state's interest, the scheme is not using the least restrictive means." *Id.* On the other hand, the court also determined that "the statute is underinclusive as to each of Indiana's three asserted interests," *id.*, and concluded that "[t]he fetal disposition requirements are contrary to that principle of the Free Exercise Clause and are void." *Id.*

The district court also ruled in favor of the plaintiffs on their free speech claims. For the fetal-disposition requirements, it determined that "the decision to provide certain or no funerary customs is expressive conduct" that receives First Amendment protection. SA21. Citing two of the plaintiffs' experts, the court remarked that "[p]roviding burial or cremation to fetal tissue conveys the message to any observer that the fetal tissue is equivalent to a person and should receive the same respect." SA22. Because the court determined "the law is squarely aimed at suppressing expression," "strict scrutiny applies." SA24. Under this analysis, the court stated that, "[a]s the fetal disposition requirements can only justify themselves by compelling Plaintiffs to show respect to fetal tissue that they do not want to respect, while prohibiting them from speaking their message, the fetal disposition requirements offend the Free Speech Clause." SA26–27.

As to the disclosure requirements, the district court declined to apply the truthful and non-misleading standard because it determined that most of the "disclosures do not relate to the risks and benefits of the procedure, are . . . inconsistent with other informed consent disclosures, and have no effect on the decision-making process." SA30. Instead, the court applied strict scrutiny and held that the disclosure requirements violate the Free Speech Clause. SA31.

Ultimately, the district court declared unconstitutional and enjoined the State from enforcing the following laws and regulations: Indiana Code Sections 16-21-11-6(b), 16-21-11-6(c), 16-34-2-1.1(a)(2)(H), 16-34-2-1.1(a)(2)(I), 16-34-3-2(b), 16-34-3-

4(a), 16-34-3-4(c), 16-34-3-4(d), 16-34-3-4(g), 16-41-16-4(d), 16-41-16-5, 410 Ind. Admin. Code 35-2-1(a), 35-2-2(a), 35-2-2(a)(1), 35-2-2(a)(2), 35-2-2(a)(4), 35-2-2(b)(1), 35-2-2(b)(2), "and the laws enforcing those sections." SA38–39. The State filed a motion for stay of the injunction pending appeal in the district court, ECF No. 103, which the district court denied, A255–56.

SUMMARY OF ARGUMENT

Indiana limits how abortion *providers* dispose of aborted fetal remains. But for abortion *patients*, state law grants a "[r]ight to determine" the final disposition of the aborted fetus. Ind. Code § 16-34-3-2. Nothing about this regulatory scheme offends free-exercise or free-speech rights of pregnant women or abortion providers. The requirement of respectful disposition by providers mirrors the undoubtedly valid requirements for disposing of the bodies of born-alive humans, and the allowance for abortion patients to dispose of the aborted fetal remains accommodates any speech or religious objections they may have.

The district court erroneously concluded that preventing the Jane Doe plaintiffs from directing abortion clinics to incinerate fetal remains as regular medical waste violated the Jane Does' free exercise rights. But the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability" even if it incidentally burdens religion. *Emp't Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Here, at most, the law imposes only an incidental burden on the Jane Doe plaintiffs' religious exercise. To start, the relevant requirements regulate abortion providers, not abortion patients. Jane Doe 1

and Jane Doe 3 cannot invoke the Free Exercise Clause to exempt abortion providers—who bring no religious objections themselves—from complying with a state regulation that is neutral and generally applicable on its face. As the U.S. Supreme Court already held, the fetal disposition requirement furthers the State's important and "legitimate interest in proper disposal of fetal remains." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (quoting *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 452, n.45 (1983)).

Nor does the law "target" religion or affect only religious conduct. As the district court acknowledged, no evidence suggests official hostility towards religion. And the fetal-disposition requirement does not selectively burden women who object to fetal burial or cremation on religious (or even non-religious) grounds. Indeed, Indiana law *accommodates* different beliefs by granting women the right to take possession of their aborted fetal remains and dispose of the remains as they see fit for religious reasons or nonreligious reasons. As a neutral and generally applicable law, it faces only rational-basis scrutiny, and the Supreme Court has already upheld it under that standard. Regardless, even if the Court subjects the law to strict scrutiny, the fetal disposition requirement must be upheld because it is narrowly tailored to further compelling government interests.

The claim that the fetal-disposition requirement burdens abortion patients' free-speech rights likewise lacks merit. The law does not prevent Jane Doe 1 and Jane Doe 3 from engaging in what they assert to be expressive conduct—avoiding burial or cremation of their aborted fetal remains. The law restricts only to the conduct of

abortion providers. In any event, the act of incinerating fetal remains as regular medical waste (or directing abortion providers to do so) is not inherently expressive conduct. Even if someone *subjectively* intends to say something through that act, it does not, as an *objective* matter, "communicate" any idea sufficient to trigger First Amendment scrutiny. Following the district court's reasoning, all state laws regulating the burial and cremation of born-alive human remains would come under heightened scrutiny. No one disputes the State's authority to regulate the dignified disposition of those remains; the same reasoning applies here.

Finally, the disclosure requirements do not violate the abortion providers' speech rights by requiring them to inform women of certain disposal options for fetal remains. The First Amendment permits States to impose informed-consent requirements on medical providers like abortion clinics, so long as the required disclosures are truthful and non-misleading. Telling women that they have a statutory right to have the providers bury or cremate fetal remains is not misleading.

STANDARD OF REVIEW

The Court reviews the district court's grant of summary judgment de novo. *Hess v. Bd of Trs. of S. Ill. Univ.*, 839 F.3d 668, 673 (7th Cir. 2016). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). If a case involves legislative facts, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v.*

Bradley, 440 U.S. 93, 111 (1979) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911)).

ARGUMENT

I. The Fetal-Disposition Requirements Do Not Violate Jane Doe 1's or Jane Doe 3's Free-Exercise Rights

No one thinks burial and cremation requirements for *born-alive* human remains violate the Free Exercise Clause. Nevertheless, Jane Doe 1 and Jane Doe 3 allege that the State's regulation of medical facilities' disposition of aborted human fetal remains violates their rights to free exercise of religion. Their novel claim must fail here, just as it would fail if the plaintiffs were challenging laws requiring respectful disposition of an adult's remains. *Employment Division v. Smith* provides the appropriate framework, but the Indiana law is valid under any standard.

A. The fetal-disposition requirement is neutral and generally applicable under *Smith*

The Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Even if the law "incidentally burden[s] religion," it will not be subject to strict scrutiny if it is "neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Smith*, 494 U.S. at 878–82).

1. The fetal-disposition requirement is neutral to religion

The fetal-disposition requirement is facially neutral because the text does not refer to religion at all. The statute refers to "interment" and "cremation" to "dispos[e]" of an "aborted fetus." Ind. Code § 16-34-3-2(b). None is an inherently religious term, *see* A11 ¶ 20; A176, and no one disputes that the requirements are facially neutral.

The fetal-disposition requirement is also neutral to religion in operation. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices" and places a religious plaintiff "on an equal footing with other religious and non-religious entities seeking" like treatment. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 650–51, 657 (10th Cir. 2006); *see, e.g.*, *id.* at 653 ("[T]he City's zoning code does not amount to a system of individualized exemptions triggering strict scrutiny").

Though it found no evidence demonstrating "official expressions of hostility toward their religious exercise," SA8 n.3, the district court concluded that, given the law's "effect," "the object of the law is the suppression of beliefs like Plaintiffs." *Id.* at 18. In the district court's view, this case presents "[t]he same problem" as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)—which overturned a city ordinance that effectively prohibited only religious animal "sacrifice" but not animal slaughter for other reasons, such as food preparation—where "[t]he [Supreme] Court found the statute . . . targeted religion because the legislature narrowed the proscribed category so that it only included the religious conduct at issue." SA17.

The notable feature for the district court here was that, because "[t]hose who have a miscarriage or abortion at home, or otherwise take the tissue home, are unaffected," "[o]nly those who have an abortion at a clinic and want the tissue treated as medical waste have their choice disregarded." SA18. That unremarkable observation has nothing to do with the exercise of religion. The fetal-disposition requirement, like the statute in *Smith*, proscribes the same conduct both when it is motivated by secular beliefs and when it is done for religious purposes. The Oregon law in *Smith* prohibited the use of peyote both when it was used for secular purposes and when it was used as a religious sacrament. *Smith*, 494 U.S. at 874. In contrast, the ordinance in *Church of Lukumi* prohibited animal slaughter only when religiously motivated. 508 U.S. at 524. Here, Indiana allows a patient to direct the abortion clinic to dispose of the fetal remains by cremation or burial regardless whether the patient is motivated by religious considerations.

What is more, if the pregnant woman chooses her own method of disposition, she may take possession of the aborted fetal remains and bear the cost of disposing of them in her preferred way. This is true both for women motivated by religious reasons and for women motivated by non-religious reasons. *See, e.g.*, *State v. Green*, 99 P.3d 820, 827 (Utah 2004) ("Utah's bigamy statute does not . . . operate to isolate and punish only that bigamy which results from the religious practices of polygamists. It contains no exemptions that would restrict the practical application of the statute only to polygamists."). Laws are not required to provide religious accommodations to meet the neutrality requirement—that is the entire point of *Smith*. *See*

Smith, 494 U.S. at 878. Holding that the law only burdens people who believe fetuses should be disposed of as medical waste by the abortion provider is no different from saying that laws prohibiting peyote use selectively burden people who believe as a matter of religious or moral conviction that smoking peyote is spiritually necessary.

In any event, even assuming for the sake of argument an adverse impact on the Doe plaintiffs' religious conduct, such, without more, is insufficient to demonstrate targeting of religion. The Supreme Court has cautioned that "adverse impact will not always lead to a finding of impermissible targeting." *Church of Lukumi*, 508 U.S. at 535. Impermissible targeting is apparent when the "text of the challenged laws targets a single religion's practice (while exempting others) or [when] in the months preceding the laws' enactment legislators demonstrated their specific intent to target Plaintiffs themselves." *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 592 (6th Cir. 2018). Absent evidence to this effect—and none exists here, as the district court held—courts have rejected allegations of impermissible targeting. *See, e.g.*, *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 763–64 (7th Cir. 2003) (text and history of zoning law did not target church); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 242 (3d Cir. 2008) (homeschooling regulations did not impermissibly target religious homeschool families). And no targeting occurs where the law's effect "may have been a legitimate concern of government for reasons quite apart from discrimination." *Church of Lukumi*, 508 U.S. at 535 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

The Indiana law also does not "incidentally burden[]" the Doe plaintiffs' religious beliefs or practices because it requires only *abortion providers* to cremate or bury the remains. It leaves the pregnant woman free to take possession of the remains and dispose of them as she sees fit. That is the case for the individual plaintiffs here who explained that they have religious or moral objections to burial or cremation of the fetal remains. A215 (Jane Doe 1 "feel[s] like burying is more of a religious belief as opposed to not"); A227 (Jane Doe 3 believes "[t]he contents of [her] uterus from th[e] abortion did not have a soul so it should not be buried or cremated"). In this way, the requirements serve the State's interest in accommodating women with different beliefs.

Even if the law results in an "incidental[]" adverse effect on religion, it still furthers "a legitimate concern of government for reasons quite apart from discrimination." *Church of Lukumi*, 508 U.S. at 535. Here, the "object" of the fetal-disposition requirements is the State's interest in the humane and dignified disposition of human remains, which is a "legitimate concern of government for reasons quite apart from discrimination," *id.*; *see Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019). Unlike the ordinances in *Church of Lukumi*, which, "when considered together disclose[d] an object *remote* from these legitimate concerns," 508 U.S. at 535 (emphasis added), the fetal-disposition law serves the stated government interests and does not target religious conduct. Thus, the object of the law is certainly "something other than the infringement or restriction of religious practices," *Grace United Methodist*, 451 F.3d at 649–50.

2. The fetal-disposition requirement is generally applicable

To satisfy the general-applicability requirement, "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Church of Lukumi*, 508 U.S. at 543; *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) ("A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" (quoting *Fulton*, 141 S. Ct. at 1877)). This principle "'protect[s] religious observers against unequal treatment,' and inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation." *Church of Lukumi*, 508 U.S. at 542–43 (emphasis added) (citation omitted). The fetal-disposition requirement pursues its interest generally, not selectively, and so it is a law of general applicability.

The district court disagreed because it determined the law is "underinclusive." SA13. In its view, "to *truly* protect abortion patients' mental health" and provide humane and dignified disposal of fetal remains, "the laws would have to apply more broadly and require burial or cremation for all fetal tissue not just fetal tissue at medical facilities." SA13–14. The court therefore would require the law to regulate women disposing of fetal remains "passed at home or taken home from the hospital" to pass muster as a "generally applicable" law. SA15–16.

Free-exercise doctrine, however, recognizes that "[a]ll laws are selective to some extent" and does not require laws to take an all-or-nothing approach. *Church of*

Lukumi, 508 U.S. at 542; *see Fulton*, 141 S. Ct. at 1880 ("customized and selective assessments" are appropriate). Instead, a law is "underinclusive" only if it "regulates religious conduct while *failing to regulate secular conduct* that is at least as harmful to the legitimate government interests purportedly justifying it." *Central Rabbinical Congress of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (emphasis added).

Here, the fetal-disposition requirement applies to both secular and religious conduct in its pursuit of its interests in ensuring the proper and dignified disposal of fetal remains and protecting abortion patients' mental health. The law allows a patient to direct the abortion clinic to dispose of the fetal remains by cremation or burial regardless whether the patient is motivated by religious considerations. Religious and non-religious persons alike bury or cremate their dead, SA32, and religious and non-religious persons both may take possession of the aborted fetus for their preferred disposition. Nothing in the record demonstrates that the law "selective[ly] . . . impose[s] burdens only on conduct motivated by religious belief." *Church of Lukumi*, 508 U.S. at 543. "The teaching of *Smith* is that a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." *Central Rabbinical*, 763 F.3d at 196. That is the case here.

1. The district court "dr[ew] the inference . . . that requiring burial or cremation benefits patients' mental health," SA14, but it took issue with the State's pur-

suit of that interest because, in the court's view, the law "strains" some women's mental health. Specifically, the court faulted the fetal-disposition requirement because "[p]atients taking fetal tissue home undoubtedly feel a strain on their mental health in a comparable way to having an abortion at a clinic." SA14–15. But that is precisely why the law presents a choice—patients can avoid taking the fetal tissue home by allowing the abortion provider to dispose of the remains, and the fetal-disposition regulations "are likely psychologically beneficial to a significant percentage of women undergoing abortions." A114 ¶ 59.

The district court would have preferred a different accommodation—one precisely tailored for these plaintiffs that combines their religious or moral preference for incineration with a mental-health concern for avoiding the handling of fetal remains. But the Free Exercise Clause does not entitle the plaintiffs to counter the State's effort to assuage mental-health burdens by insisting on their own solution. The legislature is not required to achieve every plaintiff's preferred accommodation. The law as written reflects a legislative assessment as to how to advance a legitimate state interest in abortion patients' mental health in the cases where it is relevant, while reasonably accommodating contrary views; the district court erred in invalidating that assessment simply because it disagreed with how the legislature struck that balance.

2. Regarding the State's interest in the dignified disposition of fetal remains, the district court concluded the fetal-disposition law is underinclusive because "Indiana does not attempt to pursue this interest in the context of at-home medicated

abortions, at-home miscarriages, and in vitro fertilization, all of which involve the same 'unique and independent human physical life' that Indiana asserts as critically important." SA15. Indiana, however, may constitutionally regulate the treatment of human remains by medical facilities without simultaneously reaching to regulate the conduct of women who have abortions or miscarriages within the privacy of their own homes.

Indeed, one benefit of limiting the reach of the disposition law is that it allows religious accommodation for women who prefer to avoid the burial or cremation requirement, who benefit from an opportunity to mourn the deceased child, or who prefer a specific religious ceremony of some type. Such an accommodation accords with the law. Ind. Code § 16-34-2-1.1(a)(2)(H) ("the pregnant woman has a right to determine the final disposition of the remains of the aborted fetus"). As for in vitro fertilization, the district court ultimately said it "need not decide" whether it is a "proper comparison for the statute." SA15–16. But in vitro fertilization clearly presents a different issue that is not a proper comparison. Abortion always leaves behind fetal remains that must be disposed of in some manner. Not so for in vitro fertilization, which involves the creation of embryos with the intention to implant them into a woman's body and need not involve the disposal of embryos.

B. The fetal-disposition requirement overcomes rational-basis and strict scrutiny

Because the fetal-disposition law is religion-neutral and generally applicable, rational-basis review applies. The law easily withstands this standard because it indisputably advances the legitimate government interest in safeguarding the human

dignity of the fetus. *Box*, 139 S. Ct. at 1782 (concluding that Indiana's fetal disposition statutes are "rationally related" to the State's "legitimate interest" in proper disposal of fetal remains).

Even under strict scrutiny, this law survives because it "advance[s] interests of the highest order and . . . [is] narrowly tailored in pursuit of those interests." *Church of Lukumi*, 508 U.S. at 546 (citations omitted). The district court assumed that the fetal-disposition law met the compelling interest inquiry, but nevertheless found that it is not narrowly tailored to advance that interest for the same reasons it concluded the law is not generally applicable. SA20. In doing so, the district court erred because it conflated the two inquiries so that a failure under the general applicability inquiry necessarily leads to a failure of narrow tailoring. That is not the law. *See Central Rabbinical*, 763 F.3d at 197 (explaining that the regulation "singled out" religious conduct, triggering strict scrutiny, but "this does not mean that the Regulation is not narrowly tailored—a factor relevant in the *application* of strict scrutiny, and not to the question whether strict scrutiny applies"). Regardless, the law does not selectively burden religion as the district court thought it did. *See supra* pp. 21–22.

In any event, "[t]he First Amendment requires that [a law triggering strict scrutiny] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). Ultimately, the law provides the opportunity for a woman to avoid burial or

cremation of the aborted fetus according to her religious beliefs—she can take possession and dispose of it as she sees fit. The Free Exercise Clause does not entitle her to have a medical clinic dispose of the remains in the exact way she prefers. Accordingly, the fetal-disposition law passes strict scrutiny and does not violate the Free Exercise Clause.

II. Requiring Abortion Clinics To Bury or Cremate Aborted Fetal Remains Does Not Violate the Jane Does' Free-Speech Rights

A. The fetal-disposition requirements do not implicate conduct protected by the First Amendment

Indiana's fetal-disposition requirement does not implicate the First Amendment. Here, again, Jane Doe 1 and Jane Doe 3 challenge the fetal-disposition law's requirement that abortion *providers* must dispose of aborted fetal remains by burial or cremation. The providers do not bring this claim themselves. Neither the plaintiffs nor the district court cite a case holding that a person has a right to tell *another* person to engage in expressive conduct, but that is exactly what the plaintiffs claim here. Regardless, the conduct here is not expressive, the State's regulation is not related to the suppression of expression, and the State's interests are sufficiently compelling and its law sufficiently narrowly tailored in any event.

1. A pregnant woman's choice that the abortion provider dispose of the aborted fetal remains is not expressive conduct

Because this law governs conduct—the disposition of aborted fetal remains—the first question for the Court is whether the conduct in which Plaintiffs wish to engage "constitute[s] expressive conduct." *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

The Supreme Court has rejected the idea that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, the First Amendment protects only conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Thus, conduct is expressive only if it is (1) subjectively intended to communicate an idea, *Johnson*, 491 U.S. at 404, and (2) "inherently expressive" as an objective matter, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006).

First, expressive conduct cases safeguard a right of expressive action undertaken by plaintiffs themselves. They do not safeguard a right of plaintiffs to direct others to engage in plaintiffs' preferred expressive conduct. The Supreme Court has held, for example, that the First Amendment protects a person's artistic expression in wearing a military uniform in a play. *Schacht v. United States*, 398 U.S. 58, 62–63 (1970). Likewise, the Supreme Court has held that a person's protest or demonstration is protected speech, such as where the plaintiff marched in a parade, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), or wore a black armband to school, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

Here, the plaintiffs object to the abortion provider disposing of the aborted fetus by cremation or burial because it *may imply* some understanding about the fetus to which they object. *See* A215 (Jane Doe 1 "feel[s] like burying or cremation is more

of a religious belief as opposed to not or disposing of the tissue as medical tissue"). Permitting individuals to object to the regulatory obligations of their medical (or other service) providers based on such supposed implications would amount to a dramatic expansion of the understanding of expressive conduct. Under this regime, for example, a mother who believes biological sex is merely a social construct without meaningful content could direct a medical provider to forgo reporting her new baby's sex to the Department of Health on First Amendment grounds because that identification implies an objectionable message about biological sex. Such a result is absurd.

Second, the district court incorrectly concluded that requiring abortion patients to make a choice of disposition itself is expressive conduct, in part because Jane Doe 3 "felt that the State was compelling [her] to certify that [her] abortion would end the life of a person." ECF No. 77-1 at 18 ¶ 22. According to the district court, "[d]eliberately choosing to not provide funerary rights," SA22–23, "cho[osing] to treat fetal tissue as ordinary medical waste instead of human remains," *id.*, and "deci[ding] to provide certain or no funerary customs," SA21, constitute expressive conduct.

And the district court stated that Jane Doe 1 and Jane Doe 2 "indicate[d] that they *thought* burying or cremating tissue conveyed the message that the fetal tissue was a person and deserved an equivalent amount of respect as a person." SA22 (emphasis added). But conduct is not protected "speech" even if "the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. The subjective intent to communicate an idea is just one necessary element. *See Johnson*, 491 U.S. at 404.

The Doe plaintiffs' choice of disposition fails the second element because it is not "inherently expressive" as an objective matter. *Rumsfeld*, 547 U.S. at 65–66; *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (explaining that for First Amendment protection, "the conduct *itself* must convey a message that can be readily 'understood by those who view it'" (emphasis in original) (quoting *Johnson*, 491 U.S. at 404)). The district court concluded that "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 the fetus." SA23 (emphasis added).

But the patient's conduct consists of choosing one of two options: taking the remains to dispose herself, whatever method that may be, or allowing the abortion provider to dispose of the remains, which it must do by cremation or burial. Ind. Code § 16-34-3-4(a). Regardless of any subjective "idea" the abortion patient may have while making the disposition choice required by the law, the choice communicates nothing more than identifying who is responsible for the disposition and, if the abortion provider is responsible, the possible disposition method. Because it is not "likel[y]" that "the message would be understood by those who viewed it," *Johnson*, 491 U.S. at 404, the choice made under the fetal-disposition requirement is not "sufficiently imbued with elements of communication" to constitute expressive conduct under the First Amendment, *Spence*, 418 U.S. at 409.

2. An abortion provider's cremation or interment of aborted fetal remains is not expressive conduct

Even if the Doe plaintiffs are permitted to raise the abortion provider's cremation or interment of the aborted fetal remains as their own expressive conduct, that

act is not, in fact, expressive conduct. A medical facility's cremation or interment of aborted fetal remains is not even close to the conduct deemed "expressive" by the Supreme Court. For example, the Supreme Court has held the First Amendment protects conduct related to the display of or respect shown for flags, including burning an American flag, *Johnson*, 491 U.S. at 405–06, displaying an upside-down American flag affixed with a peace symbol, *Spence*, 418 U.S. at 406, 409–11, flying a red flag, *Stromberg v. California*, 283 U.S. 359, 360–61, 369 (1931), and saluting the American flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943). In these cases, the Court "had little difficulty identifying an expressive element in conduct relating to flags," because "[t]he very purpose of a national flag is to serve as a symbol of our country." *Johnson*, 491 U.S. at 405.

The Supreme Court has also held that the First Amendment protects conduct related to demonstrations or protests, where plaintiffs marched in a parade, *see Hurley*, 515 U.S. at 569, wore a black armband to school, *Tinker*, 393 U.S. at 505–06, or participated in a silent sit-in at a "whites only" public library, *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966). Here, too, the Court has explained that "the likelihood was great that the message would be understood by those who viewed it" given the context of each. *Johnson*, 491 U.S. at 404 (citing *Tinker*, 393 U.S. at 505; *Brown*, 383 U.S. at 141).

And of course, the First Amendment protects artistic expression. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (nude dancing); *Schacht*, 398 U.S. at 62–63 (wearing a military uniform in a theatrical production).

The district court held that "the performance, or lack thereof, of funerary rites is an inherently expressive activity," SA23, because, in the district court's view, "[i]t is simply impossible for a disposition method to acknowledge and respect the human dignity of a fetus while at the same time communicating no message at all." SA24. But the Supreme Court has held that the State *may* show "respect for . . . prenatal life at all stages of development," and that it may accomplish that goal through regulation of the abortion provider. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). In fact, the district court's holding that respectful disposition of fetal remains amounts to speech off-limits to government regulation utterly contradicts the Supreme Court's holding in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, that states have a legitimate interest in regulating the disposition of fetal remains. 139 S. Ct. 1780, 1782 (2019) (per curiam). That is, declaring such disposition to be nothing more than private speech immune to regulation negates any legitimate government interest, which *Box* already recognized.

Moreover, the same argument would apply to all burial or cremation laws, which also serve a government interest in the "respect[ful] and digni[fied]" disposition of human remains. SA24. The district court was unimpressed by the comparison, contending that such laws had already been subjected to such heightened scrutiny (and presumably upheld). SA25 ("these laws were already subject to constitutional scrutiny, First Amendment included"). Yet the district court cited only a single case that supposedly considered a First Amendment challenge to a human-remains law, *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999). *See*

SA25. And that case reviewed a free-exercise claim, not a free-speech claim, against a law requiring *disinterment* of a human body for the sake of autopsy. *Kickapoo*, 46 F. Supp. 2d at 645 (emphasis added). The State's interest there was not in the dignified disposal of human remains (indeed, it was contrary to that interest), but in "assuring that the death was not the result of foul play." *Id.* at 645–46. Regardless, the court held that the tribe's injury "d[id] not rise to a constitutional level" because the law was neutral and generally applicable. *Id.* at 652–54.

If all burial and cremation laws were subjected to heightened scrutiny under the Free Speech Clause, the result in such cases must undoubtedly be the same as for the fetal-disposition requirement. Although the district court observed that "[l]aws requiring the disposition of human remains . . . are justified . . . by the State's interest in public health," SA25–26, those laws clearly also serve the government interest in the humane and dignified disposition of human remains. They do not, for example, permit disposition of human bodies by incineration with medical waste. *See* Ind. Code § 12-20-16-12(b) (authorizing only burial or cremation); *id.* § 36-2-14-16(c) (same). If the fetal-disposition law justifies itself by "reference to expression" for that reason, it follows that all burial and cremation laws must fail heightened scrutiny for the same reason. In short, the implication of the district court's decision is that even venerable laws requiring respectful handling and disposition of corpses are now open to question.

On a related note, even ethical and humane disposition of animals is within the regulatory authority of the State. *See Planned Parenthood of Ind. & Ky., Inc. v.*

Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 537 (7th Cir. 2018) (Easterbrook, J., dissenting). Courts routinely uphold statutes aimed at protecting public sensibilities by protecting animal welfare. *See id.* For instance, in *Cavel International, Inc. v. Madigan*, this Court upheld, on animal welfare grounds, an Illinois statute prohibiting the slaughter of horses for human consumption. 500 F.3d 551 (7th Cir. 2007). If "reducing dismay at poor treatment" of horses is a legitimate government interest, *Planned Parenthood*, 917 F.3d at 537 (Easterbrook, J., dissenting) (citing *Cavel,* 500 F.3d at 557), then so too is respecting the dignity of fetal remains—or (put another way) reducing dismay at the lack of such respect. *Id.* The district court's summary judgment order does not even mention, much less distinguish, these cases.

The one case that the district court cited in support, *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), is not a First Amendment case at all; it is a Freedom of Information Act (FOIA) case. While the *Favish* Court observes in passing that burial rights "are a sign of the respect a society shows for the deceased and for the surviving family members," *id.* at 168, it does so to support the government's interest in maintaining the privacy of family members who have the right "to direct and control disposition of the body of the deceased," *id.* at 167. Indiana's law, which allows a woman to take control of her fetus's remains and dispose of them in any manner she sees fit, protects that same privacy interest.

B. If necessary, the fetal-disposition requirement passes intermediate scrutiny

In any event, the district court applied the wrong constitutional test to the plaintiffs' free-speech challenge. SA24. Even if the fetal-disposition law does implicate some expressive conduct, that does not subject the requirement to strict scrutiny. At most, the fetal-disposition requirement is a conduct-based law that incidentally burdens speech and that is subject to the *O'Brien* test. *See Tagami*, 875 F.3d at 378. Under the *O'Brien* test, a law does not violate the First Amendment if it is within the government's constitutional authority, furthers an important government interest unrelated to the suppression of free expression, and restricts expression no more than necessary to further the government interest does not violate the First Amendment. 391 U.S. at 377. The fetal-disposition requirement passes that test.

The State's interest in the proper disposal of fetal remains is unrelated to the suppression of free expression. Its interest is in ensuring that the remains of unborn humans are buried or cremated in a dignified and respectful manner, not in ensuring that all abortion clinics or patients agree with the State's view of human life. The Supreme Court accepted this exact state interest in *Box*, 139 S. Ct. at 1782, so the district court was mistaken in faulting the State for pursuing that interest, *see* SA24. The law also incidentally burdens First Amendment freedoms no more than necessary to pursue that interest by providing the patient with options for disposition. Women going through abortion who want to do something else may take possession of the remains and dispose of them according to their own preferences, so the law accommodates them in any event.

C. The fetal-disposition law passes even strict scrutiny

Even if strict scrutiny is the appropriate test, the requirement passes that high bar because it advances compelling government interests and is narrowly tailored to achieve them. *See supra* Part I.B.

III. Providing the Fetal-Remains-Disposition Disclosures Does Not Violate the Abortion-Provider Plaintiffs' Free-Speech Rights

A. The disclosures are informed-consent disclosures, subject to truthful and not misleading standard

The district court held that requiring abortion providers to disclose information to the patient about the disposition of the aborted fetal remains violates the free-speech rights of the providers. SA30–31. But such disclosures concern the abortion procedure and its consequences and are therefore lawful as truthful and non-misleading informed-consent requirements.

The doctrine of informed consent "encompass[es] the right of a competent individual to refuse medical treatment." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 (1990). The Supreme Court has observed that informed-consent requirements regulating speech "as part of the practice of medicine" are "subject to reasonable licensing and regulation by the State" and are therefore constitutionally permissible. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022)). "[T]he State may regulate informed consent in the abortion context in the same way that it regulates informed consent in other medical contexts." *EMW Women's Surgical Ctr.,*

P.S.C. v. Beshear, 920 F.3d 421, 439 (6th Cir. 2019). The Supreme Court has explained that "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." *Casey*, 505 U.S. at 883. Consequently, the State may "require doctors to inform a woman seeking an abortion of . . . the consequences to the fetus, even when those consequences have no direct relation to her health." *Id.* at 882. In other medical contexts, as well, state-mandated informed-consent disclosures require practitioners to inform patients of facts relevant to deciding whether to undergo the procedure that are not related to the procedure's risks or benefits. *See, e.g.*, Ga. Code Ann. § 43-34-26.1(d)(5) (requiring pharmacists and nurses administering vaccines according to a vaccine protocol agreement to inform recipient about "the importance of having and periodically seeing a primary care physician"); Tex. Fam. Code Ann. § 32.102(c) (informed consent for immunization of child requires informing parents of their options to seek recovery under the National Childhood Vaccine Injury Act of 1986); Ohio Rev. Code Ann. § 4731.97(C)(2)(iv)–(vi) (informed consent for experimental drugs include explanations of potential legal liability and what insurance may and may not cover).

Here, the disclosures at issue may affect women's decision to get an abortion. As Dr. Curlin explained, these disclosure requirements "allow for [patients'] consent to be more informed" because patients, including the plaintiffs in this lawsuit, "care about the disposition of their fetal remains." *Id.* ¶ 34. In a similar context in *Gonzales v. Carhart*, the Supreme Court explained that knowing the consequences of the abortion procedure to the fetus informs a woman's choice about abortion, even if those

consequences are outside of the "risks the procedure entails." 550 U.S. 124, 159 (2007). The district court cited only the two individual plaintiffs' testimony to conclude to the contrary that the disclosures are "irrelevant to patients' decisions on whether to get an abortion." *Id.* But two individuals' personal experience does not render the information irrelevant to all patients. Just because "[s]ome patients may not want to hear all of the details about a surgery, . . . they still have to document their consent by receiving and signing a form that lists information about the surgery." A65 ¶ 35. That some women care about what happens to the fetus when seeking an abortion is enough to bring it within the informed-consent requirement.

B. The fetal-disposition disclosures are truthful and not misleading

The fetal disposition disclosures provide truthful and non-misleading information concerning a woman's options for disposing of her aborted fetus. The court correctly applied the truthful and not-misleading standard to the narrow provision at Section 16-34-2-1.1(a)(2)(J)(i) and held that "there is no indication that [its] statement is untrue or misleading, [so] this disclosure survives constitutional scrutiny." SA30 & n.11. The same is true for the rest of the disclosures. *See* Ind. Code § 16-34-2-1.1(a)(2)(H)–(J). They state that the pregnant woman "has a right to determine the final disposition of the fetal remains," *id.* § 16-34-2-1.1(a)(2)(H), she "has a right . . . to . . . have the health care facility dispose of the remains of the aborted fetus by interment . . . or cremation . . . and to ask which method of disposition will be used," *id.* § 16-34-2-1.1(a)(2)(I), and she is "allow[ed] . . . to return the aborted fetus to the

health care facility for disposition by interment . . . or cremation," ***id.*** § 16-34-2-1.1(a)(2)(J)(ii).

Because the disclosures merely provide women with factual information concerning the legal options for disposition of the aborted fetus, the disclosures are both truthful and non-misleading, and therefore they pass First Amendment scrutiny.

CONCLUSION

The Court should reverse the district court's judgment and vacate the injunction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 10,779 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix and Appellants' separately filed Appendix contain all of the materials required under Circuit Rule 30(a) and 30(b).

By: <u>s/ *Thomas M. Fisher*</u>
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Solicitor General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, Jane Doe No. 1, Jane Doe No. 3, Dr. William Haskell, Cassie Herr, Kelly McKinney, and Women's Med Group, sue Defendants, the Attorney General of Indiana, the Commissioner of the Indiana Department of Health, the Indiana State Board of Nursing, the Marion County Prosecutor, and the members of the Medical Licensing Board of Indiana, for Indiana's enforcement of the fetal disposition and disclosure requirements (Ind. Code §§ 16-21-11-1 to 16-21-11-6; 16-34-2-1.1(a)(2)(H)–(J); 16-34-2-1.1(a)(3)(A); 16-34-2-6(b)–(c);[1] 16-34-3-1 to 16-34-3-6; 16-41-16-4(d); 16-41-16-5; and 410 Ind. Admin. Code 35-1-1 to 35-2-1). Plaintiffs levy a bevy of constitutional claims against these requirements, namely that the requirements violate the Due Process Clause (Count I), the Equal Protection Clause (Count II), the Free Speech Clause (Count

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

III), the Establishment Clause (Count IV), and the Free Exercise Clause (Count V). Following the close of discovery, both Plaintiffs and Defendants moved for summary judgment. The court, having read and reviewed the parties' submissions, the designated evidence, and the applicable law, now **GRANTS in part and DENIES in part** Plaintiffs' motion for summary judgment and **GRANTS in part and DENIES in part** Defendants' cross motion for summary judgment.

I. Background

A. Statutory Background

Indiana law allows medical providers to dispose of human tissue, medical waste, and other infectious material through incineration, steam sterilization, chemical disinfection, thermal inactivation, and irradiation. Ind. Code § 16-41-16-3. Of these options, the standard method for disposing of medical waste is incineration. *See* (Filing No. 77-1, Case Decl. ¶ 19); *see also* (Filing No. 77-1, Haskell Decl. ¶ 7). Prior to the passage of the laws challenged here, Indiana permitted—but did not require—facilities to dispose of fetal tissue just like standard medical waste. (Filing No. 77-1, Defs. Resps. to Pls.' Reqs for Admis. at 5 (Req. 14)). Indiana law also provided a pregnant woman the "right to determine final disposition of" the aborted fetus, which allowed women to choose whether to bury, cremate, or treat as medical waste the fetal tissue. Ind. Code § 16-34-3-2.

In 2016, Indiana enacted HEA 1337, which imposed particular requirements on the disposition of fetal tissue. Among other changes, the law excluded fetal remains from the definition of infectious and pathological waste, thereby preventing abortion providers

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

In 2020, Indiana created and clarified disclosure requirements that go along with the fetal disposition requirements. These laws require an abortion provider to inform patients orally and in writing that they (1) have a right to determine the disposition of the fetus; (2) they have a right to bury or cremate the fetus; (3) they have a right to require the abortion provider to bury or cremate the fetus; (4) that medication abortion patients will expel an aborted fetus; and (5) that the abortion provider must allow a medication abortion patient to return an aborted fetus. Ind. Code § 16-34-2-1.1(a)(2)(H)–(J). The laws also require the patient to inform the facility that they have received the information and which disposition option they choose for the fetal tissue. *Id.* § 16-34-3-2(b).

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

B. Prior Challenges

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

Following a petition for certiorari, the Supreme Court reversed. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The Court held that "Indiana's stated interest in the humane and dignified disposal of human remains" was legitimate and concluded that the requirements were "rationally related to the State's interest in [the] proper disposal of fetal remains" even if the requirements were "not perfectly tailored to that end." *Id.*

C. Factual and Evidentiary Background

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

These disclosures include information that Plaintiff McKinney finds "stigmatizing," "misleading," and "inaccurate." (*Id.* ¶¶ 20, 21, 25). Specifically, they require the nurse to inform patients about some of their statutory rights following an abortion. (*Id.* ¶ 23). While this includes informing patients of the right to determine the final disposition of the aborted fetus and the right to have the facility take the tissue, it does not specifically include discussing the right to dispose of fetal tissue at home with medication abortion patients. (*Id.* ¶¶ 21–25). According to Plaintiff McKinney's uncontested testimony, these disclosures are "not consistent with the informed consent process used in other areas of medicine." (*Id.* ¶ 24). Even still, the disclosures were not relevant to the Doe Plaintiffs' decision to get an abortion. (Filing No. 82-13, Doe 1 Dep. 33:23–34:15; Filing No. 82-14, Doe 3 Dep. 38:23–39:17). Nor has there been any evidence submitted showing the disclosures have prevented a woman from receiving an abortion.

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

Specifically, Doe 3 explained that as a matter of her Baptist faith she understands the Bible to indicate that "life begins at the first breath, following birth" rather than in the womb. (Doe 3 Decl. ¶¶ 3, 6 (discussing Genesis 2:7)). Accordingly, Doe 3 believes that "burial and cremation are religious rituals reserved for people and animals with souls."

(*Id.* ¶ 7). Not only do her religious beliefs prohibit her from "burying or cremating the tissue from my abortion," but they also require "that the tissue should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means." (*Id.* ¶ 24).

Doe 1, alternatively, holds a moral, rather than religious, belief that fetal tissue is not the remains of a person. (Doe 1 Decl. ¶ 15; Filing No. 82-13, Doe 1 Tr. 28:23–29:1 (describing this belief as a moral one)). Consequently, she does not believe that her fetal tissue should "be buried or cremated." (Doe 1 Decl. ¶ 15). Instead, she believes the tissue should be disposed of "using standard medical means" and sued so that she "could have the right to ask Women's Med to dispose of [her] tissue by standard medical means that do not mark it as a person." (*Id.* ¶¶ 15, 19). Both Doe Plaintiffs believe that burying or cremating the tissue signified that the fetal tissue was a person. (*Id.* ¶ 13; Doe 3 Decl. ¶ 7). They further believe that treating the tissue as standard medical waste signifies that the fetal tissue is not a person. (Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 24).

II. Legal Standard

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

is because "[i]t is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which [it] relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008).

III. Discussion

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

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

1. Free Exercise (Count V)

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

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

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

tailored to "the least restrictive means" to "justify an inroad on religious liberty." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

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

a. Burden on Sincere Religious Belief

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

The Free Exercise Clause protects "sincerely held" religious beliefs, even if those beliefs are not mandated by a particular organization or shared among a congregation. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989). These beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (internal quotation marks omitted). Indeed, the beliefs need not be religious at all: sincerely held moral "beliefs dealing with issues of ultimate concern that . . . occupy a place parallel to that filled by . . . God" also

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

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

receive protection. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (internal quotation marks omitted).

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

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

With no evidence to the contrary, this evidence demonstrates the Doe Plaintiffs hold sincere religious and moral beliefs that the fetal tissue is not equivalent to a person and should be disposed of as medical waste.[6] By its plain terms, the fetal disposition law burdens this religious and moral belief by making it more difficult, if not impossible, to

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

dispose of fetal tissue as medical waste. *See* Ind. Code § 16-41-16-4(d) (excluding "an aborted fetus or a miscarried fetus" from the definition of "infectious waste"). After drawing all inferences in favor of Indiana, the Plaintiffs have successfully demonstrated the fetal disposition requirements burden their sincere religious and moral beliefs.[7]

That the Plaintiffs' have demonstrated a sincere religious and moral belief regarding the status of fetal tissue is an unremarkable conclusion. The Supreme Court has consistently recognized that beliefs surrounding abortion and the personhood of fetuses are "ageless," "fundamental moral question[s]." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022). In *Roe v. Wade*, the Court explained that even those "trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" regarding "the difficult question of when life begins." 410 U.S. 113, 159 (1973); *see also Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 850 (1992) (explaining some people "always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy"). As "[a]bortion presents a profound moral question," it is no surprise that some will have firmly held religious and moral beliefs as to the status of fetal tissue. *Dobbs*, 142 S. Ct. at 2284.

Indiana's argument to the contrary is not persuasive. In its view, because the fetal disposition requirements allow women to take the fetal tissue home and dispose of it how they please, the law accommodates, rather than burdens, Plaintiffs' religious and moral

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

beliefs. The fetal take-home provision does not stop the law from burdening the Doe Plaintiffs' religious exercise for two reasons. Foremost, Plaintiffs have put forward uncontested evidence that patients do not take standard medical waste home, which is instead incinerated. (RFA Resps. at 7 (Reqs 21) (admitting "[t]he Challenged Laws treat human tissue from an abortion or miscarriage differently from human tissue from all other surgical procedures"); Doe 1 Decl. ¶ 16 ("In the dental practices where I have worked, we do not give patients tissue from their biopsies . . . because it is biohazardous material."); Filing No. 77-1, Hartsock Decl. ¶ 20 (noting "the Disposition Requirement" as a whole "requires clinicians to adhere to standards that are contrary to the medical standard for disposal of human tissue"); Case Decl. ¶ 20 (explaining "in no other areas" does she "have to bury or cremate tissue resulting from the procedure" and that the "standard methods of medical disposal" include incineration)). As the relevant religious belief is treating the fetal tissue "like any other human tissue resulting from a medical procedure," (Doe 3 Decl. ¶ 24), allowing the Doe Plaintiffs to take their fetal tissue home—something that would not occur were fetal tissue treated like any other human tissue—does not accommodate their religious and moral beliefs.

And even if it did, the take-home fetal tissue option still treats those exercising the religious and moral beliefs at issue differently than those without such beliefs. The Free Exercise Clause protects against unequal treatment toward religious practices. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Because the fetal take-home provision requires more from those seeking to exercise their belief that

fetal tissue is like any other human tissue than those who do not, the free exercise of those religious and moral beliefs is, at a minimum, burdened by the statutory scheme.

b. General Applicability

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

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

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

home," the "euthanasia of stray, neglected, abandoned, or unwanted animals," the "infliction of pain or suffering" on animals "in the interest of medical science," or the use of animals "to hunt wild hogs." *Id.* at 543–44. Because the law allowed these "secular killings" but burdened the religious ones even though both fell "within the city's interest in preventing the cruel treatment of animals," the law was underinclusive. *Id.* at 544.

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

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

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

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

The law is also underinclusive with respect to Indiana's interest in the humane and dignified disposal of fetal remains. Under the fetal disposition requirements, the only fetal remains that must be given a humane and dignified disposition are those at medical facilities. The statute allows the disposal of fetal tissue pursuant to at-home medicated abortions and fetal tissue taken home to be done in any way the patient pleases. (McKinney Decl. ¶ 22). And Indiana decided not to apply the fetal disposition requirements to preimplantation embryos resulting from in vitro fertilization, (RFA Resps. at 4 (Reqs 6)), even though that process involves "the fertilization of eggs by sperm to produce embryos" that are then either "implanted . . . or disposed of," (Filing No. 77-1, Maienschein Decl. ¶ 28). Put simply, Indiana does not attempt to pursue this interest in the context of at-home medicated abortions, at-home miscarriages, and in vitro fertilization, all of which involve the same "unique and independent human physical life" that Indiana asserts as critically important. (Defs.' Br. at 16).

Indiana disputes that in vitro fertilization is a proper comparison for the statute. The court, however, need not decide that issue because even if Indiana were correct that

in vitro fertilization is different, the fetal disposition requirements do not materially advance the State's interest because the statute does not care about giving humane and dignified dispositions to fetal tissue passed at home or taken home from the hospital.

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

c. Neutrality

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

In determining whether a law is religiously neutral, courts not only look to whether the law discriminates on its face, but also to the lines drawn by the statute to

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

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

The new fetal disposition requirements only impose burdens on women who have religious or firmly held moral beliefs that aborted fetuses should be treated as medical waste rather than as a person. Prior to the passage of the 2016 fetal disposition requirements, Indiana law allowed patients to require, at their request, burial or cremation for their miscarried or aborted fetuses while at the same time allowing women with differing beliefs to treat the fetal tissue as medical waste. *See* Pub. L. 127-2014, 2014 Ind. Acts 1472–73; *see also* Pub. L. 113-205, 2015 Ind. Acts 829; (RFA Resp. at 5 (Req. 14)). After 2016, Indiana law required burial or cremation for aborted and miscarried fetuses at medical facilities. Ind. Code § 16-34-3-4. The new law also expressly excludes "an aborted or a miscarried fetus" from the definition of infectious medical

waste. Ind. Code § 16-41-16-4(d). Both the current and former regime treat women who miscarry or abort their fetus away from a medical facility the same: they can dispose of the tissue how they like, such as by flushing it down the toilet, expelling it into a sanitary napkin, burying it, or cremating the tissue. *See* Ind. Code § 16-34-3-4 (only applying to medical facilities); *see also* (Case Decl. ¶ 9 (noting patients "typically" discharge the tissue into a sanitary napkin or toilet)); (McKinney Decl. ¶ 29 (describing that most patients "expect to pass their pregnancy at home on a toilet or in a sanitary napkin")); (Peters Decl. ¶ 10 (explaining medication abortion plaintiffs "usually expel the tissue into a sanitary napkin or a toilet" but may consider "interring or cremating the tissue")).

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

Indiana argues that the Court in *Lukumi* relied on specific evidence of hostility toward religious conduct which is not present here. *Lukumi* was not so narrow. While Justice Kennedy did analyze "evidence [of] significant hostility exhibited by" proponents

of the law, that analysis failed to capture a majority of the Court. *Lukumi*, 508 U.S. at 523, 541 (The hostility analysis occurs in Part II-A-2 but Justice Kennedy "delivered the opinion of the Court, except as to Part II-A-2."). The thrust of the *Lukumi* analysis is not that a legislature must display animus for there to be a Free Exercise violation, but rather that strict scrutiny applies where a law has carefully selected its terms such that its impact is narrowly focused on religious conduct. The Court's later reading of *Lukumi* confirms that conclusion because it notes that neutrality and hostility are two separate inquiries. *Kennedy*, 142 S. Ct. at 2422 n.1 (discussing the *Lukumi* analysis while noting plaintiffs "may also prove a free exercise violation by showing . . . 'official expressions of hostility'") (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

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

d. Scrutiny

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

To satisfy strict scrutiny, the statute must advance "interests of the highest order" and be narrowly tailored. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Narrow tailoring requires that the government choose "the least restrictive means of achieving a compelling state interest." *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383

(2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). This test "really means what it says," and few laws will survive. *Smith*, 494 U.S. at 888. In short, strict scrutiny is "a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.). It is not satisfied here.

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

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

2. Free Speech (Count III)

a. Fetal Disposition Requirements

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

While not all conduct can "be labeled 'speech' whenever the person engaging in the conduct intends . . . to express an idea," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Free Speech Clause does protect conduct that is "sufficiently imbued with elements of communication," *Spence*, 418 U.S. at 409. That occurs where a party has "an intent to convey a particularized message" and there is a high likelihood "that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11). The conduct needs to be "inherently expressive" such that the conduct "comprehensively communicate[s] its own message without additional speech." *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)). If there is no inherently expressive conduct, the First Amendment inquiry is at an end.

But where the conduct is inherently expressive, the court evaluates "whether the State's regulation is related to the suppression of free expression." *Johnson*, 491 U.S. at

403. If it is, the court applies strict scrutiny. *Id.* at 412 (applying "the most exacting scrutiny") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). If it is not, the court applies the more lenient *O'Brien* test.[8] *Johnson*, 491 U.S. at 403.

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

So too have Plaintiffs demonstrated that "the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. "[H]uman communities have uniformly shown respect to human beings by treating their remains respectfully" and affording those persons funerary rites. (Curlin Decl. ¶¶ 14, 15). Providing burial or cremation to fetal tissue conveys the message to any observer that the fetal tissue is equivalent to a person and should receive the same respect. (Maienschein Decl. ¶¶ 8, 12 & n.3; Peters Decl. ¶¶ 11, 13–14, 29–38). The opposite is equally true. Deliberately choosing to not

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

provide funerary rites expresses that the fetal tissue does not require the respect owed to human remains. Thus, the choice to treat fetal tissue as ordinary medical waste instead of human remains necessarily informs onlookers about the patient's disposition toward the status of their fetus. Accordingly, treating fetal tissue as medical waste is expressive conduct that receives First Amendment protection.

Indeed, the performance, or lack thereof, of funerary rites is an inherently expressive activity. The Supreme Court explained that funerary rites "are a sign of the respect a society shows for the deceased and for the surviving family members." *Nat'l Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 168 (2004). And the sign of respect demonstrated by funerary rites is so ubiquitous as to be understood and "respected in almost all civilizations from time immemorial." *Id.* at 167–68. People intuitively understand the messages conveyed by these rituals as they have "been practiced from the very dawn of human culture" and represent "the conscious cultural forms of one of our most ancient, universal, and unconscious impulses." *Id.* (quoting 26 Encyclopaedia Britannica 851 (15th ed. 1985) and 5 Encyclopedia of Religion 450 (1987)). There can be no question that giving or refusing to give funerary rites inherently conveys a message.

Indiana seemingly agrees. Indiana submits that the purpose of the law is to "ensure[] that the remains of unborn humans are buried or cremated in a dignified and respectful manner[.]" (Defs.' Br. at 16). In its view, giving funerary rites to fetal tissue "acknowledge[s] the human dignity of the fetus." (Defs.' Reply Br. at 4). This purpose presupposes that anyone who views, hears of, or takes part in the burial or cremation

understands the respect and dignity being given to the fetal tissue. It is simply impossible for a disposition method to acknowledge and respect the human dignity of a fetus while at the same time communicating no message at all. Were Indiana correct that giving (or deciding to not give) funerary rites to fetal tissue communicates no message about the personhood of the fetus or the respect and dignity properly due to the fetal tissue, the fetal disposition requirements would concurrently fail to advance Indiana's asserted interest. Yet Indiana strenuously argues—and puts forward considerable evidence attempting to demonstrate—the opposite. *See, e.g.*, (Curlin Decl. ¶¶ 11, 14, 26); *see also* (Filing No. 92-4, Coleman Decl. ¶¶ 10, 51 (noting, among other things, that the disposition requirements "inherently equate fetal remains with other human remains")).

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

Indiana raises three arguments to justify the fetal disposition law. Each of them fails. Foremost, Indiana argues that funerary rites are not expressive conduct because the Supreme Court has only recognized three broad categories of expressive conduct: conduct displaying respect for the flag; demonstrations, parades, and protests; and artistic expression. Such a wooden framework ignores that the Supreme Court finds conduct to

be expressive whenever there is "an intent to convey a particularized message" and the "message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. Under that analysis, deciding not to provide funerary rites to fetal tissue is expressive.

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

More concretely, this argument ignores how the fetal disposition requirements are different from other laws regulating the disposition of human remains. Laws requiring

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

the disposition of human remains apply generally to remains regardless of whether those remains are in the home or the hospital, and such laws are justified—as are most statutes regulating the disposition of biohazardous material—by the State's interest in public health. That is not the case here. The fetal disposition requirements prevent one specific way of disposing of the fetal remains to effectuate the government's interest in promoting respect for fetal tissue. Put succinctly, whereas most disposition laws justify themselves without reference to expression, the fetal disposition requirements do not.

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

Lastly, Indiana contends that it may "express[] a preference for childbirth over abortion." *Casey*, 505 U.S. at 883; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). While this is a superficially correct statement, Indiana's application of that precedent here is misplaced. Just because the government may use its voice to espouse an idea does not mean it can compel other voices to speak its message. *Compare Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 215–17 (2015), *with Wooley v. Maynard*, 430 U.S. 705, 715–16 (1972). And while there are situations where the government can compel speech, Indiana, wisely, does not argue that situation occurs here. *See, e.g.*, *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005).

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

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

b. Disclosure Requirements

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

There are only two narrow situations where "more deferential review" will be applied: first, required disclosures of factual, noncontroversial information in the course of commercial speech, and second, regulations on professional conduct that only "incidentally involve[] speech." *Id.* at 2372 (collecting cases). The first of those situations applies solely to commercial speech, which is speech that "propos[es] a commercial transaction." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978). That is not applicable here.

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

Even still, courts need to be wary because "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Thus, the reach of the State's ability to regulate in this area is limited by those requirements of informed consent that are "firmly entrenched in American tort law." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). At its most firmly rooted point, informed consent requires informing patients of the substantial risks that if disclosed would cause "reasonable persons . . . [to] reject[] the proposed treatment." *Spar v. Cha*, 907 N.E.2d 974, 979–80 (Ind. 2009) (quoting Dobbs, *The Law of Torts*, § 250 (2001)). Consequently, the State can only require disclosures that relate to the risks or benefits of the procedure that might affect whether reasonable patients would reject the treatment. *Compare NIFLA*, 138 S. Ct. at 2373–74, *with Casey*, 505 U.S. at 885.

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

Many of the disclosures required by Indiana law do not relate to the risks and benefits of abortions and are irrelevant to informed consent. While the requirement to disclose that a drug-induced abortion patient "will expel an aborted fetus" relates to the expected consequences of an abortion,[11] Ind. Code § 16-34-2-1.1(a)(2)(J)(i), the rest of the disclosures do not. Instead, those provisions seek to inform women about their statutory rights following an abortion instead of the risks and benefits of the procedure.[12] Indeed, Plaintiffs introduce uncontested evidence that the disclosures here are "not consistent with the informed consent process used in other areas of medicine." (McKinney Decl. ¶ 24). There is also uncontested evidence that these disclosures are irrelevant to patients' decisions on whether to get an abortion. (Doe 1 Dep. 33:23–34:15; Doe 3 Dep. 38:23–39:17).

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

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

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

speech" and are subject to strict scrutiny under the First Amendment. *NIFLA*, 138 S. Ct. at 2374.

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

B. Establishment Clause (Count IV)

Next, Plaintiffs challenge the fetal disposition and disclosure requirements as a violation of the Establishment Clause. But because the fetal disposition and disclosure requirements do not establish any religion, the requirements do not violate the Establishment Clause. That Clause prohibits laws "respecting an establishment of religion." U.S. Const. amend. I. Those words "must be interpreted by reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (plurality opinion)). Whether a law offends the Establishment Clause turns on "the understanding of the Founding Fathers" such that the line between permissible and impermissible "accords with history." *Town of Greece*, 572 U.S. at 577 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

The Establishment Clause has not been historically understood to prohibit laws that only "coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 336 U.S. 420, 442 (1961). For example, just because prohibiting murder "agrees with the dictates of the Judaeo-Christian religions" does not mean the State establishes those religions by criminalizing murder. *Id.* at 442. Similarly, even where a

statute promulgates and reflects "traditionalist values toward[] abortion," there is no Establishment Clause violation without more. *Harris v. McRae*, 448 U.S. 297, 319–20 (1980).

While the exact boundaries of what more a law needs to do to establish religion are unclear, the court need not reach that issue today. That is because Plaintiffs have not shown anything more than the fetal disposition and disclosure requirements coinciding with certain religious beliefs. On this record, it is uncontroverted that even though some persons hold religious beliefs surrounding the burial or cremation of human remains, (Maienschein Decl. ¶ 15; Filing No. 77-1, Espada Tr. 70:5–11), many non-religious persons bury or cremate their dead and the respectful treatment of human remains is not strictly religious, (Peters Dep. 43:5–8 (Pls.' Expert); Curlin Decl. ¶ 20 (Defs.' Expert)).[13] Indeed, "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial," because they represent "a sign of the respect a society" shows the deceased even if that person is not religious. *Favish*, 541 U.S. 157, 167–68 (2004). To the extent that the fetal disposition and disclosure requirements do advance "traditionalist values" toward fetal personhood, the laws only coincide or harmonize with religious tenets and do not violate the Establishment Clause. *McRae*, 448 U.S. at 319–20.

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

The Supreme Court's recent opinion in *Kennedy* belies Plaintiffs' contention that this Court should apply the *Lemon* test or failing that, the coercion test. 142 S. Ct. at 2427. Under the *Lemon* test, the court questions "(1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether government activity fosters an excessive entanglement with religion." *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). "Governmental action is violative" of the Establishment Clause "if it violates any one of these three prongs." *Id.* However, the Supreme Court "long ago abandoned *Lemon*" and instead applies the historic approach described in *Town of Greece*. *Kennedy*, 142 S. Ct. at 2427. Moreover, the coercion test still requires religious action which, as described above, is absent here. Therefore, Defendants are entitled to summary judgment on Plaintiffs' Establishment Clause claim.

C. Due Process (Count I)

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

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

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

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

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

D. Equal Protection (Count II)

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

In relation to other substantive rights, the Equal Protection Clause complements, but does not duplicate. *See, e.g.*, *Obergefell v. Hodges*, 574 U.S. 644, 670–74 (2015) (explaining how the Equal Protection Clause synergizes with but is independent from other substantive rights). To that end, the Equal Protection Clause prohibits excluding or distinguishing between members of a particular class without sufficient justification. *City*

of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). It is not violated merely when a substantive right is burdened—even where that burden is unconstitutional. Plaintiffs have not cited a case where a court has found an equal protection violation purely because the statute violated the First Amendment as to some class of people.

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

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

IV. Conclusion

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

The disposition of these claims are as follows:

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

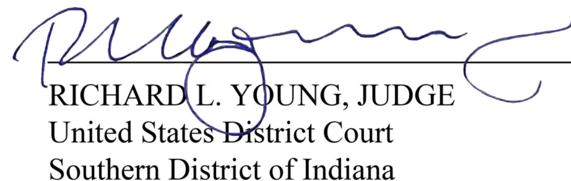
The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count II (Equal Protection).

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

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

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

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



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

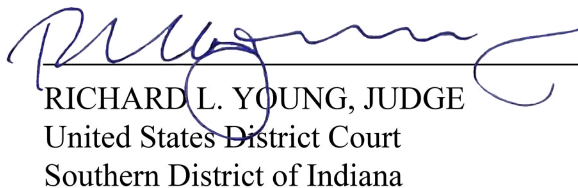
ORDER ENJOINING ENFORCEMENT OF THE FETAL DISPOSITION AND DISCLOSURE REQUIREMENTS

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

Having found that those provisions and the laws enforcing those sections violate the Plaintiffs' rights under the Free Exercise and the Free Speech Clauses, Defendants and their officers, agents, servants, employees and attorneys, and those acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Codes §§ 16-21-11-6(b), 16-21-11-6(c), 16-34-2-1.1(a)(2)(H), 16-34-2-1.1(a)(2)(I), 16-34-3-2(b), 16-34-3-4(a), 16-34-3-4(c), 16-34-3-4(d), 16-34-3-4(g), 16-41-16-4(d), 16-41-16-5, 410 Ind.

Admin. Code 35-2-1(a), 35-2-2(a), 35-2-2(a)(1), 35-2-2(a)(2), 35-2-2(a)(4), 35-2-2(b)(1), 35-2-2(b)(2).

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



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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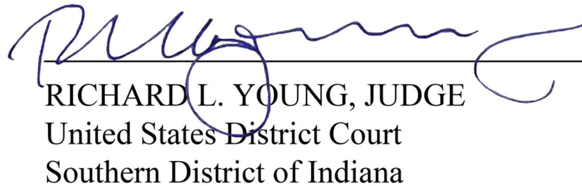
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

FINAL JUDGMENT

In today's Entry, the court granted partial summary judgment for Plaintiffs and granted partial summary judgment for Defendants. In doing so, the court resolved all of the claims at issue in the case. Accordingly, the court now enters final judgment in favor of Plaintiffs and against Defendants on Counts III and V and enters final judgment in favor of Defendants and against Plaintiffs on Counts I, II, and IV.

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



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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