

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF OF *AMICI CURIAE* FOR ORGANIZATIONS
WHOSE MEMBERS' FREE EXERCISE RIGHTS
ARE BURDENED BY INDIANA'S FETAL TISSUE
DISPOSITION LAW IN SUPPORT OF PETITIONERS**

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May 1, 2023

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**STATEMENT OF INTEREST OF AMICI
CURIAE¹**

Amici curiae represent organizations rooted in diverse religious² belief systems, including Judaism, Islam, Hinduism, Sikhism, Christianity, humanism, atheism, and Indigenous belief systems. Despite their different traditions, amici curiae are united in their

¹ Pursuant to the Court’s Rule 37.2, notice of amici’s intention to file this brief was timely provided to counsel of record for all parties. Pursuant to the Court’s Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than amici or their members made any monetary contribution to the preparation or submission of this brief.

² Throughout this brief, the word “religious” is used to describe various belief systems that posit the existence of a deity or deities (theistic belief systems), that are not centered on theist practices (nontheistic belief systems), and that expressly, though no less devoutly, deny the existence of deities (atheistic belief systems). The Constitution’s Free Exercise Clause protects all beliefs that take a position on religion, including nontheistic and atheistic beliefs. *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (“Atheism is, among other things, a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics. As such . . . it qualifies as [] religion for purposes of the First Amendment . . .”). Because all of the beliefs and practices described herein are entitled to protection under the Free Exercise Clause as “religious”—and without intending to inappropriately characterize sincerely held nontheistic or atheistic beliefs and practices as “religious” in any other context—all of the beliefs and practices described in this brief are protected by the First Amendment rights afforded to “religious” beliefs and practices, and all references to the rights afforded to “religious” beliefs and practices apply equally to nontheistic and atheistic beliefs and practices.

support of the Petitioners’ challenge to Indiana’s law requiring the burial or cremation of fetal tissue,³ and prohibiting medical providers from treating fetal tissue as ordinary medical tissue. They submit this brief to offer the Court their perspectives on the disposal of fetal tissue and to express their shared belief that the Indiana law unconstitutionally burdens their religious freedoms.⁴

American Atheists

**American Muslim and Multifaith Women’s
Empowerment Council**

Avodah

Bayard Rustin Liberation Initiative

Catholics for Choice

Central Conference of American Rabbis

Freedom from Religion Foundation

Indigenous Women Rising

³ The challenged law applies to both fetal and embryonic tissue. Throughout this brief, the term “fetal tissue” will be used to describe both fetal and embryonic tissue.

⁴ Although the perspectives shared herein are those of amici curiae and reflect the beliefs of certain of their membership, neither this brief nor amici seek to describe the beliefs or practices of any entire group, nor do they assert that all members of amici organizations adhere to the beliefs and practices described herein. Rather, this brief provides examples of the sincerely held beliefs of specific individuals and groups represented by amici to inform the Court of the variety of perspectives on this issue.

Interfaith Alliance
Jewish Orthodox Feminist Alliance
Keshet
Men of Reform Judaism
Muslims for Progressive Values
National Council of Jewish Women
Rabbinical Assembly
Reconstructionist Rabbinical Association
**Religious Coalition for Reproductive
Choice**
Rev. Jessica Petersen-Mutai
Rev. Sara Ofner-Seals
Sadhana
**Sikh American Legal Defense and
Education Fund**
Sikh Coalition
Society for Humanistic Judaism
**Spiritual Alliance of Communities for
Reproductive Dignity**
Union for Reform Judaism
Unitarian Universalist Association
Women of Reform Judaism
**Women's Alliance for Theology, Ethics
and Ritual**

SUMMARY OF ARGUMENT

Indiana’s Fetal Tissue Disposition Law compels Jews, Muslims, Hindus, Sikhs, Christians, humanists, atheists, Indigenous people, and other people with constitutionally protected religious beliefs—who hold a range of theological beliefs on life and personhood and practice or, in some cases, decline to practice a variety of end-of-life rituals—to engage in what Indiana considers the sole “humane and dignified” means of fetal tissue disposal. Br. of Appellants at 23, *Jane Doe No. 1 v. Att’y Gen. of Ind.*, No. 22-2748 (7th Cir. Nov. 9, 2022), ECF No. 12 (“Gov’t Br.”). This law burdens patients’ religious beliefs and practices in violation of the Free Exercise Clause.

ARGUMENT

I. INDIVIDUALS EXPRESS A RANGE OF RELIGIOUS BELIEFS AND PRACTICES REGARDING BURIAL AND CREMATION, INCLUDING THE BURIAL AND CREMATION OF FETAL TISSUE.

This Court has consistently recognized “that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2441 (2022). Amici are individuals and organizations who hold sincere religious beliefs and engage in a range of religious expression and practices concerning end-of-life rituals. For some, end-of-life rituals such as burial and cremation represent sacred

acts that warrant sensitivity and respect. For others, these rituals serve as inherently religious mourning activities that, when mandated by the state, contradict their sincerely held beliefs. All amici concur that burial and cremation are end-of-life rituals that reflect individuals' religious views on personhood and death.

Indiana both prescribes and proscribes religious expression through legislation curtailing the rights of individuals who seek to dispose of fetal tissue as ordinary medical tissue. *See* Ind. House Enrolled Act (“H.E.A.”) 1337 (2016), *amending* Ind. Code §§ 16-34-2-1, 16-34-3-2, 16-34-3-4, 16-41-16-4(d), 16-41-16-5, 16-41-16-7.6 (“Fetal Tissue Disposition Law”). In requiring burial or cremation of fetal tissue, Indiana compels individuals to engage in inherently religious expression. Indiana’s statute therefore unconstitutionally burdens the religious practices and beliefs of members of amici organizations.

A. Religious Traditions Include A Range Of Burial And Cremation Practices That Reflect Diverse Beliefs.

Religious traditions and philosophical perspectives on burial and cremation practices are diverse, reflecting the complexity of human beliefs. *See Kennedy*, 142 S. Ct. at 2429. Religious faiths offer different tenets and guidance regarding the treatment of fetal tissue, personhood, and the significance of funeral rites. These beliefs often depend on interpretation of religious texts, cultural influences, and moral and ethical values, resulting in a multitude of end-of-life practices across different belief systems.

Practitioners of many faiths regard burial and cremation as acts of profound respect for a person who—having lived—is dignified in death. Accordingly, these sacred practices are often reserved for those recognized as having personhood. For example, according to amicus National Council of Jewish Women (“NCJW”),⁵ Judaism encompasses an array of beliefs and practices related to burial and cremation. Many Jews place great value on *kavod ha-met*, or respect for the dead, and have established *chevra kadisha*, or burial societies, to ensure that the deceased are buried according to Jewish tradition and protected from desecration. Lynne Ames, *Burial Society’s Sacred Task of Performing a Ritual for the Dead*, N.Y. TIMES (Mar. 9, 1997), <https://www.nytimes.com/1997/03/09/nyregion/burial-society-s-sacred-task-of-performing-a-ritual-for-the-dead.html>. These traditions often incorporate the *tahara*, a ritual that involves cleansing, washing, and dressing the deceased’s body in traditional white shrouds, and reciting specific prayers. Following this ritual, the body may be placed in a wooden coffin and transported to the gravesite, where it is laid directly into the earth. *Id.*

Jews who follow these burial rituals rarely apply them to fetal tissue. Many Jews take the view that “the full title to life arises only at birth.” Joseph G. Schenker, *The Beginning of Human Life: Status of*

⁵ Throughout this brief, amici offer the Court original statements describing their beliefs that do not appear in other sources. All amici quotations featured herein were provided to amici counsel and will be identified as “Amicus statement.”

Embryo. Perspectives in Halakha, 25 J. OF ASSISTED REPROD. & GENETICS 271, 273 (June 13, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582082/>. For such believers, “[t]he death of a fetus . . . is a death of a potential life that never became a ‘viable’ person.” See Jason Weiner, *Jewish Guidance on the Loss of a Baby or Fetus*, 23 HAKIRAH THE FLATBUSH J. OF JEWISH L. & THOUGHT 93, 95 (Fall 2017) (citing to Ke-Chalom Ya’uf, 21; R. Yamin Levy, *Confronting the Loss of a Baby*, at xvii, 49, 55 (Ktav Publ’g, 1998)). Accordingly, “Jewish law requires no such observance” of mourning for expulsion or removal of fetal tissue, a point that is reinforced by the Talmud’s consideration of a fetus to be “mere fluid” for the first 40 days (after conception, as interpreted by subsequent Jewish law). See *id.* at 1; NCJW, *Abortion and Jewish Values Toolkit*, at 16 (2020), https://www.ncjw.org/wp-content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf (citing Talmud Bavli, Yevamot 69b). After 40 days, the fetus is then viewed “as its mother’s thigh,” Rabbi Josh Jacobs-Velde, *Why Judaism Differs on ‘What is a Fetus?’* (Feb. 16, 2023), <https://www.washingtonjewishweek.com/why-judaism-differs-on-what-is-a-fetus/> (citing Talmud Bavli, Gittin 23b),⁶ that is to say—as a part of the pregnant individual’s body until the “head has emerged.” NCJW, *Abortion and Jewish Values Toolkit*, at 16 (citing Mishnah, Ohalot 7:6). Thus, NCJW explains that fetal tissue lacks the formal

⁶ The Talmud refers to “mother” in its explicit wording. However, some Jewish interpretations use the more inclusive phrase “pregnant person.”

status of personhood and does not require the traditional rituals conducted out of respect for the deceased. See Rabbi Isidoro Aizenberg, *Treatment of the Loss of a Fetus through a Miscarriage*, in PROC. OF THE COMM. ON JEWISH L. & STANDARDS / 1986-1990 255, 256 (1987).

Many Muslims follow a similar approach. Before burial, which is required under Islamic law, Muslims typically perform a ritual called *Ghusl Mayyit*, which—like the Jewish *tahara* tradition—requires a washing and dressing of the deceased. Abdul R. Gatrad, *Muslim Customs Surrounding Death, Bereavement, Postmortem Examinations, and Organ Transplants*, 309 BRIT. MED. J. 521, 521-22 (Aug. 1994). Even for Muslims and Jews who are comfortable with fetal burial, a burial that does not comply with these rituals may conflict with their religious beliefs.

Muslims hold diverse beliefs as to whether and when a fetus gains personhood, informing whether and how Muslims choose to bury fetal tissue. Donna Lee Bowen, *Contemporary Muslim Ethics of Abortion*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, & EUTHANASIA 51, 55 (Jonathan E. Brockopp ed., 2003) (“Muslim legal schools differ . . . on questions of when the soul enters the fetus[.]”). Some believe personhood occurs after 40 days of gestation, while others believe personhood occurs after 120 days. *Id.* at 56; Yusuf Lenfest, *Islam and the Beginning of Human Life*, HARV. L. SCH. PETRIE FLOM CTR. (Dec. 8, 2017), <https://blog.petrieflom.law.harvard.edu/2017/12/08/islam-and-the-beginning-of-human-life/>. A ritually

marked live birth is often a prerequisite for a Muslim burial. See Alison Shaw, *Rituals of Infant Death: Defining Life and Islamic Personhood*, 28 *BIOETHICS* 84 (2014); see also Gatrad, 309 *BRIT. MED. J.* at 521 (“A stillborn baby will not require a full funeral service and in theory does not necessarily have to be buried in a cemetery.”).

Amicus Sadhana explains that Hinduism contains varied beliefs and practices related to burial and cremation, with many Hindus viewing the fundamental principle of Hinduism as one’s choice in how they practice their *dharma*, or right way of living, to inform their ultimate *karma*, where one’s actions determine their future experiences and spiritual growth. Hinduism includes many customs, cultures, geographies, and sects, and many Hindus view final death rituals—whether through cremation or burial—as sacred. Aiswarya Sasi et al., *Life After Death – the Dead Shall Teach the Living: A Qualitative Study on the Motivations and Expectations of Body Donors, their Families, and Religious Scholars in the South Indian City of Bangalore*, 12 *ASIAN BIOETHICS REV.* 149, 151 (2020) (“[D]eath is seen as an important ‘moment of passage’ and the rituals associated with death enable one to be freed from the cycle of birth and death[.]”).

Many Hindus follow the practice of *antyeshti*, or funeral rites, for the deceased, which involves cremation of the body. *Id.* Most Hindu traditions require cremation for the deceased, who are believed to have possessed a soul. However, Sadhana explains, burial may be appropriate for children under three, who are thought to have souls in the early stages of

development. See Int'l Comm. of the Red Cross, *Hindu Management of the Dead and COVID-19*, at 2 (Dec. 29, 2020), https://www.icrc.org/en/download/file/122920/002_hinduism_management_of_the_dead_and_covid-19_web.pdf.

Some Hindus, including members of Sadhana, believe, according to their understanding of reincarnation, that fetal tissue is not a conscious being capable of receiving a soul. Thus, traditional Hindu cremation practices are unsuitable for fetal tissue, which cannot be cleansed or sanctified in the customary manner.

Many Sikhs view the final resting process as sacred. Death is considered the will of God and is to be accepted with calm detachment. See Sikh Rehat Maryada (Sikh Code of Conduct and Conventions) § 4, ch. XI, art. XIX (Shromani Gurdwara Parbandhak Comm. ed., 1945). The Rehat Maryada, the Sikh code of conduct, directs that the body of the deceased be cremated, regardless of age, and that the family of the deceased pray and sing hymns during the funeral process. *Id.* As amicus Sikh American Legal Defense and Education Fund explains, there are no defined practices under the Rehat Maryada regarding the treatment of fetal tissue and no consensus on when life begins. See Sikh Research Inst., *Sikhi & Abortion*, at 30 (Nov. 2019), https://assets-global.website-files.com/5e29591964852b5d27d96ea4/5f817667787abb496bfe7744_SikhRi%20-%20SOTP5%20-%20Sikhi%20%26%20Abortion.pdf. Although Sikhs hold varying views on the ensoulment of a fetus, “depending on the developmental stage of the

embryo,” Sikhs generally will not conduct a religious ceremony following a miscarriage. Abdul R. Gatrad et al., *Sikh Birth Customs*, 90 ARCHIVES OF DISEASE IN CHILDHOOD 560, 562 (2005).

Christians hold diverse views on burial, cremation, and personhood. While some Christian denominations prefer burial or cremation of fetal tissue, requiring these practices could compel other Christians to contradict their deeply rooted beliefs. For example, the United Church of Christ (“UCC”)⁷ has formally recognized that “theological and scientific views on when human life begins are so numerous and varied that one particular view should not be forced on society through its legal system.” United Church of Christ, *Eighth General Synod Statements & Resolutions Regarding Freedom of Choice*, at 2 (1971), <https://new.uccfiles.com/pdf/GS-Resolutions-Freedom-of-Choice.pdf>. Accordingly, the UCC embraces the view that “[e]very [pregnant person] must have the freedom of choice to follow [their] personal religious and moral convictions concerning the completion or termination of [their] pregnancy.”⁸ Amicus Rev. Jessica Petersen-Mutai,

⁷ For many UCC members, burial is standard practice following death, and those seeking cremation are urged to consult their pastor. See FuneralWise, *United Church of Christ Funeral Service Rituals*, <https://www.funeralwise.com/funeral-customs/united-church-of-christ/> (last visited Apr. 21, 2023).

⁸ *United Church of Christ, Thirteenth General Synod Statements & Resolutions Regarding Freedom of Choice*, at 10 (1981), <https://new.uccfiles.com/pdf/GS-Resolutions-Freedom-of-Choice.pdf>. The Presbyterian Church (U.S.A.) has adopted similar positions on personhood, including that “[w]e may not

Senior Minister at First United Church in Bloomington, Indiana and an authorized minister with the UCC, believes that “[f]orcing a pregnant person or their family to engage in such a process of burial or cremation and interment for fetal tissue would seem to cheapen the meaning of this beautiful, meaningful ritual.”⁹

Many Christians formulate their views on burial and personhood through biblical interpretation. For instance, Rev. Dr. Timothy Murphy, Senior Pastor of Plymouth Church, UCC, of Fort Wayne, Indiana, looks to Numbers 5:11-31, which describes how the Lord instructed Moses that priests should remedy a pregnancy that resulted from adultery by inducing an abortion. Rev. Dr. Murphy interprets this verse to suggest that abortion is not inherently contrary to Biblical scripture or conceptions of personhood. Rev. Timothy Murphy, Sermon on Abortion and the Bible (May 15, 2022), <https://www.youtube.com/watch?v=guPNdThqTVI> Rev. Dr. Murphy also believes Genesis 2:7 implies that human life begins with breath. Rev. Jason

know exactly when human life begins[.]” Presbyterian Mission, *Abortion Issues*, <https://www.presbyterianmission.org/what-we-believe/abortion-issues/> (last visited Apr. 21, 2023). The Evangelical Lutheran Church of America has explained that embryology provides insight into the “complex mystery of God’s creative activity” but that individual interpretation of scientific information leads to various understandings of when life begins. Evangelical Lutheran Church in America, *Social Statement on Abortion*, at 1, 3 n.2 (1991), <https://www.elca.org/faith/faith-and-society/social-statements/abortion>.

⁹ Amicus statement.

Carson Wilson, Founding Executive Director of amicus Bayard Rustin Liberation Initiative, reads Genesis 2:7 to imply that “[i]f Adam’s life began when he took a breath, it stands to reason that God would consider a life beginning when a baby takes its first breath.”¹⁰ These beliefs align with those of Plaintiff Jane Doe 3, a Baptist Christian, who understands Genesis 2:7 to mean that “life begins at the first breath, following birth,” and “burial and cremation are religious rituals reserved for people and animals with souls.” Entry on Cross Mots. for Summ. J. at 5, *Jane Doe No. 1 v. Att’y Gen. of Ind.*, No. 1:20-cv-03247-RLY-MJD (S.D. Ind. Sept. 26, 2022), ECF No. 98.

Some individuals believe that burial and cremation practices are based on religious rules that contradict or undermine their sincerely held nontheistic or atheistic beliefs. Rabbi Jeremy Kridel, of amicus Society of Humanistic Judaism, a movement emphasizing the cultural and ethical aspects of Judaism without requiring belief in God, explains that “[f]or humanists, religious law of any religion is not a factor and decisions around pregnancy, birth, and disposal of fetal tissue are determined solely by the pregnant person in consultation with their medical providers and loved ones.”¹¹ He elaborates that humanism “centers reason, science, individual choice, and autonomy in its belief system and approach to all ethical matters

¹⁰ Amicus statement.

¹¹ Amicus statement.

...”¹² Accordingly, “Humanistic Jews would conclude that a fetus is not a human life.”¹³ Instead, he explains that Humanistic Jews sincerely believe the decision regarding the disposition of fetal tissue should be left to the individual who carried the fetus. Although some Humanistic Jews might opt for a funeral ceremony, burial, or cremation, he explains others might “find [these practices] objectionable or even morally abhorrent because of their commitment to reason and science as integral to their practice of Judaism.”¹⁴

Likewise, amicus American Atheists explains that many atheists believe mourning practices, like burial and cremation, are closely tied to “an individual’s beliefs about life and death, the status of the fetus, and their religious practices.” Letter from American Atheists, to Rep. Stephen D. Hambley (Apr. 30, 2019) (opposition to Ohio Senate Bill 27). Its members view the imposition of such activities as a violation of a person’s religious freedom. In opposing SB 27, a bill similar to Indiana’s H.E.A. 1337, American Atheists testified that “[m]ourning activities, such as choosing to bury or cremate [fetal tissue] . . . reflect an individual’s beliefs about life and death, the status of the fetus, and their religious practices.” *Id.* at 2. American Atheists has no objection to individuals choosing to bury or cremate fetal tissue if doing so aligns with their beliefs, but its

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

members oppose regulations compelling such practices, which they consider inherently religious. *Id.*

Indigenous end-of-life customs vary widely, and some Indigenous communities do not believe in cremation. Amicus Indigenous Women Rising (“IWR”) explains that the Laguna Pueblo, for instance, observe a four-day burial practice after death:

[T]here is a continuous watch, day and night, over the body [and] burial, [and] then ceremonies from sunrise on the [fourth] day after the family received the body. These ceremonies can take hours and require medicine men and women, and the deceased’s entire family including extended family[.] Our families do this practice whether it is for a pregnancy that did not make it to term, by miscarriage, or abortion, or a loved one.¹⁵

Each Indigenous community has its own end-of-life practices, reflecting its beliefs and worldviews on birth, death, and pregnancy-related care.

B. Indiana’s Fetal Tissue Disposition Law Burdens The Sincerely Held Beliefs And Practices Described In Section I(A).

Indiana’s Fetal Tissue Disposition Law mandates that medical providers either bury or cremate fetal tissue from miscarriages or abortions or return them to the patient. Ind. Code § 16-34-3-2(b)-

¹⁵ Amicus statement.

(e). Patients must sign a document, preserved within their medical records, either authorizing burial or cremation (at the medical provider's ultimate discretion) or agreeing to take possession of the tissue. *Id.* Patients whose religious beliefs about fetal tissue disposition conflict with those of the Indiana legislature are forced to assume the financial costs and potential hazards of managing biohazardous material. No other medical tissue is treated this way under Indiana law, and no other group of patients is denied the opportunity to have their tissue disposed of by medical professionals in the ordinary course.

Members of amici organizations are thus faced with a false choice: either agree in writing to "acts undeniably at odds with fundamental tenets of their religious beliefs" or bear the emotional stress, financial cost, inconvenience, and public health and personal safety risk associated with tissue disposal. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

For many Jewish individuals, burial is not a secular act, but religiously expressive conduct that holds deep spiritual and religious significance. Indiana's inability to guarantee that (a) a provider will perform a burial (as opposed to cremation), and (b) the burial would be in accordance with Jewish practice renders the law a burden on the patient's religious exercise.

The same is true for some Muslims, for whom burial is a sacred form of religious expression, rooted in scripture and centuries of custom. Indiana's law compels Muslims to engage in conduct that might be misaligned with Islamic principles for burying the deceased, or worse, insult those principles.

In Hinduism, the treatment of fetal tissue differs from that of conscious beings, making traditional cremation unsuitable. By mandating burial or cremation, Indiana forces Hindus to engage in conduct that is incompatible with their religious customs and beliefs.

Many Sikhs likewise view the final resting process as sacred and have a unique cremation practice. Sikhs generally do not conduct religious ceremonies following a miscarriage, depending on the developmental stage of the fetus. Indiana law burdens Sikh religious rights by impeding Sikh cremation rituals and requiring cremation (or burial) where inappropriate under Sikh beliefs.

Indiana's law disregards Christians' diverse theological perspectives, encroaches upon Christians' ability to make personal religious decisions, and contradicts some Christians' faith. Many Christians believe that personhood does not commence at conception and fetal tissue should not receive a sacred burial.

For some nontheistic and atheistic individuals, including Humanistic Jews, burial and cremation practices convey deeply held beliefs about life, death, and the nature of existence that they might sincerely reject. As a result, some individuals who do not view fetal tissue as human life object to Indiana dictating the disposition of such tissue. The Indiana mandate effectively compels them to participate in conduct that directly contradicts their sincerely held beliefs.

Finally, Indiana's law burdens the spectrum of Indigenous communities' beliefs and practices by compelling individuals to participate in Indiana's

preferred religious exercise, contrary to their true beliefs. IWR adds additional, painful context to this coercion by noting that “Indigenous people were not allowed to practice our own religions until the 1970s.”¹⁶ Under Indiana law, Indigenous communities are still impeded from doing so.

Indiana’s Fetal Tissue Disposition Law burdens the religious exercise of a diverse array of people by forcing them to defy their deeply held convictions. By compelling communities with diverse beliefs protected under the First Amendment’s Free Exercise Clause to abide by a one-size-fits-all approach to the disposition of fetal tissue, Indiana infringes upon their religious freedom both by disregarding some individuals’ sincerely held beliefs about the sanctity of burial and cremation practices, and by compelling other individuals to acquiesce to acts of burial and cremation in violation of their right to abstain from state-mandated rituals.

II. INDIANA’S FETAL TISSUE DISPOSITION LAW BURDENS RELIGIOUS EXERCISE.

Indiana’s Fetal Tissue Disposition Law is contrary to the religious beliefs and obligations of not only named plaintiffs, but also countless Jews, Muslims, Hindus, Sikhs, Christians, Indigenous people, and those who hold nontheistic or atheistic beliefs. Indiana has made numerous attempts to characterize the law’s burden on religious and spiritual exercise as minimal, including arguing that:

¹⁶ Amicus statement.

- a) requiring fetal burial or cremation has no impact on those who do not believe that fetuses are persons;
- b) patients may avoid any religious or spiritual burden by disposing of fetal tissue themselves;
- c) the disposition laws apply only to medical providers and do not impact patients at all; and
- d) no religion mandates that fetal tissue should be treated in the same manner as other medical tissue.

These arguments misinterpret the Indiana statute and misconstrue protections afforded under the First Amendment.

A. Individuals Have A Right To Refuse To Engage In Practices They Believe Hold Religious Or Spiritual Significance.

Numerous cases decided under multiple provisions of the First Amendment protect individuals from compelled speech or practices that violate their religious beliefs. *See Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997) (“coercing a person to conform her beliefs or her conduct to a particular set of religious tenets can run afoul of both the establishment as well as the free exercise clauses”). *See also, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot require drivers to display license plate motto that violates their religious beliefs); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state cannot make declaration of a belief in God a condition for holding office); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state cannot require students to recite the

pledge of allegiance contrary to their religious beliefs); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996) (state cannot pressure incarcerated people to participate in a counseling program centered around religious principles). The Supreme Court recently explained, “it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018).

Just as “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind,’” *Wooley*, 430 U.S. at 714, the right to engage in religious exercise and the right to *refrain* from religious exercise are complementary components of the broader concept of religious liberty. But Indiana denies precisely this right when it compels its residents who object to the cremation or burial of fetal tissue based on their sincerely held beliefs to yield to the state’s mandated religious practices.

Indiana has argued that those who do not believe a fetus is a person are unburdened by the requirement to bury or cremate fetal tissue. Quoting Professor Priscilla K. Coleman, Indiana claimed that “[w]hen abortion patients do not consider the fetus human . . .’ disposition requirements for the fetal remains ‘will likely have no demonstrative impact on such women.” Gov’t Br. at 5. Plaintiffs’ testimony and the fact that they have undertaken this litigation belie Indiana’s assertion, as do amici’s explanations of

how Indiana's law is contrary to the sincerely held beliefs of their members. Section I(A), *supra*.

More broadly, this claim ignores that all people have a right to refrain from compelled religious exercise. Indiana's claim is akin to arguing that people who do not believe in the spiritual properties of holy water should have no objection to having their infant baptized. To the contrary, the doctrine is clear that the Constitution protects all people from compelled participation in rituals they believe hold religious or spiritual significance.

B. The Government Burdens Religious Exercise When It Coerces Individuals To Violate Their Sincerely Held Beliefs.

Even where participation in a religious practice to which one objects is not *mandatory*, pressuring an individual to violate their beliefs, or to espouse or act in accordance with religious beliefs they do not hold, constitutes a burden on the free exercise of religion. While “a substantial burden exists when the government compels a religious person to ‘perform acts undeniably at odds with fundamental tenets of [his] religious beliefs’ . . . a burden on religious exercise also arises when the government ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.’” *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013) (quoting *Yoder*, 406 U.S. at 218; *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)). Under this test, “[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” *Thomas*, 450 U.S. at 718.

The “substantial pressure” test “focuses primarily on the ‘intensity of the coercion applied by the government to act contrary to [religious] beliefs.’ Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent’s religious practice.” *Korte*, 735 F.3d at 683 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)) (internal citations omitted). “Substantial pressure” may take the form of a choice between violating one’s religious beliefs and, for example, forgoing a government benefit (*Thomas v. Rev. Bd.*); paying a financial penalty (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)); facing criminal penalties (*Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002)); forgoing adequate nutrition while in prison (*Jones v. Carter*, 915 F.3d 1147, 1150 (7th Cir. 2019)); or being denied a driver’s license (*Quaring v. Peterson*, 728 F.2d 1121, 1125 (8th Cir. 1984)).

That Indiana law attempts to ameliorate the free exercise burden by leaving open a narrow self-help option is inconsequential, so long as individuals face “substantial pressure” to abandon their beliefs. For example, in *Hobby Lobby*, the Supreme Court rejected the argument that companies burdened by a law requiring insurance coverage of birth control could “readily eliminate any substantial burden [on religion] by forcing their employees to obtain insurance in the government exchanges,” noting that those companies felt religiously motivated to provide employee health insurance, and that eliminating insurance coverage has costs, including competitive disadvantage in hiring workers. 573 U.S. at 721.

Here, Indiana offers patients two choices—agree in writing to allow their medical provider to choose whether to bury or cremate their fetal tissue (at the *medical provider’s* discretion) or take the tissue home (foisting the burden of disposal entirely on individuals unlikely to have any experience disposing of biohazardous tissue)—a requirement unheard of in any other medical procedure. This false choice places substantial pressure on patients to agree to have their fetal tissue buried or cremated, even when doing so would violate their sincerely held beliefs.

Indiana has argued that “the allowance for abortion patients to dispose of the aborted fetal remains accommodates any . . . religious objections they may have.” Gov’t Br. at 16. This ignores the fact that home disposal violates some individuals’ sincerely held belief that fetal tissue should be disposed of in the same manner as all other forms of medical tissue. Indiana’s argument also ignores that the law puts substantial pressure on patients to acquiesce to burial or cremation of fetal tissue, in violation of their beliefs, because few people have the expertise or means to properly dispose of biohazardous tissue. This burden applies even to those who believe that burial (but not cremation) or that cremation (but not burial) may be appropriate—both groups are pressured to cede this decision to their medical provider.

The patient appellees’ complaint explains that home disposal is not an acceptable option for patients because they have no “training or expertise in the proper disposal of untreated human tissue,” they do “not know how to transport or dispose of the untreated

tissue properly to avoid environmental contamination and violation of local sanitation laws,” and home disposal caused some patients “additional anguish.” Compl. ¶¶ 17, 26, *Jane Doe No. 1 v. Att’y Gen. of Ind.*, No. 1:20-cv-03247-RLY-MJD (S.D. Ind. Dec. 21, 2020), ECF No. 1. Given the potential legal and medical risks of improper disposal of medical tissue, in addition to the spiritual and emotional costs of having to dispose of this tissue, the Fetal Tissue Disposition Law substantially pressures individuals to allow their tissue to be buried or cremated by a medical provider in violation of their sincerely held beliefs.

C. That Indiana’s Fetal Tissue Disposition Law Applies To Medical Providers Does Not Lessen The Burden It Places On Patients’ Religious Beliefs And Practices.

The Seventh Circuit found that the Fetal Tissue Disposition Law did not violate patients’ religious beliefs because the “directive applies only to hospitals and clinics,” not patients themselves. *Jane Doe No. 1 v. Att’y Gen. of Ind.*, No. 22-2748, slip op. at 3 (7th Cir. Nov. 28, 2022). Indiana has similarly argued that patients “cannot invoke the First Amendment to exempt abortion providers—who have no religious objections themselves—from complying with a state medical regulation.” Gov’t Br. at 1. This overlooks the fact that patients must either bring the fetal tissue home or complete a form explicitly consenting to burial or cremation.

Moreover, medical procedures performed by healthcare practitioners have routinely been found to burden patients’ or their families’ religious beliefs.

Developments in the Law – Medical Technology and the Law, The Right to Refuse Medical Treatment, 103 HARV. L. REV. 1643, 1669 (May 1990) (“When the patient is competent and no third parties are immediately and adversely affected by the refusal, there is a strong consensus finding free exercise clause protection for religiously motivated refusals of treatment.”). That the legal obligation (or permission) falls on medical providers, rather than patients, has not prevented courts from finding a burden on religious exercise.

Perhaps the closest analogues to the burden imposed by the Fetal Tissue Disposition Law are in the numerous opinions holding that the performance of an autopsy—another category of procedure performed by a third party/medical provider on nonliving tissue—can burden the religious practice of either the deceased or their family. For example, in *You Vang Yang v. Sturner*, a district court found a religious burden where an autopsy performed by a state actor violated the religious beliefs of the deceased and his family. See 728 F. Supp. 845 (D.R.I.), *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990);¹⁷ *Smith v. Li*, 599 F. Supp. 3d 706 (M.D. Tenn. 2022) (procedures performed after death would substantially burden claimant’s religious exercise); *United States v. Hammer*, 121 F. Supp. 2d 794 (M.D.

¹⁷ *Yang* was withdrawn due to *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990), which was itself superseded by The Religious Freedom Restoration Act of 1993 and codified at 42 U.S.C. § 2000bb. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1893 n.26 (2021) (Alito, J., concurring).

Pa. 2000) (autopsy would burden deceased's exercise of religion); *Kohn v. United States*, 591 F. Supp. 568 (E.D.N.Y. 1984) (while post-homicide autopsy was justified, embalming and partial cremation of Jewish soldier burdened his family's free exercise rights). Thus, when mandated by the state, medical providers' actions can clearly burden the free religious exercise of patients and their families.

D. The Free Exercise Clause Protects Individual And Minority Religious Beliefs And Practices.

Religious liberty protections apply to all sincerely held beliefs, whether or not they are mandatory or adhere to formal religious doctrine. It is well settled that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. The Fetal Tissue Disposition Law need not burden the religious practice of every member of a denomination or tradition to burden the religious practice of some.

Indiana downplays the burden that the Fetal Tissue Disposition Law places on religious exercise by claiming that "no tradition . . . holds that human remains must be disposed of in the same place and manner as waste." Gov't Br. at 4. This claim, regardless of its accuracy, is immaterial. Amici's statements herein make abundantly clear that Indiana's Fetal Tissue Disposition Law pressures some, if not all, Jews, Muslims, Hindus, Sikhs, Christians, Indigenous people, and those who hold nontheistic or atheistic beliefs to abandon their

essential religious beliefs and practices regarding life and death.

CONCLUSION

Indiana's Fetal Tissue Disposition Law burdens the constitutionally protected religious beliefs of Jews, Muslims, Hindus, Sikhs, Christians, Indigenous people, and those who hold nontheistic or atheistic beliefs, in violation of the Free Exercise Clause.

Respectfully submitted,

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May 1, 2023