IN THE
INDIANA COURT OF APPEALS

Case No. 22A-PL-02938

THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, in their official capacities, et al., Appellants, v. ANONYMOUS PLAINTIFF 1, et al., Appellees.	Interlocutory Appeal from the Marion Superior Court, Trial Court Case No. 49D01-2209-PL-031056, The Honorable Heather A. Welch, Judge.

BRIEF IN SUPPORT OF APPELLEES OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; THE SIKH COALITION; UNION FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION; AND WOMEN OF REFORM JUDAISM

Katherine Lacy Crosby, #36005-22
Tachau Meek PLC
101 S. Fifth St., Suite 3600
PNC Tower
Louisville, KY 40202-3120
502-238-9908

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTERESTS OF *AMICI CURIAE*

Amici are religious and civil-rights organizations that share a commitment to preserving religious freedom for all. They deeply value the rich religious diversity that the Indiana Constitution has enabled to grow and thrive, and they recognize that this healthy pluralism cannot exist when government picks and chooses among religions and enforces conformity to the dictates of any faith. *Amici* believe that the near-total abortion ban of S.E.A. 1 does exactly that and thereby creates religion-based oppression, discord, and strife.

The organizations joining this brief as *amici curiae* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Reconstructionist Rabbinical Association.
- Religious Coalition for Reproductive Choice.
- The Sikh Coalition.
- Union for Reform Judaism.

- Unitarian Universalist Association.
- Women of Reform Judaism.

SUMMARY OF ARGUMENT

The State of Indiana is, at its very best, a refuge for people of diverse faiths and viewpoints respecting matters of religion. To protect this religious pluralism, Article 1, Section 4 of the Indiana Constitution unambiguously guarantees that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship." The nearly complete prohibition against abortions imposed by S.E.A. 1 violates this constitutional guarantee.

Different religions hold a wide variety of beliefs about what life is and when it begins—beliefs that animate the debate around abortion. The debate about the beginning of life is thus grounded in irreducible matters of conscience that, for many people, turn on inherently religious considerations. Yet Indiana legislators sought to impose their religious beliefs about when life begins on all Hoosiers by enacting S.E.A. 1. The abortion ban thus threatens the state's healthy religious pluralism, compounds the threat of religiously based strife, and increases the already substantial mistrust of our political institutions by miring them in theological matters that they are not empowered to resolve.

As S.E.A. 1—and the interest at its heart—are based on religious judgments that Section 4 of Article 1 prohibits the legislature from making, the legislation cannot serve a compelling state interest and thus cannot survive scrutiny under the

Indiana Religious Freedom Restoration Act. This Court should therefore affirm the trial court's preliminary injunction against enforcement of S.E.A. 1.

ARGUMENT

I. Indiana's constitution protects religious pluralism.

1. Protections for religious freedom both at the federal level and in Indiana have long historical roots. Religious dissenters fled established religions in Europe, as well as the religion-based political conflict and persecution that came with those establishments, by emigrating to colonial America. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 425–27 (1962). In Indiana, "[t]he influx of settlers" into the state between 1815 and 1850 "reflected the 'whole range of religious belief and practice,' and 'there was no religious unity from the beginning.'" *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 449 (Ind. 2001) (quoting L.C. Rudolph, *Hoosier Faiths* x (1995)).

Thus, since its ratification in 1851, Indiana's constitution has straightforwardly and expansively guaranteed in Section 4 of Article 1 that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."[1] Section 4 of Article 1 and other Indiana

[1] This language has been amended only once, in 1984, to "degender[ ]" the second clause, which previously began with the phrase "and no *man* shall be compelled." *See Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1059 (Ind. Ct. App. 2004) (Baker, J., concurring in part and dissenting in part) (emphasis added), *reversed on other grounds*, 837 N.E.2d 973, 977 (Ind. 2005); Ind. Const. of 1851, art. 1, § 4, https://bit.ly/3jXaZgR.

constitutional clauses concerning religion were "not intended merely to mirror the federal First Amendment"; the Indiana Supreme Court has expressly "reject[ed] the contention that . . . federal jurisprudence . . . governs the interpretation of [Indiana's] state guarantees." *City Chapel*, 744 N.E.2d at 446. Instead, through Section 4 of Article 1 and related clauses, "[Indiana's] state constitution, framed by wise men, and adopted by the people, has still more securely [than the federal Constitution] placed [Indiana] out of the reach of those fierce and bloody struggles arising out of a difference in religious opinion in former times." *Smith v. Pedigo*, 145 Ind. 361, 33 N.E. 777, 779 (1893).[2]

The prohibition in Section 4 of Article 1 against preference for any "creed" was added to an earlier draft of Section 4 that had prohibited only preferences among "religious societies" and "modes of worship." *See City Chapel*, 744 N.E.2d at 448 n.6. Thus, the first clause of Section 4 was intentionally adopted in part to prevent any governmental preference for any "religious belief"—"the ordinary and usual meaning of the word 'creed.'" *See Hammer v. State*, 173 Ind. 199, 89 N.E. 850, 852 (1909). In addition, Section 4's second clause serves as "a restraint upon government compulsion of individuals to engage in religious practices absent their consent." *Meredith v. Pence*, 984 N.E.2d 1213, 1226 (Ind. 2013). By imposing these

[2] Indiana is not alone in recognizing that its state constitutional guarantees against religious establishments and preferences are broader than the federal First Amendment. *See, e.g.*, *Paster v. Tussey*, 512 S.W.2d 97, 101–02 (Mo. 1972) (en banc); *Prescott v. Okla. Capitol Preservation Comm'n*, 373 P.3d 1032, 1033–34 (Okla. 2015); *McDonald v. Sch. Bd.*, 246 N.W.2d 93, 97 n.3 (S.D. 1976); *Summum v. Pleasant Grove City*, 345 P.3d 1188, 1193 (Utah 2015).

firm restrictions, the Indiana Constitution prevents one religious group from using the government to adopt its beliefs and practices as law. It also discourages religious groups from vying with each other for political control by obviating the need for them to seek power to protect themselves against religious impositions by others.

2. Over time, America has become more and more religiously pluralistic. The United States is now home to more than 2,000 religious groups. *See* J. Gordon Melton, *Melton's Encyclopedia of American Religions* 1 (8th ed. 2009); *see also* Pluralism Project at Harvard Univ., *A New Multi-Religious America* (2020), https://bit.ly/3SB5zU8. Jews and Muslims, present in America since the colonial era, have grown in numbers. *See, e.g.*, Melton, *supra*, at 896–97, 925–26.[3] And more than one-quarter of Americans are religiously unaffiliated—including atheists, agnostics, and those who may consider themselves religious or spiritual but do not identify with any particular denomination or house of worship. *See In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Rsch. Ctr. (Oct. 17, 2019), https://pewrsr.ch/3CiliCn.

Religious diversity has likewise flourished in Indiana. "Throughout the 20th century, the religious diversity of Indiana stood in marked contrast to the homogenous religious culture of much of the nation." David J. Bodenhamer, Center for Urban Policy and the Environment, *Religious Diversity in Central Indiana* 5

[3] Many of the earliest Muslims to arrive in America did not, however, come of their own volition: They were enslaved West Africans, whose religious beliefs and practices were not accepted by white society. *See* Melton, *supra*, at 925.

(2002), https://bit.ly/3jLtrc5. A 1990 census identified 75 denominations in Central Indiana alone—a number that was almost certainly an underestimate. *See id.* The annual Festival of Faiths in Indianapolis "is one of the Midwest's largest one-day celebrations of religious diversity and vitality, attracting thousands of attendees . . . to explore the booths of more than 100 congregations." Center for Interfaith Cooperation, *Vision, Mission, & History*, https://bit.ly/3HRsSFP (last visited Feb. 24, 2023). In 2020, PBS produced an hour-long documentary on the broad array of faith traditions in Central Indiana, interviewing Hoosiers representing Protestant Christian denominations, Catholicism, Islam, Sufism, Jainism, Judaism, Sikhism, Eckankar, Hinduism, Buddhism, and the Bahá'í faith. *See To Know Your Neighbor: Religious Diversity in Central Indiana*, PBS (Dec. 29, 2020), http://bit.ly/3xdUwI5. And in 2014, more than one-quarter of Indiana adults identified as religiously unaffiliated. *See Adults in Indiana*, Pew Rsch. Ctr. (2014), http://bit.ly/3YkqKNK. This broad religious diversity renders the Indiana Constitution's safeguarding of the fundamental freedom of conscience all the more crucial.

II. The challenged abortion ban runs roughshod over religious pluralism.

Nowhere in recent decades has the battle over political power to impose particular religious views been more pronounced, more heated, or more dangerous to religious pluralism than in the context of abortion. As severe as the social tensions that result from controversy over abortion are, even worse are the assaults on people of conscience when inherently religious questions are subjected to

ordinary political processes. For when political power is used to impose one religious belief on others, the religious freedom of the politically disempowered is lost.

A. When human life begins raises deep, inherently religious questions that implicate freedom of conscience.

People hold a wide range of religious, moral, and philosophical views about abortion. That is because, if one goes beyond the biological facts about when a fetus may survive independently of the mother, one is left to confront the deepest and most profound mysteries about the nature of human existence: What constitutes life? What makes a person a person? Does a soul exist, and if so, what is it? Under what circumstances might ensoulment occur, and what is its significance?

Despite the State's dogged insistence, there is no "scientific consensus" that "the life of a human organism begins at conception." *Cf.* Appellants' Br. 11 (quoting Appellants' App. vol. III. p. 7). Dr. Scott F. Gilbert, a leading expert on developmental biology, has summarized several positions held by different groups of biologists as to when independent human life begins—ranging from fertilization to birth—and has also noted that "many scientists feel that personhood is not a scientific category" but rather "an issue decided on emotions, upbringing, and politics, not science." Scott F. Gilbert, *Pseudo-embryology and Personhood: How Embryological Pseudoscience Helps Structure the American Abortion Debate*, Natural Sciences, Jan. 2023, at 2–4, https://bit.ly/40Z56Ai.

The specific point at which life begins is thus a matter for theologians and philosophers to debate and for individuals to ponder. It is quintessentially a concern

of religion, and one that each person must resolve in accordance with individual conscience.

It should therefore come as no surprise that different religions have a variety of answers to these questions. And as a result, numerous religious traditions either specifically approve of abortion or view it as the subject of a moral decision to be made according to individual conscience. For example, the Episcopal Church believes that "everyone [should] have the right to make decisions about their bodies and those decisions should be between themselves and their provider." *Resolution 2018-D032, Advocate for Gender Equity, Including Reproductive Rights, in Healthcare*, Archives of the Episcopal Church (2018), https://bit.ly/3xYYh1Z. The Disciples of Christ have "consistent[ly] affirm[ed] . . . [their] commitment to reproductive rights for women," including the right to an abortion. Rev. Terri Hord Owens, *Statement on the Supreme Court Dobbs Decision*, Disciples (June 24, 2022), http://bit.ly/3IJPvxs. The United Church of Christ has long supported access to abortion services. *See* Chris Davies, *Let's Talk about Abortion*, United Church of Christ: Witness for Justice (Feb. 18, 2021), https://bit.ly/37SyNZs; *Reproductive Justice*, United Church of Christ, https://bit.ly/3swceU8 (last visited Feb. 24, 2023). The Evangelical Lutheran Church in America takes the position that there is not a clear line as to when life begins and believes that "[a]n abortion is morally responsible" in certain situations. *Social Statement on Abortion* 3 n.2, 7, Evangelical Lutheran Church in America (1991), https://bit.ly/3XYgY2U. The General Assembly of the Presbyterian Church (U.S.A.) has affirmed that "[h]umans are empowered by

the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy." *Abortion/Reproductive Choice Issues*, Presbyterian Church (U.S.A.) Presbyterian Mission, https://bit.ly/3kj3JId (last visited Feb. 24, 2023). The Unitarian Universalist Association has described the right to choose an abortion as an "important aspect" of "the right of individual conscience." *Right to Choose: 1987 General Resolution*, Unitarian Universalist Ass'n (July 1, 1987), https://bit.ly/3qUZvtZ.

Within Judaism, life is viewed as beginning at birth, and Conservative, Reform, and Reconstructionist rabbinical bodies have all affirmed the right to an abortion, while some Orthodox authorities hold more restrictive views. *See, e.g.*, *Resolution on State Restrictions on Access to Reproductive Health Services*, Cent. Conf. of Am. Rabbis (Apr. 2008), https://bit.ly/3j0dDiE; *Resolution: Right to Reproductive Choice*, Reconstructionist Rabbinical Ass'n (1981), https://bit.ly/3gfEup0; *Resolution on Reproductive Freedom in the United States*, Rabbinical Assembly (May 21, 2012), https://bit.ly/3mfM1I4; Rabbi Lori Koffman, *Jewish Perspectives on Reproductive Realities*, Nat'l Council of Jewish Women, https://bit.ly/3kpdS5Y (last visited Feb. 24, 2023). Indeed, some Jewish sources hold that abortion is *required* if the pregnant person's life or health (including mental health) is at risk. *See* Koffman, *supra*.

Even within particular denominations and religious traditions, individual believers may hold different positions concerning abortion. A majority of Catholics, for instance, disagree with church teachings and support policies that favor access

to the full range of reproductive-health options, including abortion. *See* Belden Russonello Strategists LLC, *2016 Survey of Catholic Likely Voters Conducted for Catholics for Choice* 5–6 (2016), https://bit.ly/3ridKZW. Muslims have a diversity of views on these issues as well: Many Muslims believe that ensoulment occurs at 120 days and that abortion is permissible before that point, and classical Islamic law does not treat the fetus as a person. *See, e.g.*, Khaleel Mohammed, *Islam and Reproductive Choice*, Religious Coal. for Reprod. Choice, https://bit.ly/3xXvCKM; Abed Awad, *Alabama's Abortion Law Is Not 'Christian Sharia,' Professor Says. Sharia Isn't as Inflexible, as Draconian.*, Abed Awad, Esq. (July 11, 2020), https://bit.ly/3M5JqeH; Omar Suleiman, *Islam and the Abortion Debate*, Yaqeen Inst. (Sept. 20, 2022), https://bit.ly/3C7bvh0. And while some Hindu institutions believe that life begins at fertilization, the Hindu-rooted Brahma Kumaris believe that the soul enters the fetus only around the fourth or fifth month of pregnancy and that the decision to have an abortion should be based on one's "lifestyle, morals, and values." *Hindus in America Speak out on Abortion Issues*, Hinduism Today (Sept. 1, 1985), https://bit.ly/3BZubAu. U.S. Hindus in particular strongly support abortion access, based partly on their belief that "[i]ndividual ethical choice cannot be imposed on others." Dheepa Sundaram, *Hindu's Classical Texts Strictly Forbid Abortion. Here's Why Many Hindus Don't.*, Religion News Service (May 20, 2022), https://bit.ly/3BEpStj.

The religious beliefs of the plaintiffs in this case likewise reflect views on abortion that are diametrically opposed to those embodied in S.E.A. 1. (*See*

Appellants' App. Vol. II, pp. 28–37.) Indeed, the plaintiffs in this case hold religious beliefs that require abortions in certain circumstances. (*See id.*)

B. Indiana's abortion ban imposes one religion-based view of abortion on all Hoosiers.

The Indiana Constitution embodies respect for this diversity of religious viewpoints by prohibiting any governmental preference for one set of religious beliefs over others. Indiana's near-total abortion ban violates that restriction.

1. In debating and passing the challenged abortion ban, Indiana legislators expressly based their positions on their personal religious beliefs.

Numerous legislators in both chambers of the Indiana General Assembly explained their votes in favor of S.E.A. 1 in religious terms. Senator Stacey Donato said, "As many of you know, I'm a very devout Catholic, and I believe in pro-life, the life to preserve the mother when needed. So . . . I am going to vote yes to move this bill forward so that we have the chance to protect life in the House." WTHR, *Indiana Senate Discussion on Abortion Legislation* 3:36:18–40, YouTube (Jul. 30, 2022), https://bit.ly/3Yqf7Fa. Representative Robert Morris declared, "I will continue to pray that Christ is our guide in this General Assembly. All life is sacred. I will do, always, do all I can to protect the sanctity of life and the Hoosier who can't stand yet for themselves." WTHR, *LIVE: Special Session* 2:40:56–41:20, YouTube (Aug. 5, 2022), https://bit.ly/3lqqkH7. Senator Gary Byrne stated, "I know exactly how I feel about this, I'm an open book: life begins at conception, and thou shalt not kill." *Senate Discussion*, *supra*, at 3:33:34–44. And Representative Elizabeth Rowray explained:

> We're making laws here as human beings. But we are not the ultimate judge. We will all meet our maker one day, and He will judge us. My faith dictates to everyone, regardless of your decision here today, I'm going to respect you, and I'm not going to judge you for what vote you cast today. But I am gonna vote on this bill and pass this bill, because I will also say that, if abortion had been legal in 1968, I wouldn't be here today to be able to cast a vote.

Special Session, *supra*, at 3:16:34–17:07.

Legislators opposed to S.E.A. 1 highlighted how the abortion ban would force the religious beliefs of some on others. Senator Fady Qaddoura discussed how "the history of this nation was based on freedom from religious persecution," emphasizing religious pluralism and explaining that he "was not elected to be a religious leader." *Senate Discussion*, *supra*, at 2:31:15–21, 2:32:42–45. Senator Shelli Yoder emphasized that "this bill undeniably conflicts with other religious concepts of when life begins" and criticized the Senate's rejection of an amendment that would have created a religious exception like the one that the plaintiffs in this case seek, noting that in the previous legislative session, a "vaccine bill carved out the same exact exceptions." *Id.* at 3:18:45–55, 3:19:09–13.

Additionally, when directly questioned about the effect of S.E.A. 1 on Hoosiers whose religions support or require abortion access, bill sponsor Senator Sue Glick did not seem to comprehend the idea that a religion could support abortion. That remained the case even after she heard public testimony by speakers from multiple faith traditions about how abortion access is important to their faith. *See, e.g.,* WTHR, *Senate Committee Hearing on Indiana Abortion Ban Bill* 1:45:34–46:15, YouTube (July 25, 2022), http://bit.ly/3IcyhbJ (testimony of Rabbi Aaron Spiegel)

("Proposals that ban abortion, including in cases of rape, incest, or undue risk to the pregnant woman, infringe on the separation of religion and state. . . . Under Jewish law, abortion is not only permissible in some circumstances but is required if necessary to protect the physical and mental health of the pregnant woman."); *id.* at 2:23:56–24:12 (testimony of Rev. Gray Lesesne) ("[T]here are many faithful Christians and people of many different faiths in the Hoosier state who believe that equitable access to women's health care, including women's reproductive health care, is an integral part of a woman's struggle to assert her dignity and worth as a human being."). Senator Glick avoided answering questions by Senator Eddie Melton and Senator Qaddoura about what pregnant people of faith are supposed to do under S.E.A. 1 if their religious beliefs or faith leaders counsel in favor of abortion, instead repeatedly asserting that the bill does not force anyone to have an abortion—as though the only possible religious belief or commitment on abortion was her own. *Id.* at 23:34–25:33; *Senate Discussion*, *supra*, at 25:41–26:44. Finally, Senator Glick admitted that if a constituent as a matter of faith sought an abortion not permitted by S.E.A. 1, "they'll not be allowed to have the abortion legally in the state of Indiana." *Senate Discussion*, *supra*, at 59:13–18.

And whereas Senator Glick apparently could not conceive of any religious traditions that differ from her own with respect to beliefs on abortion, other legislators who supported S.E.A. 1 openly denigrated other faith traditions while discussing the bill. Senator Michael Young complained about hearing testimony from those whose religious beliefs support abortion access and appeared to equate

Judaism's views on reproductive rights with condoning murder, saying, "It seems to me, we can't use our religion to protect life, but they can use their religious beliefs to kill life." *Indianapolis Jewish Community Relations Council Calls for Sen. Michael Young to Apologize over Abortion Remarks*, WTHR (Aug. 2, 2022), http://bit.ly/3lqLXab. And Representative John Young disparagingly compared requests for religious exemptions from an abortion ban to the "church of cannabis," whose "central tenet" he described as "smoke marijuana, get higher to God." *Special Session*, *supra*, at 4:09:46–52.

2. To be sure, government may permissibly act in ways that "happen[] to coincide" with particular religious beliefs. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). If not, government could seldom act at all. And individuals will often favor one or another policy based at least in part on the teachings of their faith. That they may hold and voice strong religious views about abortion is not the problem.

As the legislative history described above shows, however, it is no coincidence that the challenged abortion ban aligns with specific religious views. Rather, legislators expressly linked the ban to their religious beliefs, encoded their faith into law, and justified the law as an implementation of those beliefs. Thus, the State's assertions that the ban merely imposes a scientific or secular view of when life begins (*see* Appellants' Br. 10–12) fails. *See* Gilbert, *supra*, at 2–4; *see also* Sarah Varney, *When Does Life Begin? As State Laws Define It, Science, Politics and Religion Clash*, NPR (Aug. 27, 2022), https://n.pr/3dDx0hi. And for similar reasons, the State's analogy to laws prohibiting theft (*see* Appellants' Br. 52) is inapposite.

Unlike the abortion ban here, those laws are grounded in secular principles; the decision whether to outlaw theft does not hinge on the resolution of theological disputes.

More fundamentally, whether life begins before viability, and if so at what point, are questions about the nature of being, human existence, and the soul that, for many people, simply cannot be pondered, much less definitively answered, except in religious terms. The answers must come from religion and philosophy.

To be sure, when one religious view becomes the official pronouncement of the aims and ends of government, as is the case here, the resulting official action may well seem justified to those who hold the religious beliefs underlying it. To those who do not, however, the action is illegitimate, if not impious. And when there are insufficient genuine, religiously neutral objectives supporting legislation, what is left in the eyes of religious dissenters is a naked exercise of power that cannot be squared with equal rights of conscience for all.

3. Indiana's General Assembly is not alone in pressing abortion bans forthrightly as a religious mission. For example, when Alabama's Governor signed a bill in 2019 to make almost all abortions punishable as felonies, she explained that the new law "stands as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God." Kim Chandler & Blake Paterson, *Alabama Governor Invokes God in Banning Nearly All Abortions*, A.P. News (May 16, 2019), https://bit.ly/3rbYiPf. When the Arkansas Senate passed a near-total ban on abortions, the bill's sponsor justified it by insisting that

"[t]here's six things God hates, and one of those is people who shed innocent blood." Austin Bailey, *Arkansas Senators Pass Near-Total Abortion Ban; It Now Goes to House*, Ark. Times (Feb. 22, 2021), https://bit.ly/3dO6Mc4. When the Missouri House of Representatives debated its own near-total abortion ban, the bill's sponsor stated, "[A]s a Catholic I do believe life begins at conception, that is built into our legislative findings currently in law." *Debate* 12:36:35–39, H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. May 17, 2019), http://bit.ly/3INDLtZ. And when Oklahoma enacted a ban on abortions after a "fetal heartbeat" is detected, the president pro tempore of the State Senate enthused, "All life is precious and a gift from God." Press Release, Gov. Kevin Stitt, Governor Stitt Celebrates Nine New Pro-Life Laws with Ceremonial Bill Signing (Sept. 21, 2021), https://bit.ly/3SFgHiX (also noting statements from other legislators, including, "God values life and so do I," and, "We thank the Lord for the team of people that worked together to help make this happen, and the multitudes who have prayed for years about this. We also thank the Lord for answered prayer. To God be the glory!"). Comments like these illustrate the inherently religious considerations behind bans on abortion.

C. Respecting access to abortion limits political control over matters that are irreducibly religious, and so avoids further undermining public trust in our political institutions.

1. Political decision-making necessarily relies on compromise: Legislatures debate; and through give and take a majority comes together to pass a particular measure. Or it doesn't. And then tomorrow, the members debate some other measure, hold another vote, and put another issue to bed, at least for a while.

This democratic governance "becomes possible . . . only when certain emotionally charged solidarities and commitments are displaced from the political realm." Stephen Holmes, *Gag Rules or the Politics of Omission, in Constitutionalism and Democracy* 19, 24 (Jon Elster & Rune Slagstad eds., 1993). Majoritarian institutions are simply not competent to address fundamentally and quintessentially religious matters when spiritual commitments on one or both sides mean that the politics of compromise would entail compromising one's faith. *See id.* at 23. When they try, they engender grave mistrust from those who see their faith being threatened. Hence, the framers of Indiana's constitution and the voters who ratified it, sensitive to these concerns, "adopted seven separate and specific provisions," including Section 4 of Article 1, protecting religious freedom from governmental imposition, favoritism, or tyranny. *See City Chapel*, 744 N.E.2d at 445–46.

2. Keeping the most bitterly divisive religious disputes outside the reach of politics as much as possible not only is critical to religious freedom and social stability but also is a singularly appropriate application of judicial power. When the courts reinforce democratic political institutions against the tyranny of the majority (*see generally* John Stuart Mill, *On Liberty* 3–5 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859)), "[l]egislators are enjoined from officially discussing questions which, if placed under the control of electoral majorities, would (it is thought) . . . exacerbate factional animosities" (Holmes, *supra*, at 21). "[B]y agreeing

to privatize religion, a divided citizenry can enable itself to resolve its *other* differences rationally, by means of public debate and compromise." *Id.* at 24.

Article 1, Section 4 of the Indiana Constitution straightforwardly promotes this end by prohibiting the granting of any governmental "preference . . . to any creed, religious society, or mode of worship" and by placing, as the Indiana Supreme Court stated in *Meredith*, 984 N.E.2d at 1226, "a restraint upon government compulsion of individuals to engage in religious practices absent their consent." This privatization of religion, in turn, helps ensure that persons holding different religious views may practice their faith without governmental interference, and that religion remains entirely free to offer answers to the most difficult questions about human existence.

3. Governmental impositions of the beliefs of one faith over the objections of others also have another deleterious effect: They contribute yet more to the already substantial popular mistrust of legislatures, by subjecting to political compromise and majority rule a set of issues on which, for many, compromise simply is not possible because of their religious views. *See generally Public Trust in Government: 1958–2022*, Pew Rsch. Ctr. (June 6, 2022), https://pewrsr.ch/3C5klfc. Removing these types of issues from the scope of permissible legislative action—and thereby reducing the temptation to foist any particular set of religious commitments on those with contrary beliefs—may be frustrating to some, but it at least does not cast doubt on the basic ideas of popular self-governance and majority rule. Constitutional limitations on legislative power, such as Section 4 of Article 1, exist to provide an important backstop protecting religious diversity and allowing all

religious beliefs the space to flourish; the courts are the essential institutional safeguard for those fundamental protections.

CONCLUSION

The State's assertions that S.E.A. 1 furthers a "compelling interest in protecting unborn human lives" (Appellants' Br. 48) are incompatible with the constitutional mandate in Section 4 of Article 1 that "[n]o preference shall be given, by law, to any [religious] creed." By enacting S.E.A. 1, Indiana legislators expressed a preference for religious creeds opposed to abortion. Indiana cannot have a compelling interest in enforcing a law that violates its own constitution and the fundamental values that the constitution protects. As the State has not asserted any other compelling interest to support S.E.A. 1, the law cannot satisfy Indiana's RFRA. This Court should affirm the trial court's preliminary injunction.

Respectfully submitted,

/s/ Katherine Lacy Crosby
Katherine Lacy Crosby, #36005-22
Tachau Meek PLC
101 S. Fifth St., Suite 3600
PNC Tower
Louisville, KY 40202-3120
502-238-9908
kcrosby@tachaulaw.com

Attorney for Amici Curiae

CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 7,000 words.

/s/ Katherine Lacy Crosby
Katherine Lacy Crosby, #36005-22
Tachau Meek PLC
101 S. Fifth St., Suite 3600
PNC Tower
Louisville, KY 40202-3120
502-238-9908
kcrosby@tachaulaw.com

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS), and the foregoing document was served upon the following persons using the IEFS:

Theodore E. Rokita
Thomas M. Fisher
James A. Barta
Melinda R. Holmes
Razi S. Lane
Counsel for appellants

Kenneth J. Falk
Stevie J. Pactor
Gavin M. Rose
Counsel for appellees

Paul Joseph Carroll
Adèle A. Keim
Rebekah P. Ricketts
Lori H. Windham
Counsel for amicus curiae Becket Fund for Religious Liberty

Zechariah D. Yoder
Joshua M. Blackman
Howard Slugh
Counsel for amicus curiae Jewish Coalition for Religious Liberty

/s/ Katherine Lacy Crosby
Katherine Lacy Crosby, #36005-22
Tachau Meek PLC
101 S. Fifth St., Suite 3600
PNC Tower
Louisville, KY 40202-3120
502-238-9908
kcrosby@tachaulaw.com