

**IN THE INDIANA SUPREME COURT
Appellate Case No. 22A-PL-2938**

THE INDIVIDUAL MEMBERS
OF THE MEDICAL LICENSING BOARD
OF INDIANA,
in their official capacities, et al.,

Defendants/Appellants,

v.

ANONYMOUS PLAINTIFF 1, et al.,

Plaintiffs/Appellees.

On Petition to Transfer from:
Indiana Court of Appeals
Case No. 22A-PL-02938

Interlocutory Appeal from the
Marion Superior Court
Trial Court No.
49D01-2209-PL-031056
The Honorable Heather A.
Welch, Judge

BRIEF IN SUPPORT OF APPELLEES OF *AMICI CURIAE* NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF JEWISH WOMEN INDIANAPOLIS SECTION, RECONSTRUCTIONIST RABBINICAL ASSOCIATION, ZIONESS, T'RUAH, KESHET, RABBINICAL ASSEMBLY, MOVING TRADITIONS, AVODAH, MUSLIMS FOR PROGRESSIVE VALUES, HINDUS FOR HUMAN RIGHTS, CATHOLICS FOR CHOICE, DIGNITYUSA, JEWISH WOMEN INTERNATIONAL, JEWISH ORTHODOX FEMINIST ALLIANCE, WOMEN'S ALLIANCE FOR THEOLOGY, ETHICS, AND RITUAL (WATER), JEWISH COUNCIL FOR PUBLIC AFFAIRS, SACRED - SPIRITUAL ALLIANCE OF COMMUNITIES FOR REPRODUCTIVE DIGNITY, WOMEN'S RABBINIC NETWORK, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, AND UNITARIAN UNIVERSALIST ASSOCIATION

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	6
SUMMARY OF ARGUMENT	7
ARGUMENT	7
I. PLAINTIFFS HAVE DEMONSTRATED CONSISTENT, RELIGIOUSLY MOTIVATED BEHAVIOR REGARDING ABORTION	7
II. PLAINTIFFS' BEHAVIOR IS RELIGIOUSLY MOTIVATED	12
CONCLUSION	16
CERTIFICATE OF WORD COUNT	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)14

Cleveland v. U.S., 329 U.S. 14 (1946).....13

Emp. Div. Dep’t of Human Res. v. Smith, 494 U.S. 872 (1990)..... 13

Sherbert v. Verner, 374 U.S. 398 (1963)..... 13

Thomas v. Review Bd. Of Indiana Employment Sec. Division, 450 U.S. 707 (1981)..... 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 13

UNITED STATES FEDERAL CASES

Blattert v. State, 190 N.E.3d 417 (Ind. App. Ct. 2022) 12, 13

Hussein v. Waldorf-Astoria, 134 F.Supp 2d 591 (S.D.N.Y. 2001).....9, 11

International Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981)..... 8

Kanai v. McHugh, 638 F.3d 251 (4th Cir. 2011).....8

Lindell v. Casperson, 360 F.Supp 2d 932 (2005)..... 9

Moussazadeh v. Texas Dep’t of Criminal Justice, 703 F.3d 781 (5th Cir. 2012)..... 11

New v. U.S., 245 F. 710 (9th Cir. 1917).....8

Patrick v. LeFevre, 745 F.2d 153 (2d Cir. 1984)..... 8

Reed v. Faulkner, 842 F.2d 960 (1988)..... 9

St. John’s United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).....12

Watson v. Geren, 569 F.3d 115 (2d Cir. 2009) 11

STATE CASES

Dobkin v. District of Columbia, 194 A.2d 657 (1963)..... 8

<i>Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiffs</i> , Opinion 22A-PL-2938, 1, 8 (Ind. App. Ct. 2024).....	7
UNITED STATES STATUTES	
Religious Freedom Restoration Act (RFRA).....	12
Religious Land Use and Institutionalized Persons Act (RLIUPA).....	7
STATE STATUTES	
Ind. Code Ann. § 34-13-9-8.....	12
SECONDARY AUTHORITY	
Abdulaziz Sachedina, <i>Islamic Biomedical Ethics: Principles and Applications</i> 1341 (2009);.....	14
Anne Stensvold, <i>A History of Pregnancy in Christianity: From Original Sin to Contemporary Abortion Debates</i> 45-46 (2015).....	14
Dariusch Atighetchi, <i>Islamic Bioethics: Problems and Perspectives</i> 94 (2006).;.....	14
Elissa Strauss, <i>When Does Life Begin? It's Not So Simple</i> , Slate (Apr. 4, 2017).....	14
Evangelical Lutheran Church in America, Social Statement on Abortion at 1, 3 n.2 (1991).....	14
Frank K. Flinn, <i>Encyclopedia of Catholicism</i> 4-5 (2007).....	14
Garry Wills, <i>Abortion Isn't a Religious Issue</i> , L.A. Times (Nov. 4, 2007).....	14
Kara Loewentheil and Elizabeth Reiner Platt, <i>In Defense of the Sincerity Test</i> , in RELIGIOUS EXEMPTIONS 247 (Kevin Vallier, ed.; Michael Weber, ed., 2018).....	7, 8, 9
<i>Mishnah Oholot</i> 7:6.....	14
Mark Cherry, <i>Religious Perspective on Bioethics</i> 196 (2004).....	14

Presbyterian Church (U.S.A.), Abortion/Reproductive Choice Issues..... 14

St. Thomas Aquinas, *Summa Contra Gentiles* 2.88-89; *Summa Theologiae* 1.118..... 14

Torah, Exodus 21:22-25.....14

United Church of Christ, Statement on Reproductive Health and Justice 14

Vatican Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, at
n.19 (Nov. 18, 1974).....14

INTEREST OF AMICI CURIAE

Amici are interfaith organizations that recognize the value of religious guidance and teachings important to Judaism and other faith traditions. Attacking Plaintiffs' and Hoosier Jews for Choice's sincerely held religious beliefs in this case has dangerous implications for reproductive health care, including abortion.

National Council of Jewish Women (NCJW) is a grassroots organization of volunteers and advocates who pursue equity and justice, through a powerful combination of community organizing, education, direct service, and advocacy. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families, and by safeguarding individual rights and freedoms.

The organizations joining this brief as *amici curiae*¹ are:

- National Council of Jewish Women
- National Council of Jewish Women Indianapolis Section
- Reconstructionist Rabbinical Association
- Zioness
- T'ruah
- Keshet
- Rabbinical Assembly
- Moving Traditions
- Avodah
- Muslims for Progressive Values
- Hindus for Human Rights
- Catholics for Choice
- DignityUSA
- Jewish Women International
- Jewish Orthodox Feminist Alliance

¹ The first twelve amici listed here joined National Council of Jewish Women's amicus brief with the Appeals Court of Indiana. The remaining nine amici have moved for leave to appear on this amicus brief.

- Women’s Alliance for Theology, Ethics, and Ritual (WATER)
- Jewish Council for Public Affairs
- SACReD - Spiritual Alliance of Communities for Reproductive Dignity
- Women’s Rabbinic Network
- Hadassah, The Women’s Zionist Organization of America
- Unitarian Universalist Association

SUMMARY OF ARGUMENT

The Court of Appeals of Indiana’s ruling should wholly be affirmed, particularly its grant of a preliminary injunction for the individual Plaintiffs and Hoosier Jews for Choice (collectively “Plaintiffs”). At the core of this case is whether the Plaintiffs² have demonstrated sincerely-held religious beliefs, and that their motivation in seeking abortions is religious. S.E.A. 1’s codification of the principle that life begins at conception substantially burdens individual Plaintiffs’ exercise of religion regarding abortion because their beliefs and conduct about abortion are religiously motivated.³

ARGUMENT

I. PLAINTIFFS HAVE DEMONSTRATED CONSISTENT, RELIGIOUSLY MOTIVATED BEHAVIOR REGARDING ABORTION

Courts may use five factors to evaluate the sincerity of claimants’ religious beliefs: consistency and clarity in describing religious beliefs; consistent behavior; the presence of

² The Court of Appeals of Indiana has upheld the trial court’s finding of standing for the individual Plaintiffs and associational standing for Hoosier Jews for Choice. *See Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiffs*, Opinion 22A-PL-2938, 1, 8 (Ind. App. Ct. 2024). *See also* page 23.

³ This brief utilizes the Religious Freedom Restoration (Act) and Indiana’s RFRA as the underlying basis for explaining how the Plaintiffs have demonstrated sincerely-held religious beliefs. The Supreme Court has incorporated the sincerity test into two of the most significant federal religious accommodation statutes: RFRA, which provides religious exemptions to all federal laws, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides accommodations in the state prison and land use context. *See Kara Loewentheil and Elizabeth Reiner Platt, In Defense of the Sincerity Test, in RELIGIOUS EXEMPTIONS 247, 248 (Kevin Vallier, ed.; Michael Weber, ed., 2018) (citing to 42 U.S.C. § 2000cc et seq.)*.

ulterior motives; timing; and demeanor. *See* Loewentheil and Platt at 251 (discussing religious beliefs); at 252 (discussing inconsistent behavior); at 255 (discussing ulterior motive); at 257 (discussing tardy timing); at 258 (discussing demeanor).

Courts look at the totality of the facts at hand to assess religious sincerity. Loewentheil & Platt, at 251. Courts apply these factors to judicially dispense with claimants who are “animated by motives of deception” and seek to exploit the concept of sincerely held religious beliefs for personal gain. *Id.* at 250 (citing to *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)). *See also New v. U.S.*, 245 F. 710, 713 (9th Cir. 1917) (“the question of the defendant’s good faith is the cardinal question”); *International Soc. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (“Our openness is legitimately restricted only when underlying motives of deception and fraud hide behind a facade of conscience and religious belief”). Courts can thus identify claimants exploiting the phrase “religious beliefs” as a form of protection for unlawful, nefarious, or otherwise harmful activity to society.

Courts look to whether a person has violated a religious belief in the past to find whether that person’s behavior on a particular issue has been consistent. *See Dobkin v. District of Columbia*, 194 A.2d 657, 659 (1963) (where an individual had worked on Saturdays before requesting a postponement of his trial to observe Shabbat). Simply stating a belief does not *ipse facto* make an individual’s beliefs sincerely held; an individual’s behavior must align with stated religious beliefs. *Kanai v. McHugh*, 638 F.3d 251, 263 (4th Cir. 2011). Courts are generally careful to examine consistency only as a matter of whether the claimant’s actions are consistent with his own stated beliefs. Loewentheil & Platt at 254 (citing to *Thomas v. Review Bd. Of Indiana Employment Sec. Division*, 450 U.S. 707, 714 (1981)); *see Lindell v. Casperson*, 360 F. Supp. 2d 932, 952-53 (2005) (noting a discrepancy in the plaintiff’s prior request for a vegetarian diet

compared to the issue at hand, where the plaintiff requested certain kinds of meat and other dietary specifications to practice Wotanism).

A court may also look to whether an individual has recently converted to a religion if there is a sudden change in the behavior of an individual striving to act in accordance with religious beliefs. *See Hussein v. Waldorf-Astoria*, 134 F.Supp 2d 591, 596-97 (S.D.N.Y. 2001). Courts can also look to see if there are discrepancies in a plaintiff's behavior with regards to a specific issue. The fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere. *Reed v. Faulkner*, 842 F.2d 960, 963 (1988).

The fact of the matter is that the Plaintiffs have demonstrated that their religious beliefs are sincerely held.⁴ Of the five factors enumerated above, this brief focuses on the consistent, religiously motivated behavior of the Plaintiffs about abortion. For the purposes of evaluating Plaintiffs' behavior regarding abortion, this Court must look to only their behavior regarding abortion.

When deciding to terminate her second pregnancy, Plaintiff 1 consulted her religious leaders in her decision-making process. Defs' Ex. 4 at 18:15-25; Pl. Ex. 1 ¶ 10 (describing her religious beliefs). In making her decision in accordance with her beliefs about Judaism, Plaintiff 1 took into consideration her physical, mental, and emotional health. *Id.* 19; 20:1-9. Plaintiff 2 terminated her pregnancy in accordance with her religious belief that she was compelled to terminate a pregnancy if it would infringe on her ability to realize her full humanity and inherent dignity. Defs' Ex. 5 at 30:16-18; 31:17-18.

⁴ NCJW detailed why and how the Plaintiffs' religious beliefs are sincerely held in an amicus brief filed with the Court of Appeals of Indiana in 2023. The description of their religious beliefs about abortion have been consistent and clear, they have sincere motives in bringing the lawsuit, and their timing in bringing the lawsuit is appropriate.

Plaintiffs 3, 4, and 5 all used their religious beliefs in guiding their decisions about their access to abortion. Plaintiff 3 is Muslim and was sexually active prior to the enactment of S.E.A. 1. Defs' Ex. 6. at 65: 25. Approximately around the time the law was enacted, Plaintiff 3 began abstaining from sexual intercourse, afraid that she would fall pregnant and could not access the requisite healthcare needed, including abortion, because of her Crohn's Disease. *Id.* at 64: 2-17. Plaintiff 3's decision to abstain from intercourse is guided by the teaching in Islam that up to 120 days' gestation, a woman can make the decision that she could terminate a pregnancy. *Id.* at 46. Under S.E.A. 1, she would not be able to access abortion until the 120-day mark, per her religious beliefs. If she fell pregnant, she could not continue to prioritize her physical health and well-being, as her religious beliefs dictate.

Plaintiffs 4 and 5 are married, and were hoping to start a family. Defs' Ex. 8 at 41:6-11; 42:2-6. Plaintiffs 4 and 5 halted the process of beginning a family because of S.E.A. 1's passage, afraid that they would not be able to access abortion when experiencing physical and mental harm during pregnancy, according to their religious beliefs. *Id.* at 43:19-24; *see* Defs' Ex. 7 at 15:9-23, Defs' Ex. 8 at 21:5-18, 22:2-16.

Members of the Hoosier Jews for Choice who are able to become pregnant have altered their sexual practices or birth control practices as a response to S.E.A. 1., afraid that they will not be able to access abortion when experiencing physical or mental harm during pregnancy, as their religious beliefs dictate. Defs' Ex. 10 at 20:13-25; 21:1-8.

To assess whether individuals are credible regarding the espousal of their religious beliefs, courts look to individuals' demeanor. An assessment of demeanor would include past evidence of an individual's behavior. *See Hussein*, 134 F.Supp.2d at 598 (where the court considered the individual's past altercations with his employer and other disciplinary actions to

evaluate his credibility, finding that he was being insincere in his religious beliefs). Courts recognize that religious beliefs may take time to crystallize. *See Watson v. Geren*, 569 F.3d 115, 121 (2d Cir. 2009) (where a conscientious objector described the time it took for his beliefs to formulate). A court should examine religious convictions for credibility, but not stray into the realm of religious inquiry, an area in which courts are forbidden to tread. *Moussazadeh*, 703 F.3d 781, 792 (5th Cir. 2019).

Therefore, this Court would not be assessing the validity of the Plaintiffs' religious beliefs, but would be assessing the credibility of each. To assess the Plaintiffs' credibility, this Court may consider evidence about their past behavior related to their religious beliefs about abortion, why they hold such sincere religious beliefs, how they behave according to their religious beliefs, and why they have sincere motives in bringing this lawsuit.

Plaintiff 1 attended Jewish school and camp, worked at a synagogue, and currently attends synagogue. Defs' Ex. 4 at 21:23-25; 22:7-8;22:16. Plaintiff 2 began thinking through her religious beliefs while still attending a Catholic afterschool program. Defs' Ex. 5 at 22:5-7. She continues to reflect on her religious beliefs in a thoughtful manner. *Id.* at 23:5-7. She does not see a distinction between her lifestyle choices and religious beliefs, showing that both are inextricably linked. *Id.* at 29:1; 28:23-25. Plaintiff 2 also sought a religious exemption from the COVID-19 vaccine with her state employer, which was granted. *Id.* at 28:6-16. Plaintiff 3 attempts to fast during Ramadan, despite her Crohn's Disease. Defs' Ex. 6 at 28:23-25. Since she prioritizes her health and well-being according to her religious beliefs, she does not fast all the way through Ramadan because her Crohn's Disease prevents her from fasting the full period, and her religious beliefs instruct her to prioritize her physical well-being. *Id.* at 56:24-25.

Plaintiff 4 belongs to a Reform synagogue. Defs' Ex. 7 at 9:5. She attends Shabbat each week and has relationships with family members who are rabbis. *Id.* at 11:2-3; 11:12-13.

Plaintiff 5 had two Jewish wedding ceremonies with Plaintiff 4, one larger ceremony and one private. Defs' Ex. 8 at 11:25; 12:1-2; 12:4-6. Plaintiff 5 attends synagogue, Shabbat, has Jewish things in her home, and observes all Jewish holidays. *Id.* at 14:3; 14:4; 14:6; 14:9.

Members of Hoosier Jews for Choice held a Havdalah, a Jewish service that ends the Sabbath, as part of a reproductive justice vigil in September 2022. Defs' Ex. 10 at 25:21-23. Hoosier Jews for Choice also consults with rabbis for articulation about its Jewish beliefs about abortion. *See generally* Pl. Ex. 5.

These behaviors generally speak to the Plaintiffs' credibility. These behavioral illustrations above are not exhaustive, but serve as examples from the past that underscore their credibility regarding their religious beliefs.

II. PLAINTIFFS' BEHAVIOR IS RELIGIOUSLY MOTIVATED

The test for religiously motivated conduct under RFRA is two-fold:

- 1) A party establishes a prima facie defense under RFRA by showing the disputed governmental action substantially burdens a sincerely held religious belief;
- 2) then the burden shifts to the government to establish that a compelling governmental interest is satisfied through application of the challenged law to the person, the particular claimant whose sincere exercise of religion is being substantially burdened. Ind. Code Ann. § 34-13-9-8. *See also Blatter v. State*, 190 N.E.3d 417, 421 (Ind. App. Ct. 2022).

A court may examine whether individuals are motivated by fear that their religious practices may be violated. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 627 (7th Cir. 2007) (where religious adherents could be motivated to bury loved ones elsewhere out

of fear of future disinterment). A court would not simply find that an individual had a religious motive for her actions as a matter of course; religiously motivated acts are given high protection. *See Cleveland v. U.S.*, 329 U.S. 14, 20 (1946) (the Court noting that if it accepted the petitioners' defense that criminal actions were motivated by religion, it would place beyond the law any act done under the claim of religious sanction).

Courts may look to various factors to determine that religiously motivated actions stem from sincerely held beliefs. *See Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (where Amish individuals demonstrated that based on their long history and mode of life in the United States, their religious beliefs were sincere); *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963) (where the plaintiff was denied unemployment benefits because her sincere Seventh-day Adventist beliefs prevented her from working Saturdays); *Emp. Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 878 (1990) (where individuals were religiously motivated to use peyote for sacramental purposes).

Citations to extreme cases where individuals attempt to justify their personal behavior as religious exercise, claiming that RFRA is imposing a substantial burden on their religious exercise, only serve to highlight how carefully courts have tailored the contours of RFRA. *See Blatter v. State*, 190 N.E. 3d at 419 (where an individual claimed that his religion commanded him to discipline his children with corporal punishment and consequently claimed that the state was burdening his exercise of religion). Crucially, the exercise of religion may involve performance of, or abstention from, physical acts engaged in for religious reasons. *See Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 710 (2014) (quoting *Emp. Div. Dep't of Hum. Res. v. Smith*, 494 U.S. at 877).

Various faith traditions hold different definitions on when life begins.⁵ Jewish text not only permits abortion, but requires abortion if the pregnant woman's life is in danger. Torah, Exodus 21:22-25. Since the fetus is regarded as merely potential life, the pregnant person's health and safety take precedent up until and even partway into the process of birth. *See Mishnah Oholot* 7:6. "[A]mong Muslims, there is no universally agreed-upon moment when a fetus becomes a person." Elissa Strauss, *When Does Life Begin? It's Not So Simple*, Slate (Apr. 4, 2017), <https://slate.com/human-interest/2017/04/when-does-life-begin-outside-the-christian-right-the-answer-is-over-time.html>. The predominant Islamic view is that a fetus acquires personhood 120 days from conception, *i.e.*, at approximately 19-20 weeks of gestation. Mark Cherry, *Religious Perspective on Bioethics* 196-97 (2004); Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Applications* 134-35, 140-41 (2009); Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives* 94 (2006).

For this Court's convenience, the nexus between religious belief and substantive burden will be addressed in the following manner: what are the Plaintiffs' sincere religious beliefs, how

⁵ For the Court's convenience, some of the differing definitions and interpretations regarding abortion are explained below and underscore how narrow and limiting S.E.A. 1 is for the exercise of various religious beliefs regarding abortion. The Presbyterian Church, Lutheran Church, and United Church of Christ have all declined to take a position on when life begins, while noting the diverse range of religious views on the question. *See* Presbyterian Church (U.S.A.), Abortion/Reproductive Choice Issues, <https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/>; Evangelical Lutheran Church in America, Social Statement on Abortion at 1, 3 n.2 (1991), <http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf>; United Church of Christ, Statement on Reproductive Health and Justice, https://d3n8a8pro7vnmx.cloudfront.net/unitedchurchofchrist/legacy_url/455/reproductive-health-and-justice.pdf. Catholic teachings on the abortion question have also varied dramatically. *See* Vatican Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, at n.19 (Nov. 18, 1974), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html; *see* Anne Stensvold, *A History of Pregnancy in Christianity: From Original Sin to Contemporary Abortion Debates* 45-46 (2015); Frank K. Flinn, *Encyclopedia of Catholicism* 4-5 (2007); Elissa Strauss, *When Does Life Begin? It's Not So Simple*, Slate (Apr. 4, 2017), <https://slate.com/human-interest/2017/04/when-does-life-begin-outside-the-christian-right-the-answer-is-over-time.html>; St. Thomas Aquinas, *Summa Contra Gentiles* 2.88-89; *Summa Theologiae* 1.118; Garry Wills, *Abortion Isn't a Religious Issue*, L.A. Times (Nov. 4, 2007), <https://www.latimes.com/la-op-wills4nov04-story.html>.

their conduct regarding abortion is religiously-motivated, and then, how the conduct is substantively burdened by S.E.A. 1.

Plaintiffs' religious beliefs have already been explained on the record; the analysis thus proceeds to Plaintiffs' religious motivation. Plaintiffs' conduct is religiously motivated, with each of the Plaintiffs sharing how their religious beliefs have motivated them to alter their conduct. Plaintiff 1 is taking birth control and began abstaining from sex with her husband on September 15, 2022, the day S.E.A. 1 went into effect. Defs' Ex. 4 at 51:3-11. Plaintiff 1 is afraid that she will not be able to access abortion, as her religious beliefs dictate, when experiencing physical and mental harm during pregnancy. *See* Pl. Ex. 1 ¶ 10 (describing her religious beliefs); Defs' Ex. 4 at 33:14-18 (describing her religious beliefs). Plaintiff 2 chose to reduce intimacy with her husband, afraid that she would not be able to access abortion to realize her bodily autonomy and inherent dignity according to her religious beliefs. *See* Defs' Ex. 5 at 22:18-21, 30:16-18; 31:17-18.

Plaintiff 3 is practicing abstinence because she fears falling pregnant and experiencing severe side effects as result of her underlying health conditions. She would not be able to access abortion as her religious beliefs dictate, up to the 120-day mark. *See* Defs' Ex. 6 at 25:2-8; 28:8-11 (describing her religious beliefs). Plaintiffs 4 and 5 are refraining from starting a family, afraid that they would not be able to access abortion, as their religious beliefs dictate, when experiencing physical and mental harm during pregnancy. *See* Defs. Ex. 7 at 15:9-23 (describing her religious beliefs); Defs' Ex. 8 at 21:5-18; 22:2-16 (describing her religious beliefs). Members of the Hoosier Jews have also altered their sexual practices, afraid that they would not be able to access abortion, as their religious beliefs dictate, when experiencing physical and mental harm during pregnancy. *See* Defs' Ex. 10 at 28:19-21; 30:3-13 (describing their religious beliefs).

To comply with S.E.A 1's narrow codification of when life begins and near-total abortion ban, Plaintiffs have altered their behaviors, ranging from no sexual intimacy to highly detailed precautions during sexual intercourse. This dramatic alteration of behavior in their personal lives shows that Plaintiffs are avoiding the possibility of becoming pregnant, because none of them would be able to access abortion as their religious beliefs dictate.⁶ Therefore, S.E.A. 1 places a substantive burden on Plaintiffs' and Hoosier Jews' exercise of their religious beliefs regarding abortion.

CONCLUSION

Plaintiffs hold sincere religious beliefs about abortion, demonstrating consistency and clarity in their behavior per their religious beliefs. Therefore, Plaintiffs' behavior regarding abortion access is religiously motivated. S.E.A. 1 places a substantive burden on the exercise of Plaintiffs' religious beliefs regarding abortion. Consequently, this Court should affirm the Appeals Court's ruling wholly, particularly the preliminary injunction.

Respectfully submitted,

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⁶ During a medical emergency, pregnant individuals should not have the burden of seeking urgent relief through the legal system. Individuals would have to place their sincere religious beliefs at odds with compliance with the S.E.A.1 were it not for the preliminary injunction in place.

WORD COUNT CERTIFICATION

I hereby certify that the foregoing Brief of Amicus Curiae contains no more than 4200 words, pursuant to Ind. R. App. 44(E).

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CERTIFICATE OF SERVICE

I certify that on June 10, 2024, the foregoing document was electronically filed using the Indiana E-Filing System (IEFS). I also certify that on June 10, 2024, the following persons were served electronically with the foregoing document through IEFS:

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