IN THE INDIANA SUPREME COURT
Case No. 26S-PL-00128

The Individual Members of the Medical Licensing Board of Indiana, et al., *Appellants*, v. Anonymous Plaintiff 1, et al., *Appellees*.	Appeal from the Marion County Superior Court 1 Trial Court Case No.: 49D01-2209-PL-031056 Hon. Christina R. Klineman, Judge.

Brief of United States Senator Jim Banks (IN) As *Amicus Curiae* in Support of Appellants

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Brief of *Amicus Curiae*
Senator Jim Banks

Table of Contents

Table of Authorities

Cases

Brief of *Amicus Curiae*
Senator Jim Banks

Constitutional Provisions

Statutes

Other Authorities

Interests of Amicus Curiae [1]

Amicus is the junior United States Senator from Indiana. As a member of the United States Senate, he has an interest in the ends and duties of American government. As an Indiana resident, he has an interest in supporting the State's efforts to secure the right to life of all persons within its jurisdiction. And as the father of three girls, he has an interest in protecting children everywhere.

Summary of Argument

In 2022, Indiana became the first state in the country to pass a pro-life law, following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health*, 597 U.S. 215 (2022), that states can act to protect unborn life at all stages. S.E.A. 1 continues a longstanding tradition of protecting the right to life of all persons within a jurisdiction, including those who are unborn.

The trial court enjoined S.E.A. 1 as to a certified religious class under the Indiana Religious Freedom Restoration Act, Ind. Code §§ 34-13-9-1 et seq. (2022) ("**RFRA**").

More than fifty years ago, this Court held Indiana's interest in protecting unborn life "valid and compelling" "from the moment of conception." *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972). *Cheaney* remains good law, and the General Assembly has codified treatment of the unborn as persons deserving of the protection of the laws.

[1] No party's counsel authored any part of this brief nor did any party's counsel or any other person contribute any money intended to file this brief.

Ind. Code § 16-34-2-1.1(a)(1)(E) (2022). Indiana's interest in doing so is deeply rooted in the "history and tradition" of the United States, and Dobbs restored to the states the ability to act upon it. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22 (2022).

Just as Indiana has an interest in protecting unborn life, it has an interest in rejecting religious claims to end that life. There is no religious right to take a human life. Countless judicial decisions affirm the states' compelling interest in denying requests for an exemption from laws against private violence. Courts reject these requests even where practitioners' views are sincerely held and even though such laws contain other exemptions. The government has the same compelling interest in denying religious claims to abortion that it has in denying religious requests for murder and other forms of violence.

The promises of the American Founding and guarantees of the American legal tradition are for all persons. The Indiana Supreme Court should reverse the judgment of the trial court and give Indiana's pro-life law its full effect.

Argument

I. Indiana Has a Compelling Interest in Protecting Life, Including Unborn Life.

Denying an exemption to Indiana's abortion ban accords with the "history and tradition" of Indiana and the United States, which is the protection of life. *Bruen*, 597 U.S. at 22. The American and Indiana traditions establish what the United States

Supreme Court, Indiana Supreme Court, and the Indiana General Assembly have confirmed: the State has a compelling and valid interest in protecting life, including unborn life. This Court recognized the interest as valid and compelling more than fifty years ago, and the General Assembly has confirmed the personhood of the unborn and their right to the protection of the laws. *Dobbs* restored to the states the authority to act on this interest under their own police powers and the guarantees of the Fourteenth Amendment of the United States Constitution.

A. Securing the Right to Life Runs Through the Core of the American Tradition and Is a Key Element of State Police Powers.

Regulations alleged to infringe a right should be analyzed in the light of the Nation's "history and tradition." *Bruen*, 597 U.S. at 22. *See also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022). The tradition at issue in this case is the protection of life. States have historic police powers that enable them to act to protect the health and safety of persons within their borders. These powers reach their apex when the state acts to safeguard human life. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).

Police powers have their roots in the American Founding and beyond. The Declaration of Independence announces that "all men are created equal," that they hold rights from their Creator, and that the first of those rights is life. "Governments are instituted among men" to secure these rights. Declaration of Independence para.

2 (1776). *See also Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 248, 266 (2023) (Thomas, J., concurring).

The Founders inherited an ancient tradition holding that private violence is wrong and that governments must protect citizens from it. *See* Aristotle, *Politics* bk. I, ch. 2 (Ernest Barker trans., 1946) ("the state comes into existence for the sake of life"); Cicero, *Pro Milone* § 13 (N.H. Watts trans., 1931) (recognizing the state's interest against private violence among citizens in a free state); Romans 13:1, 4 (KJV) (governing authorities are "the minister of God, a revenger to execute wrath upon him that doeth evil"); Thomas Aquinas, *Summa Theologiae*, I-II, Q.96, art. 2 ("human laws do not forbid all vices, . . . but . . . chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and the like").

English common law framed this duty as a right to life belonging to all persons and incumbent upon government to protect. Life is "an immediate gift of God, inherent by nature in every individual," and all persons hold an "absolute right[]" to life, liberty, and property "vested in them by the immutable laws of nature." 1 William Blackstone, Commentaries on the Laws of England 124. Protecting those rights is "the principal aim of society." *Id.* John Locke, whose philosophy looms large in the Declaration, observed the same principles as teachings of the "law of nature": "all being equal and

independent, no one ought to harm another in his life, health, liberty, or possessions." John Locke, Second Treatise of Government ch. II, § 6.

The American founding built on Blackstone and Locke in articulating the government's duty to protect the right to life. *See, e.g.,* Letter from Thomas Jefferson to Henry Lee (May 8, 1825) (the Declaration's "authority rests then on the harmonizing sentiments of the day," "whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney."). Protecting life motivated the American Revolution, *see* Declaration, *supra*, at para. 2, and the earliest expositors of the American tradition reiterated life as a natural right and a core object of the new government. *See* James Wilson, "Of the Natural Rights of Individuals," in 2 The Works of James Wilson 592, 597 (Robert G. McCloskey ed., 1896) ("Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members . . . By the law, life is protected not only from immediate destruction, but from every degree of actual violence[.]"); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 330 (1833) ("The Declaration of Independence . . . puts the doctrine on true grounds. Men are endowed, it declares with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men[.]"); John Adams, *A Defence of the Constitutions of Government of the United States of America*, in 6 *The Works of John Adams, Second President of the United*

States (Charles Francis Adams ed., 1856) ("To this constancy [of a republic], therefore, is due that delightful tranquillity of mind, arising from a sense of perfect security in the protection of known laws for the enjoyment of life, liberty, honor, reputation, and property.").

Securing the right to life also motivated the states as they adopted their own republican forms of government. *See* Story, *supra*, at § 338 (state constitutions "are forms of government, ordained and established by the people in their original sovereign capacity to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare"). Most state constitutions recognize a right to life extending to every member of the human family, securing "inherent rights, including the enjoyment of life." *See, e.g.*, Va. Const. art. I, § 1; Ill. Const. art. I, § 1. States also regulated to protect life, embracing common-law rules against killing and other forms of private violence. *See, e.g.*, *Commonwealth v. York*, 9 Met. 93, 109 (Mass. 1845) (locating the rules of "murder and manslaughter" in "the common law"); *Wilson*, *supra*, at 596–97.

The language of the Declaration, the framers, and the state constitutions was universal: "*all* men" are "endowed by their Creator with certain unalienable rights." Declaration, *supra*, at para. 2; *see* Abraham Lincoln, Reply to the Dred Scott Decision (June 26, 1857) (the Founders "consider[ed] all men created equal — equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This

they said, and this meant."). Neither the Founders nor the tradition they inherited fully lived up to these principles, and American law did not adequately protect the rights of black Americans.

But failures in application did not, as Chief Justice Taney supposed in *Dred Scott v. Sandford*, narrow the Declaration's reach or strip any class of persons of the rights it promised. *See* 60 U.S. 393, 407, 410 (1857). The Founders, as Lincoln remarked in his response to *Dred Scott*, "did not mean to assert the obvious untruth that all were then actually enjoying . . . equality," only "to declare the right, so that enforcement of it might follow as fast as circumstances should permit." Lincoln, *supra*.

Indeed, the Fourteenth Amendment "codified" the Declaration's promise that "each man shall have the right to pursue in his own way life, liberty, and happiness." *Students for Fair Admissions*, 600 U.S. at 248, 266 (Thomas, J., concurring). The Equal Protection Clause applies to all who are "humans, live, and have their being," *Levy v. Louisiana*, 391 U.S. 68, 70 (1968), and forbids states from excluding classes of persons from generally applicable protections against harm. *See also* C'Zar Bernstein, *The Constitutional Personality of the Unborn*, 18 J.L. Econ. & Pol'y 281, 282–83 (2023) ("the word 'person' in the Equal Protection Clause . . . mean[s] what it ordinarily meant to the public in 1868: a living human being").

The right to life runs through the core of the American tradition. Securing that right is the principal duty of government, and the Fourteenth Amendment confirms

that the law must equally protect all members of the human family, including the unborn.

B. States Have a Compelling Interest in Protecting the Right to Life of Unborn Persons.

Dobbs recognized the state's interest in protecting unborn life as compelling. *Dobbs*, 597 U.S. at 300–01. This holding comports with America's tradition of protecting the unborn as persons.

Unborn humans were understood as natural persons in the traditions that shaped the United States. Roman law considered "[t]hose who are in the womb" "among the existing things of nature." Digest 1.5.26 (Julianus); *see also id.* at 1.5.7 (Paulus) ("A child in its mother's womb is cared for just as if it were in existence, whenever its own advantage is concerned"). Blackstone affirmed the personhood of the unborn, stating that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." Blackstone, *supra*, at *129; *see also Wallis v. Hodson*, (1740) 26 Eng. Rep. 472, 473 (speech of Lord Chancellor Hardwicke) (a child in the womb is "a person *in rerum natura*, so that by the rules of the common and civil law, . . . was, to all intents and purposes, a child" (cleaned up)).

The unborn were also historically entitled to legal protection. Unborn children in Rome enjoyed property rights and could inherit an estate in certain cases. *See* Dig. 1.5.26. So too in England, where a child in the womb could be included in wills, receive an interest in land, and have his or her property interests protected by a guardian. *See*

Blackstone, *supra*, at 129. Both the civil and common-law systems punished the intentional killing of an unborn child through abortion. *See* Dig. 47.11.4 (Marcianus); Edward Coke, 3 *Institutes of the Laws of England* 50 (1644); Blackstone, *supra*, at 129. Blackstone accordingly declared that the right to life belonged to "every individual," including the "infant . . . able to stir in the mother's womb." Blackstone, *supra*, at 129.

The American Founders knew and embraced this history in the early republic. The founding generation treated unborn children as members of the human family entitled to the law's protection. *See, e.g.*, 2 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 178 (1799) ("[t]he law regards an infant even in the mother's womb"); Wilson, *supra*, at 597 ("[i]n the contemplation of law, life begins when the infant is first able to stir in the womb"); *Swift v. Duffield*, 5 Serg. & Rawle 38, 40 (Pa. 1818) ("A child in the womb of the mother is under the protection of the law, and possesses all the privileges of a living being."); *State v. Jones*, 1 Miss. 83, 84 (1820) (a "child unborn" is "a human being"). These entitlements had grown stronger in the common law by the time of the founding, and the new states maintained many of the English and Roman protections. *See, e.g.*, *Hall v. Hancock*, 32 Mass. 255, 257–58 (1834) ("a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered"); *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) ("By the well-settled and established doctrine of the common law, the

civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception.").

American states also maintained the legal prohibition on killing an unborn child through abortion. Early abortion prohibitions adopted the common-law framework, with abortion a "great misdemeanor" for children who died in the womb after "quickening" and murder for those born alive after a failed abortion. *Swift*, *supra*, at 299. The differing standards reflected evidentiary limits, not a lesser view of the personhood of the unborn or their right to life. Medical technology made it difficult to show pregnancy and that a child was alive at the time of an abortion, especially before the time a child could be felt moving in the womb. *See* C'Zar Bernstein, *Fetal Personhood and the Original Meanings of 'Person' in the Constitution*, 26 Tex. Rev. L. & Pol. 485, 535 (2022); Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J.L. & Pub. Pol'y 540, 553 (2017). The born-alive rule "consistently prohibited abortion of human beings in utero according to the best medical knowledge of the day, and viewed abortion as the wrongful killing of a human being." Craddock, *supra*, at 553.

States and the federal government soon moved to fully protect the right to life of the unborn. By the end of 1868, the year the Fourteenth Amendment was ratified, three-quarters of the states made abortion a crime at all stages. *See* James S. Witherspoon, *Reexamining* Roe: *Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 35 (1985). All but one of the remaining states

criminalized abortion at all stages within thirty-five years, and the territories that became the final states followed suit before 1920. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 248–49 (2022). Congress, for its part, criminalized in 1873 the mailing of abortion drugs and items used to perform abortions in the Comstock Act. 18 U.S.C. § 1461.

The Fourteenth Amendment was ratified against this background of expanding statutory protection for unborn life. Its Equal Protection Clause forbids states from denying protection of the laws to "any person," U.S. Const. amend. XIV, § 1, and that protection extends to all who are "humans, live, and have their being." *Levy*, 391 U.S. at 70. The consensus of the common-law tradition was that the unborn are humans, *see, e.g.*, Blackstone, *supra*, at *129; Wilson, *supra*, at 597, and most states explicitly referred to the unborn as "child[ren]" or as "persons" near the time of the passage of the Fourteenth Amendment. *See* Craddock, *supra*, at 556; Witherspoon, *supra*, at 48. In addition, the same actors who ratified the Amendment were, at the same time, regulating to protect unborn life. *See also* Bernstein, *Constitutional Personality*, *supra*, at 281–82 (the "word 'person' in the Equal Protection Clause . . . encompasses the unborn"); Craddock, *supra*, at 542 ("all prenatal life is included within the Fourteenth Amendment's existing guarantees of Due Process and Equal Protection").

Consistent with the Fourteenth Amendment, states have a compelling interest in protecting all persons in their jurisdiction against private violence, including when

those persons are unborn. *Roe v. Wade* displaced the pro-life laws of most states, arbitrarily imposed an atextual and ahistorical right that was neither "deeply rooted in the Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Dobbs*, 597 U.S. at 231. Inventing the right to "destroy a 'potential life,'" *id.* at 262, stood at odds with the tradition of protecting life. *Dobbs* affirmed that states have an interest in protecting unborn persons and in rejecting "theor[ies] of life" that "regard a fetus as lacking even the most basic human right — to live — at least until an arbitrary point in a pregnancy has passed." *See Dobbs*, 597 U.S. at 263.

American history and tradition protect the right to life of unborn persons. The Founders believed the unborn to be members of the human family, and the legal developments of the early Republic confirmed that the unborn are persons entitled to the promises of the Declaration of Independence. States have a compelling interest in continuing this history.

C. Indiana Has Continuously Protected Unborn Life since Statehood, and its Interest in Doing So Has Been Described as Compelling by this Court.

Over fifty years ago, the Indiana Supreme Court, upholding Indiana's then-existing pro-life law, held that Indiana's interest in protecting unborn life "from the moment of conception" is "both *valid and compelling*." *Cheaney*, 285 N.E.2d at 270 (emphasis added). That holding has never been overruled, and it comports with Indiana's own history and tradition of protecting unborn persons.

The Indiana Constitution, like most state constitutions, enshrines the rights to "life, liberty, and the pursuit of happiness" as inalienable, God-given rights. Ind. Const. art. I, § 1. *See also Clinic for Women v. Brizzi*, 837 N.E.2d 973, 990 (Ind. 2003) (Dickson, J., concurring) ("the text of Section 1 expressly recognizes the inalienable right of 'life'"). This Court has affirmed that Section 1 adopts and codifies John Locke's natural-rights theory. *Members of the Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.,* 211 N.E.3d 957, 966–67 (Ind. 2023) ("Section 1 is a Lockean Natural Rights guarantee securing fundamental rights"). The rights of Section 1 apply, like the promises of the Declaration and the protections of the Fourteenth Amendment, "to all people." Ind. Const. art. I, § 1.

Section 1's protection for "the inalienable right of 'life'" reaches unborn humans no less than those who have been born. The Section 1 protection for life is interpreted based on "the common understanding of both those who framed our Constitution and those who ratified it." *Members of the Med. Licensing Bd.*, 211 N.E.3d at 967 (quoting *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1272 (Ind. 2013)) (cleaned up). Therefore, its protection of the right to life of "all people" should be understood to define "people" the way that it would have been defined in 1816: to include all members of the human family, including those who are unborn. *See* Blackstone, *supra*, at 129; Wilson, *supra*; *Swift*, *supra*, at 188; *Jones*, 1 Miss. at 84;

Duffield, 5 Serg. & Rawle at 40. Indiana's own legislators described abortion as a "crime[] against the person" and the fetus in the womb as a "child" in the State abortion law passed after ratification of the Fourteenth Amendment. Act of Apr. 14, 1881, ch. XXXVII, §§ 22–23. *See also Clinic for Women*, 837 N.E.2d at 990 (Dickson, J., concurring) ("[e]very decision to terminate a pregnancy denies 'the inalienable right of "life"' in 'the text of Section 1' to an unborn child").)

Consistent with this understanding, Indiana has acted since its founding to secure the right to life of all persons within its jurisdiction, including persons in the womb. "For all of Indiana's history, abortion has been the subject of State lawmaking." *Members of the Med. Licensing Bd.*, 211 N.E.3d at 979. Territorial law prohibited murder in the Indiana territory, and Indiana inherited this law when it received statehood in 1816. *See* Francis Philbrick, *Laws of the Indiana Territory: 1801–1809*, at 172 (1930). The State also adopted the common-law abortion framework at its founding, *see* Act of Jan. 2, 1818, ch. LII, § 1, 1818 Ind. Acts 308, 308–09, and codified an expanded ban in 1835 that prohibited the administration of anything meant to induce an abortion to *any* pregnant woman. Act of Feb. 7, 1835, ch. XLVII, § 3, 1835 Ind. Gen. Laws 66. Further expansions followed in 1852, 1859, and 1881, when providing an abortion was made a felony. *See* Ind. Rev. Stat. vol. II, pt. III, ch. 6, § 36, at 437 (1852); Act of Mar. 5, 1859, ch. LXXXI, § 2, 1859 Ind. Acts 130, 131; Act of Apr. 14, 1881, ch. XXXVII, §§ 22–23, 1881 Ind. Acts 174, 177. These laws were the subject

of repeated prosecution. *See Willey v. State*, 52 Ind. 421 (1876); *Adams v. State*, 48 Ind. 212 (1874); *Basset v. State*, 41 Ind. 303 (1872); *Carter v. State*, 2 Ind. 617 (1851).

Even under the regime of *Roe v. Wade*, Indiana acted to ensure that unborn persons received the protection of the laws. *Roe* displaced Indiana's pro-life laws and the pro-life laws of most states. *See Dobbs*, 597 U.S. at 118. For fifty years after *Roe*, Indiana regulated abortion to the full extent permitted by the federal courts. *See, e.g.*, *Box v. Planned Parenthood of Ind. & Ky.*, 587 U.S. 490 (2019); *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018); *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018). Indiana then became the first state to pass a new abortion law following the Supreme Court's decision to overrule *Roe* in *Dobbs*. *See* 2022 Ind. Acts 2d Spec. Sess., Pub. L. No. 213-2022 (S.E.A. 1) (codified at Ind. Code § 16-34-2-1 *et seq.*).

Freed from the rule of *Roe*, Indiana's code treats the unborn as persons protected against private violence beginning at the moment of conception. *Dobbs* recognized not only Indiana's right to protect unborn life, but also its right to view the unborn as persons entitled to that right. *See Dobbs*, 597 U.S. at 263 ("Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt [a] 'theory of life'" whereby states must "regard a fetus as lacking even the most basic human right — to live — at least until an arbitrary point in a pregnancy has passed."). The State code accordingly states that "human physical life begins when a human ovum is fertilized

by a human sperm." Ind. Code § 16-34-2-1.1(a)(1)(E) (2022). Indiana criminal law confirms the point. The murder statute reaches the knowing or intentional killing of an "unborn child," Ind. Code § 35-42-1-1 (2022), and the feticide and related statutes do the same, *id.* §§ 35-42-1-4, 35-42-1-6 (2022). *See also* Ind. Code §§ 16-34-2-1.1(b), -5(b)(3) (2022).

Indiana's constitutional, statutory, and common-law sources converge: the State has a longstanding and compelling interest in protecting unborn life. That interest has been confirmed by this Court and is the history and tradition that should inform application of S.E.A. 1 to would-be religious claimants.

II. Recognizing a Religious Exemption from S.E.A. 1 Is Not Required by RFRA and Would Generate Consequences this Court Should Not Invite.

Indiana has a compelling interest in denying a religious exemption from its pro-life law, just as it would have a compelling interest in denying a religious exemption from its murder laws. There is no religious right to kill or physically harm another person, and countless judicial decisions demonstrate the State's right to reject religious claims to commit such practices.

A religious exemption to receive an abortion would transform RFRA into something it was not enacted to be. Such an exemption would convert RFRA into an open-ended opt-out from laws against private violence, in tension with State efforts to protect the right to life of persons within their jurisdiction.

A. Indiana Has a Compelling Interest in Rejecting Religious Claims to Commit Intentional Physical Violence.

RFRA's strict-scrutiny inquiry asks whether the State's compelling interest is served by applying the law to the specific claimant. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014); *Holt v. Hobbs*, 574 U.S. 352, 362–65 (2015); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–32 (2006). Indiana's compelling interest in protecting unborn life is served by applying the law to individuals who assert religious claims requiring abortion.

"Well-established and representative historical analogue[s]" verify this interest as applied to religious claimants. *See Bruen*, 597 U.S. at 30. The American Declaration and Indiana Constitution were both framed for the purpose of protecting life. Neither these founding documents, nor the laws of the states at the time of the founding or the Fourteenth Amendment, assert an interest in taking the lives of law-abiding persons within their jurisdictions.

The Indiana Constitution protects persons from private violence and confers no right to commit it. The natural rights protected by the Constitution do not include the "tak[ing] away or impair[ing] the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another." *Members of the Medical Licensing Bd.*, 211 N.E.3d at 967. Sanctioning private violence would be the antithesis of the police power, which is strongest when the state acts to protect life. *Lohr*, 518 U.S. at 475; *Automated*

Med. Labs, 471 U.S. at 715. It would also damage the guarantees of the Fourteenth Amendment, which promises equal protection of the laws. U.S. Const. amend. XIV § 1.

States' compelling interest in preventing private violence extends to private violence committed for religious reasons. Section 1 of the Indiana Constitution "constitutionaliz[ed] the social contract theory of John Locke." *Members of the Medical Licensing Bd.*, 211 N.E.3d at 967. This "social contract theory" establishes that religion cannot be used as a justification to intentionally and physically harm another. *See* John Locke, Essay Concerning Human Understanding at 61 ("it is part of the worship of God, not to kill another man"). States act appropriately by enjoining violence, even if committed as part of sincere religious observance. *See* John Locke, Two Treatises of Government ("[I[f some congregations should have a mind to sacrifice infants . . . is the magistrate obliged to tolerate them, because they are committed in a religious assembly? I answer: No.").

The founding-era understanding of religious liberty confirms that the American tradition contains no religious right to take a life. At the time of the American founding, religious liberty was broadly understood to protect exercises of religion that did not endanger the "peace and safety" of the political community. *Fulton v. City of Philadelphia,* 593 U.S. 522, 575–580 (2021) (Alito, J., concurring). Most state constitutions stipulated that religious liberty was limited to such practices. *Id.* at 576. So did the Northwest Ordinance, which initially governed the Indiana territory. *Id.* at

577. Founding-era dictionaries defined "peace" as freedom from "war," "suits," "disturbances," "commotion," "riots," "tumults," a "hostile state," and "terrour," and "safety" as freedom from "danger" and "hurt." *See id.* at 579–80 (quoting 2 Johnson (1755)).

Religious liberty does not cover practices that place others in physical danger, and courts have affirmed the government's compelling interest in applying laws against violence to religious claimants. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"); *Gardner v. DeHahn*, No. 24-CV-196, 2024 WL 2853868, at *1 (E.D. Wis. 2024) ("There is no merit to a claim that the First Amendment excuses murder."); *United States v. Lindor*, 83 M.J. 678, 684 (U.S. Army Crim. App. 2023) ("The United States Constitution's framers and the various ratifying conventions plainly and deliberately did not contemplate that one could seek protection in the clause for an act that violated another's right to be free from malicious violence."); *United States v. Epstein*, 91 F.Supp.3d 573, 585 (D.N.J. 2015) ("[I]n the specific context of violent crimes, the Government unquestionably has a compelling interest in uniformly applying its kidnapping laws to prevent serious crimes of violence."); *People v. Schmidt*, 216 N.Y. 324, 340 (1915) ("The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from

responsibility before the law."). *See also Fulton*, 593 U.S. at 565 n.28 (Alito, J., concurring) ("No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice."). State action does not offend religious expression if "the expression threatens to inflict 'particularized harm' analogous to tortious injury on readily identifiable private interests." *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996).

Courts have unanimously and consistently vindicated the government's interest in "interfer[ing] to prevent violence" by rejecting First Amendment and RFRA justifications for killing and other violent acts. *Reynolds*, 98 U.S. at 166. Convictions for violent acts have been upheld against religious liberty claims by every court to consider them. *See Gardner*, 2024 WL 2853868, at *1 (murder of girlfriend as an alleged religious duty); *Lindor*, 83 M.J. at 684 (attempted poisoning of wife as part of a Haitian "Vodou" ritual); *State v. Holm*, 137 P.3d 726, 732 (Utah 2006) (religiously-motivated bigamy involving a minor); *Epstein*, 91 F. Supp. 3d 573 (religiously-motivated kidnapping). In the civil context, too, courts have allowed the government to halt religious practices that jeopardized the lives and physical safety of practitioners. *See Harden v. State*, 188 Tenn. 17 (1948) (handling rattlesnakes in church to demonstrate immunity to venom); *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) (drinking poison and letting poisonous snakes roam during church

services). *Cf. United States v. Beasley*, 72 F.3d 1518, 1527 (11th Cir. 1996) (prosecuting cult members for RICO homicide violations does not entail putting "religion on trial, in violation of the First Amendment"); *Goninan v. Holmes*, No. 6:12–cv–01555–PK, 2014 WL 6966990, at *7–8 (D. Or. Dec. 4, 2014) (collecting cases) (prisons can deny inmate access to The Satanic Bible, which advocates "violence, mutilation and murder"). Courts have blocked such practices even where they were sincere and central to the faith of the challengers. *See Pack*, 527 S.W.2d at 112 ("we have not lost sight of the fact that snake handling is central to respondents' faith"). *Cf. Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts" that "posed some substantial threat to public safety, peace or order").

To be clear, the government's interest in denying religious exemptions on grounds of private violence should not be understood more broadly than just that. *See Fulton*, 579–80 (Alito, J., concurring) ("it cannot be said that every violation of every law imperils public 'peace' or 'safety'"). That the government can punish murder committed for religious reasons does not permit it to interfere in the internal affairs of religious institutions, probe the centrality of practices to a faith, or proscribe non-violent practices that may be unpopular or offensive. *See Our Lady of Guadalupe Sch. v. Morrisey-Beru*, 591 U.S. 732 (2020); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Masterpiece Cakeshop v. Colo. Civil Rghts. Cmm'n*, 584 U.S. 617 (2018). Nor does it

allow the government to enjoin practices simply because the government finds them not to be "acceptable, logical, consistent, or comprehensible to others." *Fulton*, 593 U.S. at 532 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). But it does empower the government to stop religion from being used to commit acts of intentional physical violence, including murder. The difference is between a law that prohibits giving to religious institutions on the one hand, and the application of a robbery law to prevent stealing in order to give to a religious institution. The first is unlawful; the second prevents religion from being used to "inflict particularized harm." *Whittington*, 669 N.E.2d 1363, 1370 (internal quotation marks omitted).

RFRA requires no state, including Indiana, to allow the taking of life for religious reasons. Every "historical analogue" and judicial precedent points to the State's compelling interest in rejecting religious requests to do private violence. *Bruen*, 597 U.S. at 30.

B. Indiana's Compelling Interest in Rejecting Religious Claims to Private Violence Extends to its Pro-life Laws.

Indiana's compelling interest in exercising its police power to reject religious claims to do violence includes a compelling interest in rejecting requests for religious exemptions from its pro-life laws. "Interfer[ing] to prevent" the killing of another person does not offend RFRA, including when the person killed is unborn. *Reynolds*, 98 U.S. at 166. Indiana defines the unborn as persons who are entitled to the protection of the laws. *See* Ind. Code § 16-34-2-1.1(a)(1)(E) (2022); Ind. Code § 35-42-1-1

(2022). The unborn were considered members of the human family at the time of the American founding and in the tradition that informed it. *See* Blackstone, *supra*, at *129; Wilson, *supra*; *Swift*, *supra*, at 188; *Jones*, 1 Miss. at 84; *Duffield*, 5 Serg. & Rawle at 40. And according to the Lockean natural rights theory in the Indiana Constitution, *Members of the Medical Licensing Bd.*, 211 N.E.3d at 966, just as "it is part of the worship of God, not to kill another person," so too "it is part of the worship of God, not . . . to procure abortion." Locke, Human Understanding, *supra*, at 61.

Disagreements by religious claimants about whether an abortion constitutes violence against another person do not justify an exemption. Indiana has taken the position that the right to life begins at the moment of conception. This position has been shared by the Anglo-American tradition since time immemorial. States have a right to adopt this traditional "theory of life" and to protect unborn persons as persons that possess "the most basic human right—to live." *Dobbs*, 597 U.S. at 263. Any private right to determine that some persons are not persons in the eyes of the law has been repudiated by passage of the Fourteenth Amendment. *Compare Dred Scott*, 60 U.S. at 407 (black Americans "had for more than a century before been regarded as beings of an inferior order, and . . . had no rights which the white man was bound to respect"), with *Levy*, 391 U.S. at 70 (all who are "humans, live, and have their being . . . are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment"). Indiana is within its rights to treat the unborn as persons and violence

against them as private violence that can be enjoined without violating religious liberty protections.

Exemptions to pro-life laws also cannot justify a religious exemption. . "Underinclusiveness . . . does not itself defeat strict scrutiny." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). Many laws against private violence include exemptions, or fail to cover activity that looks like private violence. For instance, it is a longstanding principle of criminal law that actions taken in self-defense do not constitute murder, even if they result in the death of another person. Likewise, a killing committed by a person who cannot grasp the wrongfulness of his actions due to a mental defect may receive punishment, but such a killing is not murder. These principles emanate from the civil and common-law traditions, and Indiana's criminal code incorporates them. *See* Ind. Code § 35-42-1-1 (2022); Ind. Code § 41-3-2 (2022); Ind. Code § 41-3-6 (2022). But exemptions in the murder law do not require states to recognize a religious right to commit murder, just like exemptions in the tax code do not establish a religious right not to pay taxes. *See United States v. Lee*, 455 U.S. 252, 260–61 (1982). Indeed, courts have always rejected religious claims to commit violence. *See, e.g., Reynolds*, 98 U.S. at 166; *Gardner*, 2024 WL 2853868, at *1.

These principles apply to the exemptions in Indiana's pro-life law. Receiving an abortion for religious reasons is not "comparable" to the activity permitted by Indiana's pro-life law. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Indiana's pro-life law

contains life-of-the-mother, fatal-anomaly, and circumstance-of-pregnancy exemptions. Ind. Code § 16-34-2-1(a)(1)(A)(1)–(3) (2022). Some of these exemptions track historical laws that protected mothers' ability to seek necessary emergency care. Others involve situations where pregnancy was not volitional. None of them are comparable to taking the life of another person because of a religious dispute about whether that person is alive or whether broadly-stated health reasons justify taking his or her life.

C. An Exemption Would Convert RFRA into an Open-ended Opt-out from Indiana's Pro-life Law and Other Laws Against Private Violence.

Forcing Indiana to recognize a religious right to abortion in such cases risks swallowing the protections for the unborn contained in Indiana's pro-life law. For the purposes of religious liberty claims, "[c]omparability is concerned with the risks various activities pose," *Tandon*, 593 U.S. at 62, and Indiana's law exempted activities with a low risk of undermining the protection for unborn life. Current exceptions are limited to a narrow, defined, and easily verifiable range of conditions. Most of them require medical evidence. *See* Ind. Code § 16-34-2-1(a)(1)(A)(i) (2022); Ind. Code § 16-18-2-327.9 (2022); Ind. Code § 16-25-4.5-2 (2022). Four years after the statute's passage, its exemptions have not unsettled its general protections: the total number of surgical abortions performed in the State decreased from nearly 8,500 in 2021 to 126 in 2025. Ind. Dep't of Health, Annual Terminated Pregnancy Report (2025); Ind. Dep't of Health, Annual Terminated Pregnancy Report (2021). There is little risk that the statutory exemptions will destabilize the law.

By contrast, a religious exemption requires the State to allow a potentially unlimited number of abortions. The trial court certified a class consisting of "[a]ll persons in Indiana whose religious beliefs direct them to obtain abortions." *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous*, 233 N.E.3d 416, 431(Ind. Ct. App. 2024). This class includes members who do not belong to a religious tradition but have "personal religious and spiritual beliefs" about when life begins, as well as members who believe abortion is justified to prevent emotional harm to pregnant mothers. *Anonymous v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056, slip op. at 4, 6 (Ind. Sup. Ct. Mar. 5, 2026). Any pregnant woman in Indiana could conceivably join this class. Courts evaluating religious liberty claims do not probe the centrality of beliefs to a faith, *see Hernandez*, 680 U.S. at 699, leaving the State to accept every self-certification. Such a result would give class members a private veto of Indiana's pro-life law and effectively repeal the law so long as a claimant invokes religion.

Private veto by self-certification is exactly the "widespread voluntary" non-compliance that *United States v. Lee* held a state need not tolerate. 455 U.S. 258–61. The Supreme Court has denied religious exemptions to tax laws, on grounds that the tax system "could not function" if denominations could opt out on religious grounds. "Mandatory participation . . . is indispensable to the fiscal vitality" of the system. *Lee*, 455 U.S. at 258. The same holds for laws protecting unborn life. Just as "widespread

voluntary coverage" would make the tax system unworkable, voluntary observance of pro-life laws would render the State's two-hundred-year interest in protecting life illusory. An exemption regime operating without verification or limitation is not a less restrictive alternative to S.E.A. 1; it is the disappearance of S.E.A. 1.

Permitting religious vetoes of laws protecting unborn life also undermines the State's power to protect life at other stages. If abortion is justified on grounds of non-personhood, "it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as 'persons.'" *Dobbs*, 597 U.S. at 275–76. And if such other individuals are not considered persons for religious reasons, the trial court's decision leaves them without adequate protection.

Indiana has taken the position that all of these persons, including unborn persons, "merit protection as 'persons.'" *Id.* This interest flows from the American tradition and guarantees of the State and federal constitutions. This Court should allow the State to protect all of them and reject judicial rules that risk destabilizing any of the State's laws against private violence.

Conclusion

Indiana's interest in protecting unborn life is compelling, has been compelling for over two hundred years, and survives the State's narrow statutory exceptions. RFRA does not entitle claimants to commit acts of physical violence, and it does not require

states to create exemptions for such claims. The promises of the American Founding and the Indiana Constitution are for all persons, including those who are unborn, and Indiana should be allowed to secure those promises. This Court should reverse.

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Respectfully submitted,

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Brief of *Amicus Curiae*
Senator Jim Banks

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