IN THE
COURT OF APPEALS OF INDIANA
Nos. 22A-PL-02938, 23A-PL-01313

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 OF APPELLEES ON APPEAL OF CLASS CERTIFICATION

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Statement of the Issues

The women who filed this case have sincere religious beliefs that direct them to terminate pregnancies in situations where the abortions are not allowed by Senate Enrolled Act No. 1 (ss) (2022) ("S.E.A. 1" or "the Act"). They have altered their lives to avoid becoming pregnant as the Act would prohibit them from obtaining religiously-required abortions. They are not alone in their beliefs. After all, in addition to the individual plaintiffs, one of the plaintiffs is Hoosier Jews for Choice, which is a membership organization comprised of persons who share those beliefs. And it is uncontested that there is nothing idiosyncratic about the views of the plaintiffs as the belief that a woman may be directed by her religion to obtain abortions under circumstances otherwise prohibited by S.E.A. 1 is shared by many Jews, Muslims, Unitarian Universalists, Episcopalians, Pagans, and others. Clearly, S.E.A. 1 impacts the religious beliefs of many more persons than the women who brought this action. Given that there is a reservoir of individuals whose religious beliefs are impacted and constrained by the Act and who could bring separate actions, this would appear to be a natural case for a class action as the "[p]rincipal purpose of the class certification is promotion of efficiency and economy of litigation." *Indiana Univ. ex rel. Bd. of Trs. v. Thomas*, 167 N.E.3d 724, 730 (Ind. Ct. App. 2021) (internal quotation and citation omitted). This is particularly true here, as the only relief sought is injunctive and declaratory to prevent denial of a basic civil right—the ability to exercise sincere religious beliefs—and

courts have been clear that class action requirements "may be more liberally construed in civil rights cases in which injunctive relief is sought." *Osgood v. Harrah's Entertainment, Inc.*, 202 F.R.D. 115, 122 (D. N.J. 2001) (citation omitted).[1]

The issues presented are whether the trial court abused its discretion in holding that:

1. The named plaintiffs are members of a properly defined class.

2. The class is sufficiently definite inasmuch as membership in the class is ascertainable and inasmuch as accepting the State's argument, which has been rejected by numerous courts, would preclude the certification of any class that focuses on personal religious belief despite the fact that courts frequently certify such classes.

3. The numerosity requirement, Indiana Trial Rule 23(A)(1), is met where even though there is not unanimity of religious belief, it is uncontested that many Jews, Muslims, Pagans, and other persons have sincere religious beliefs that abortions not allowed by S.E.A. 1 are mandated by their faith.

4. The class satisfies the commonality requirement of Indiana Trial Rule 23(A)(2) inasmuch as the class, despite the various religious traditions reflected in its membership, is united by the common question of whether the Act burdens the class members' sincere

[1] Given that the requirements of Indiana Rule of Trial Procedure 23 are virtually identical to those of Federal Rule of Civil Procedure 23, federal class action cases are "persuasive authority" in interpreting Indiana's Rule 23. *CSX Transp., Inc. v. Clark*, 646 N.E.2d 1003, 1007 (Ind. Ct. App. 1995). Therefore federal class action cases, as well as Indiana cases, will be utilized in this brief.

religious exercise in violation of Indiana's Religious Freedom Restoration Act ("Indiana RFRA"), Ind. Code § 34-13-9-0.7, *et seq.*

5. The adequacy and typicality requirements of Indiana Trial Rule 23(A)(3) and (4) are met insofar as the plaintiffs are all aggrieved by the Act and their claims arise from the same claims as those of the class, they are not antagonistic with the claims of the class, and they have demonstrated that they have a sufficient interest to ensure vigorous advocacy of this case.

6. The further requirements of Indiana Trial Rule 23(B)(2) are met in that a single injunction, establishing a religious exemption to the near-total abortion ban of S.E.A. 1, can be issued to grant relief to the class.

Statement of the Case

Plaintiffs-Appellees agree with the State's Statement of the Case.

Statement of Facts

I. S.E.A. 1 effects a prohibition on abortion in Indiana except for extremely limited exceptions

In the aftermath of the Supreme Court removing the federal constitutional protection of abortion in *Dobbs v. Jackson Women's Health Org.*, –U.S.–, 142 S. Ct. 2228 (2022), the General Assembly adopted S.E.A. 1, which prohibits abortion except in three limited circumstances:

a. If a physician determines that an "abortion is necessary when reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's

life." Ind. Code § 16-34-2-1(1)(A)(i), (3)(A). "Serious health risk" means "a condition exists that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function." Ind. Code § 16-18-2-327.9. The term expressly excludes "psychological or emotional conditions." *Id.* These abortions may be performed at any time, although after the earlier of viability or 20 weeks after fertilization, additional restrictions are imposed. Ind. Code § 16-34-2-1(a)(1), 3.

b. If a physician determines that the fetus has a "lethal fetal anomaly," an abortion may be performed before the earlier of viability or twenty (20) weeks of postfertilization age. Ind. Code § 16-34-2-1(a)(1)(A)(ii).[2]

c. If the pregnancy is the result of rape or incest "during the first ten (10) weeks of postfertilization age of the fetus." Ind. Code § 16-34-2-1(a)(2).

II. The plaintiffs-appellees

A. The individual plaintiffs-appellees have religious and spiritual beliefs that require them to obtain abortions under circumstances prohibited by S.E.A 1

1. Plaintiff 1

Plaintiff 1 is a married Jewish woman, with one child, and her religious beliefs as an observant Jew are essential to all aspects of her life. (Appellants' Appendix submitted on January 17, 2023 ["Def. App."] II 127-28). She grew up in a Jewish family and both of her parents work in positions of leadership in the Jewish community. (*Id.* 128). She is active in her synagogue and observes Jewish tradition and rituals. (*Id.*).

[2] A "lethal fatal anomaly," is "a fetal condition diagnosed before birth that, if the pregnancy results in a live birth, will with reasonable certainty result in the death of the child not more than three (3) months after the child's birth." Ind. Code § 16-25-4.5-2.

Plaintiff 1 understands that Jewish law and teaching command that life begins when a child is born and takes their first breath outside of the womb. (*Id.*). Moreover, Jewish law instructs that the life and health of a pregnant woman, including both physical and mental health and wellbeing, must take precedence over the potential life represented by the fetus. (*Id.*). Accordingly she understands that Judaism instructs that if her health or wellbeing, be it physical, mental, or emotional, is threatened by pregnancy or any conditions related to pregnancy, she must obtain an abortion.(*Id.*).

Plaintiff 1 had to terminate a pregnancy when genetic testing revealed the fetus had a non-hereditary chromosomal defect that would cause miscarriage, stillbirth, or the birth of a child with no more than a 10% chance of survival for more than a year. (*Id.* 129). The pregnancy put her physical, mental, and emotional health at risk even though it would not have caused a serious risk of substantial and irreversible impairment of a major bodily function and may not have resulted in the death of the child within three months. (*Id.* 129-31). In accordance with her understanding of the requirements of Judaism, she obtained an abortion in March of 2022 as it was required to protect her physical and emotional health. (*Id.* 130-31).

Plaintiff 1 wishes to attempt to have another child. (*Id.* 131). However, she is aware that due to her age, any pregnancy would be high risk, which could impair her physical or mental health, without falling within any of the exceptions in S.E.A. 1, thereby preventing her from obtaining the religiously-directed abortion. (*Id.* 131-32). Health risks

are particularly acute for her as her first pregnancy, which resulted in the birth of her one child, caused serious pregnancy and post-partum difficulties, including gestational diabetes, nerve damage in her spine, and complications with her liver and oxygen levels. (*Id.* 128-29). Additionally, there is a significant risk that any fetus will have the same chromosomal abnormality noted above, yet S.E.A. 1 might prevent her from obtaining an abortion. (*Id.* 130). There are many scenarios under which her physical or mental health would be at risk in the pregnancy, such that her religious beliefs would direct her to terminate it, but where a termination would not be permitted by the Act. (*Id.* 132). Therefore, although she and her husband wish to have another child, she is refraining from becoming pregnant, and she has significantly restricted sexual activity with her husband, due exclusively to S.E.A. 1. (*Id.* 132; Def. App. III 126).

2. Plaintiff 2

Plaintiff 2 is a 30-year-old married woman with two children. (Def. App. II 134). Unlike Plaintiff 1, she does not belong to any formal religion, but is guided in life by personal religious and spiritual beliefs that create for her a moral and ethical structure. (*Id.* 135). Rather than believing in a single deity, she recognizes a force in the universe that connects all persons and that is larger than any individual person. (*Id.*). Key to her spiritual beliefs is her understanding that all persons are endowed with bodily autonomy that should not be infringed upon, as doing so constitutes a spiritual and moral wrong, preventing the full expression of a person's humanity. (*Id.*).

It is her belief that at least prior to viability the fetus is part of the woman's body. (*Id.*). Central to her religious beliefs is that she must maintain autonomy over her body, including the fetus, so it is her spiritual obligation to decide whether to remain pregnant. (*Id.* 136). If a pregnancy or the birth of a child would not allow her to fully realize her humanity and inherent dignity, she would have to terminate her pregnancy even under circumstances otherwise prohibited by S.E.A. 1. (*Id.*). Plaintiff 2 has previously terminated a pregnancy for this reason. (*Id.*).

If Plaintiff 2 became pregnant, there are therefore circumstances in which her beliefs would require her to terminate that pregnancy although the termination would be prohibited by S.E.A. 1. (*Id.*). The passage of S.E.A. 1 has caused her significant anxiety about the possibility of an unintended pregnancy and her inability to terminate such a pregnancy. (*Id.*). This has resulted in a reduction in physical intimacy between her and her husband, and a barrier between them, further burdening her religious beliefs. (*Id.*). Therefore, S.E.A. 1 is substantially burdening her religious beliefs. (*Id.*).

3. Plaintiffs 4 and 5

Plaintiffs 4 and 5 are two women who are married to one another and who wish to have a child through the use of assisted reproductive measures. (*Id.* at 143, 145). They are Jewish, and their Jewish beliefs impact and inform their lived experiences, including their lifestyles, family life, holiday observances, and moral and ethical decision-making. (*Id.* 144). They adhere to the Jewish belief that life begins when a child is born and takes

their first breath. (*Id.*) They also believe, consistent with Jewish law and teachings, that the life of a pregnant person, including her physical and mental health and wellbeing, must take precedence over the potential for life embodied in the fetus so that if there is a threat to health or wellbeing, they are directed to terminate the pregnancy. (*Id.* 144-45).

Therefore, if either Plaintiff 4 or 5 became pregnant, there are circumstances in which their religious beliefs would compel them to terminate the pregnancy, but the termination would be prohibited by S.E.A. 1. (*Id.* 145). This would include circumstances in which their physical or mental health would be impaired, but not put them at risk of death or permanent impairment of a major bodily function, or where there is a fetal anomaly that is either non-fatal, or would not be fatal within three months of birth. (*Id.*).

Although Plaintiffs 4 and 5 wish to try to have a child, they cannot do so unless they are sure that they would be able to obtain an abortion if compelled to do so by their religious beliefs. (*Id.* 146). They are therefore refraining from becoming pregnant, solely because of S.E.A. 1. (*Id.*).

B. Hoosier Jews for Choice

Hoosier Jews for Choice is a membership organization, comprised of Jewish persons, which exists to advance reproductive justice, support abortion access, and promote bodily autonomy for all people in Indiana. (*Id.* 148-49). This organization is made up of Jews who believe that under Jewish law and teachings, life does not begin at conception and that a fetus is a physical part of the woman's body, not having a life of its

own or independent rights. (*Id.* 149). The organization and its members therefore believe that under Jewish law an abortion is directed to occur if necessary to prevent physical or emotional harm to a pregnant person, even if there is not a physical health risk that is likely to cause substantial and irreversible impairment of a major bodily function. (*Id.*).

After being in existence for one month, Hoosier Jews for Choice had a number of members, all but a few from Indiana, 45 of whom were of child-bearing age. (Def. App. V 7, 54). At least six of the women of childbearing age, or 13%, have changed their sexual or birth control practices because of S.E.A. 1 to avoid the need to obtain an abortion that would not be available because of the statute, although the number is probably larger. (Def. App. II 149; Def. App. V 54-55).[3] The limitations imposed by S.E.A. 1 therefore violate and substantially burden the sincere religious exercise of a number of members of Hoosier Jews for Choice. (Def. App. II 150).

III. Numerous religious traditions hold that adherents are directed to obtain abortions under circumstances prohibited by S.E.A. 1

The beliefs of the individual plaintiffs and members of the Hoosier Jews for Choice

[3] At one point the witness for Hoosier Jews for Choice indicated that at least 10% of its membership had changed their behavior because of the Act, but then indicated that this was the percentage of members of child-bearing age. (Dep. App. V 22-23, 53-54). However, the witness further clarified this, indicating that at least 6 of 45 members of the organization of child-bearing age had changed their behaviors. (Def. App. V 55). The trial court adopted the 10% of the total membership figure as the basis of its calculations as lead counsel for plaintiffs erroneously argued this calculation in plaintiffs' memorandum to the trial court. (Defs' Class App. II 24; VIII 137). The differences in the results are not material as the class is obviously numerous. (*Infra* at 42-44). Counsel apologizes for his error.

are not idiosyncratic. Numerous religious traditions have beliefs that abortions must be made available under circumstances prohibited by S.E.A. 1.

A. Judaism

In the trial court the plaintiffs presented declarations from three rabbis indicating that Judaism teaches that a fetus becomes a living person only at birth, and before that is considered part of the woman's body, without independent rights, a belief endorsed by the Jewish plaintiffs. (Appellees' Appendix submitted on March 2, 2023 ["Pls.' App."] II 4, 8). Abortion should occur and is mandated to end a pregnancy that may cause serious consequences to a woman's mental or physical health. (*Id.* 5, 8-9). These physical risks are not limited to those likely to cause substantial and irreversible impairment of a major bodily function. (*Id.*). Judaism stresses the necessity of protecting the physical and mental health of the woman—a life—over the potential for life represented by the fetus. (*Id.* 4, 8-9). Therefore, restrictions that prevent a woman from obtaining an abortion where compelled by Jewish law, which requires that the woman act to protect her physical or mental health, impose a substantial burden on that adherent's religious exercise. (*Id.* 5, 10).

One of the rabbis, Rabbi Brett Krichiver of the Indianapolis Hebrew Congregation, notes that he has counselled congregants who were struggling with the question of whether to obtain an abortion. (*Id.* 9). At times this was because of the possibility of a serious birth defect; at other times it was because of the congregant's health concerns.

(*Id.*). In a number of these cases S.E.A. 1 would have precluded the ability of the congregant to obtain an abortion. (*Id.*). And, as of the time that he signed his declaration, a number of his congregants were pregnant or were considering becoming pregnant and were concerned because of their age or other factors that they may find themselves in a situation where Jewish law mandates that they obtain an abortion, but S.E.A. 1 would prevent them from receiving one. (*Id.*).

It is true that not all Jews share the belief of the above rabbis, Plaintiffs 1, 4, and 5, and the members of Hoosier Jews for Choice concerning the religious need for abortions. (Appellants' Appendix Submitted on September 7, 2023 in support of their appeal of the class action determination ["Defs.' Class App."] III 60). But even one of the rabbis whose declaration was introduced by the State agreed that there are rabbis who believe that there are times when a woman's mental health concerns would justify an abortion. (*Id*. VIII 92-93). He attests that the Orthodox Union, the largest group of Orthodox rabbis in the world, has indicated that legislation concerning abortions must have a mental health exception. (*Id.*). Of course, S.E.A. 1 has no such exception. Another one of the rabbis whose declaration the State introduced also agrees that some Jewish authorities hold that abortion must be allowed if the pregnancy is causing psychological harm. (*Id.* 97).[4]

[4] A third rabbi whose declaration the State used, an Orthodox Jew, opined that abortion is always prohibited, except when the woman's life is in danger, excluding an exception for a woman's mental health. (Defs.' Class App. VIII 104). His opinion is obviously out of step with that of the Orthodox Union and many other Jewish authorities.

B. Unitarian Universalism

Unitarian Universalist Minister Catherine Joseph Romano Griffin testified, without contravention, concerning the tenets of the religion. She indicated that a core belief of Unitarian Universalism is that the Creator has bestowed inherent worth and dignity on every human being. (Defs.' Class App. II 81). Therefore, if a woman believes it is necessary to obtain an abortion, she is compelled to obtain one to maintain the covenant to honor her own inherent worth and dignity. (*Id*). Being denied the ability to obtain an abortion breaks the covenant. (*Id.*).

C. Islam

There are Muslim scholars who believe that a fetus is not ensouled until 40 days after conception and therefore it is appropriate to obtain an abortion during this time for any reason, including reasons not allowed under S.E.A. 1. (Defs.' Class App. II 84). Scholars also believe that an abortion must be available after the 40-day period if there is a "pressing need," which includes the physical or mental health of the woman. (*Id.*). Therefore, for those who believe that they must be able to obtain an abortion even when not allowed by the Act, the denial of the ability to obtain an abortion imposes a substantial burden on religious belief and exercise. (*Id.* 85).

Of course, there are those within the Islamic community who disagree with the above position. However, the State's expert conceded that the above position does present one Islamic view of abortion, although he labelled it as an "outlier" view. (Defs.'

Class. App. VIII 109). Nevertheless, he quotes with approval a "prominent Muslim-American public figure" who agrees that abortions may occur for "medical issues" during the first 40 days of pregnancy. (*Id.* 111). Of course, there are many "medical issues" not recognized as exceptions to the S.E.A. 1's general prohibition on abortion.

D. Episcopalianism

There are those associated with the Episcopal Church who affirm that abortions may occur under circumstances not allowed by S.E.A. 1. (Defs.' Class App. II 94). Specifically, if continuing a pregnancy will cause serious problems to a woman's mental or physical health, even if the health problem does not fall within the limited exceptions in the Act, it is morally and religiously permissible for the woman to obtain an abortion and it should be obtained as the wellbeing of the pregnant person is of primary importance. (*Id.*).

E. Paganism

Paganism is not a specific religious belief system, but is an umbrella term that comprises many polytheistic spiritual traditions. (Defs.' Class App. II 11). However, these spiritual beliefs play similar roles in the lives of Pagans as do monotheistic religions for believers in those religions. (*Id.*). Most Pagans recognize that there are Gods and Goddesses and stress the feminine face of divinity. (*Id.* 12). Because of this, Pagans demand as part of their religious and spiritual tradition that women be allowed to have control over their bodies, free from the interference of others. (*Id.*). Therefore, as a matter

of religious and spiritual belief, many Pagans believe that in recognition of a woman's spiritually-demanded autonomy women must be allowed to obtain abortions. (*Id.*). Denying the ability to obtain an abortion to a practicing Pagan who holds this conviction will impose a substantial burden on her sincere religious beliefs. (*Id.*).

F. Relevant numbers of adherents

There are 26,045 Jews in Indiana.[5] There are more than 2,000 Unitarian Universalists in Indiana. (Defs.' Class App. VII 9). There are more than 41,000 Muslims in Indiana.[6] Although there is no indication as to how many Pagans there are in Indiana, in Putnam County, the home county of the witness whose declaration plaintiffs presented to the trial court, there are approximately 200-300 Pagans. (Defs.' Class App. VIII 19).[7]

IV. The trial court's decision certifying the case as a class action

Plaintiffs filed their motion to certify this case as a class action on September 12,

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[5] *World Population Review* reports that there are 26,045 Jews in Indiana. World Population Review, *Jewish Population by State* 2023, https://worldpopulationreview.com/state-rankings/jewish-population-by-state (last visited September 26, 2023). This is a slightly greater number than the February 2023 figure reported to the trial court. (Defs.' Class App. VIII 138) Of course, a court can take judicial notice of this type of general fact. Ind. Rule of Evid. 201(a)(1); *see also, e.g., Williams v. Indiana Dep't of Corr.*, 142 N.E.3d 986, 991 n.2 (Ind. Ct. App. 2020) (taking judicial notice of general facts concerning diseases and medications as noted on the website for the Mayo Clinic); *Bender v. State ex rel. Wareham*, 388 N.E.2d 578, 582 n.3 (Ind. Ct. App. 1979) (noting that this Court can take judicial notice of census data).

[6] Muslim Population by State, https://worldpopulationreview.com/state-rankings/muslim-population-by-state (last visited Sept. 20, 2023).

[7] Of Indiana's 92 counties, Putnam County ranks 41st in population. Indiana Demographics, https://www.indiana-demographics.com/counties_by_population (last visited Sept. 25, 2023).

2023, and filed their supporting memorandum on the same date. (Defs.' Class App. II 39, 57). On December 2, 2022, the trial court issued its preliminary injunction in plaintiffs' favor. (Defs.' App. II 170). After briefing of the class issue by the parties and their filing of evidentiary material, the trial court held oral argument on the motion on April 4, 2023. (Defs.' Class App. II 10, 13).

The trial court issued its decision on June 6, 2023, certifying a class defined as:

> All persons in Indiana whose religious beliefs direct them to obtain abortions in situations prohibited by Senate Enrolled Act No. 1 (ss) who need, or will need, to obtain an abortion and who are not, or will not be, able to obtain an abortion because of the Act.

(*Id.* 15).

In its decision, the trial court first concluded that the proposed class met the implicit requirement for class certification that the class be definite or ascertainable as "necessary objective measures do exist to deem the class sufficiently definite." (*Id.* 21). The court then concluded that the proposed class satisfied the explicit requirements of Indiana Rule of Trial Procedure 23(A). The court held that the numerosity requirement of Rule 23(A)(1) was satisfied as "numerosity is not a substantial burden to overcome at this stage of proceedings" and joinder of additional plaintiffs "would be highly impracticable." (*Id.* at 27-28). Given that the proposed class shares with the individual plaintiffs the "alleged harm of S.E.A. 1's failure to provide a religious exemption to seek an abortion," the Rule 23(A)(2) commonality requirement was satisfied. The trial court was also satisfied that the typicality requirement of Rule 23(A)(3) was met as "ultimately

all members of the putative class would be claiming their religious practices have been allegedly substantially burdened" by the Act. (*Id.* 31). Finally, the adequacy requirement of Rule 23(A)(4) was fulfilled because "the current Plaintiffs all share similar interest in the outcome of this litigation and do not have conflicting claims" and they "have shown the necessary interest in the outcome of this lawsuit to ensure it is litigated intently." (*Id.* 32). The court also found "Plaintiff's counsel to possess the necessary experience in these types of claims to handle this case competently." (*Id.*).

Plaintiffs sought to certify this case as a class action pursuant to Rule 23(B)(2). The trial court found that the requirements of this rule were met inasmuch as "a single injunction would provide the putative class members with the same general benefit, namely the preservation of the right to challenge enforcement of S.E.A. 1 on protected religious exercise under RFRA." (*Id.* 37).

Summary of the Argument

1. This Court exercises deferential review over a decision concerning class certification as "[w]hether the prerequisites to class certification have been met is a question of fact. The trial court occupies a better position to make this determination" *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E. 2d 843, 851 (Ind. 1997) (emphasis removed) (citation omitted).

2. The class in this case is defined as persons in Indiana whose religious beliefs direct them to obtain abortions that would otherwise be prohibited by S.E.A. 1 and who need

or will need to obtain a prohibited abortion. The State repeatedly argues that because the plaintiffs do not need abortion care today, they are not members of the class they have sought and the class was improperly certified. However, it is undisputed that solely because of S.E.A. 1 the plaintiffs have radically changed their behaviors to avoid becoming pregnant. They, as well as the members of the class, therefore need the assurance today that abortion care is available to them. The class is therefore properly defined and the plaintiffs are members of the class. Moreover, to the extent that the class definition is deemed improper, which it is not, "the trial court can redefine [the] class in order to sustain [the] lawsuit." *LHO Indianapolis One Lessee, LLC v. Bowman,* 40 N.E.3d 1264, 1270 (Ind. Ct. App. 2015) (internal quotation omitted).

3. There is an implicit requirement in Rule 23 of the Indiana Rules of Trial Procedure that a defined class be sufficiently definite or ascertainable for a court to determine if an individual is a member of the class. *Perdue v. Murphy*, 915 N.E.2d 498, 505 (Ind. Ct. App. 2009). The State argues that because membership in the class certified by the trial court depends on a class member's religious belief, it is not definite or ascertainable. This ignores the fact that numerous courts have rejected this argument and that many courts have certified classes defined by the religious belief of their members. The State's argument would mean that cases challenging government actions as impinging on religious rights could never be brought as class actions, and this is simply not the case.

The State also errs in claiming that the class is a "fail-safe" class, a class defined in such a way that "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012). Given that it is possible for the plaintiffs to lose this action and the class members to lose and also be bound by the judgment, this is clearly not a fail-safe class. The class is properly defined as persons who will be injured by S.E.A. 1, all of whom claim that the statute violates Indiana's RFRA.

4. The trial court did not abuse its discretion in finding that the evidence established that the class is so numerous that joinder of all members is impracticable. The numerosity requirement of Trial Rule 23(A)(1) does not require precise computation of the number of members of the class. *7-Eleven, Inc. v. Bowens,* 857 N.E.2d 382, 392 (Ind. Ct. App. 2006). A finding of numerosity may be supported by common sense. *Northern Indiana Public Service v. Bolka*, 693 N.E.2d 613, 616 (Ind. Ct. App. 1998), *trans. denied*. And numerosity is generally found if the proposed class has at least 40 members. *Id.* The evidence in this case and common sense establish that the class contains many more than 40 persons and the trial court did not clearly err in so finding.

5. The trial court also correctly concluded that the class presents a common question of law or fact as required by Trial Rule 23(A)(2). There is clearly a common question of law here: whether S.E.A. 1 violates Indiana's RFRA because it imposes a substantial burden on religious exercise and belief. This is a specific question that allows a resolution

of the class members' concerns and claims "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Nothing more is necessary to establish commonality.

6. The class also satisfies the typicality requirement of Trial Rule 23(A)(3). This requirement demands that the claims of the class and the named plaintiffs "have the same essential characteristics." *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008). The State argues that this requirement is not met because the plaintiffs are not members of the certified class. The plaintiffs certainly are members of the class and the trial court properly found that typicality is met as the named plaintiffs and all the class members assert that their religious beliefs and practices are unlawfully burdened by S.E.A. 1. The "same essential characteristics" requirement is satisfied.

Similarly, the trial court did not abuse its discretion in concluding that the adequacy requirement of Trial Rule 23(A)(4) is satisfied. The plaintiffs and the class have no conflicting or antagonistic claims, have an interest in the case that assures vigorous advocacy, and are represented by competent counsel. This is all that is required to demonstrate adequacy. *Bolka*, 693 N.E.2d at 618. The State does not dispute any of this, but merely erroneously argues that the plaintiffs are not members of the certified class. The trial court properly found to the contrary.

7. Trial Rule 23(B)(2) requires that "final injunctive or corresponding declaratory relief" be appropriate for the class. Despite the fact that the class members come from disparate religious backgrounds, they are united by their need to have abortion care

available that is prohibited by S.E.A. 1. They all, therefore, benefit from the injunction entered by the trial court, which enjoins "Defendants and their officers from enforcing the provisions of S.E.A. 1 against the Plaintiffs." (Defs.' App. II 59). Any final injunction can be crafted to require the creation of a religious exemption to the otherwise generally applicable S.E.A. 1. Such exemptions are not uncommon in both statute and case law, demonstrating that final injunctive and declaratory relief is appropriate for the class, as required by Rule 23(B)(2).

Argument

I. Standard of review

"The trial court has broad discretion in determining whether an action is maintainable as a class action." *Indiana Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 949 (Ind. Ct. App. 2004) (citation omitted). "Whether the prerequisites to class certification have been met is a question of fact. The trial court occupies a better position to make this determination." *Hefty*, 680 N.E. 2d at 851(emphasis removed) (citation omitted). Therefore, "[o]n appeal, we neither reweigh evidence nor judge witness credibility, and we affirm if the evidence most favorable to the judgment and all reasonable inferences to be drawn therefrom support the trial court's determination." *Hollowell*, 818 N.E.2d at 949 (internal quotation and citations omitted). The question is whether the trial court abused its discretion in certifying the class. *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1042 (Ind. Ct. App. 1998).

II. The plaintiffs are members of the class and the class is properly defined

Reprising an argument that it made in the trial court, the State argues throughout its brief that the trial court erred in certifying the class because the individual plaintiffs are not currently pregnant and in need of an abortion today, and therefore are not part of the certified class. (*See* Appellants' Br. 25, 46-55). The class is properly defined and that, even if not, the remedy is not to deny class certification, but merely to redefine the class, which this Court can certainly direct the trial court to do.

While it is true that the plaintiffs are not currently pregnant, they are taking extraordinary efforts to avoid becoming pregnant because of the unavailability of an abortion that might be necessary, but would be unavailable because of S.E.A. 1. As the plaintiffs argued in their appellate brief concerning the preliminary injunction, this certainly makes the case justiciable and their claims ripe. (Appellees' Brief of March 2, 2023 at 27-31). They are most assuredly persons "whose religious beliefs direct them to obtain an abortion in situations prohibited by Senate Enrolled Act No. 1 (ss)" and who will need to have abortion services available today in order to be able to resume their normal lives. Despite not being pregnant today, they currently need the availability of abortion care and therefore clearly are members of the class that they lead.

Ultimately, the State's argument in this regard is a semantic one – that the class should be defined slightly differently so that the phrase in the class definition "who need, or will need to obtain an abortion. . . " should instead read "who need, or will need to

obtain an abortion *or have abortion services available. . .*" This redefinition is not necessary, but even if it were, "the trial court can redefine a class in order to sustain a lawsuit." *LHO,* 40 N.E.3d at 1270 (internal quotation omitted). Therefore, the alleged problem of which the State complains does not "doom[ ] class certification for the simple reason that, as courts in every circuit have held, when a class definition is not acceptable, judicial discretion can be utilized to save the lawsuit." 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 7.27 (6th ed. 2023). This is explicit in Trial Rule 23(C)(1), which indicates that class certification orders are "conditional, and may be altered or amended before the decision on the merits." Therefore, this concern, to the extent that it is realistic, "can and should be solved by redefining the class definition rather than by flatly denying class certification on that basis." *Messner*, 669 F.3d at 825.

There is no cause to disturb the class definition. But, if this Court believes it necessary, the trial court should simply be instructed to redefine the class upon remand of this interlocutory appeal. *See, e.g., Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 982 (Ind. Ct. App. 1996) (remanding the case with instructions for the trial court to redefine the class).

III. The trial court did not abuse its discretion in finding that the class meets the implicit requirement that a class be ascertainable and definite

As the State notes, in addition to meeting the explicit requirements of Trial Rule 23, "[a] class definition must be specific enough for the court to determine whether or not an individual is a class member." *Perdue v. Murphy*, 915 N.E.2d 498, 505 (Ind. Ct. App.

2009). This so-called "definiteness" (or "ascertainability") requirement necessitates that a class "be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). What it does *not* require, however, is that "plaintiffs prove at the certification stage that there is a 'reliable and administratively feasible' way to identify all who fall within the class definition." *Id.* at 657-58.

A. As numerous courts have recognized, a class defined in part by reference to religious belief does not fail the definiteness requirement

Although lengthy, the State's primary argument in this case is simple: because membership is determined in part by a person's religious beliefs, and because these beliefs are personal, the trial court erred in concluding that the class is defined by reference to objective criteria. Indeed, a significant portion of its argument consists of describing various statements, excerpted from the record in this case, indicating that not all co-religionists believe the same thing. (Appellants' Br. at 32-35). It is unnecessary to address these statements at all, for the plaintiffs concede this to be the case: even within a particular denomination, religious belief or practice is seldom uniform. But the conclusion that the State draws from this—that differences in religious belief render any class indefinite and therefore uncertifiable—is wrong.

1. Courts have routinely rejected the precise argument the State is advancing here

If the State's argument were meritorious, a class could never be certified in a case

challenging governmental action as violative of the state or federal Religious Freedom Restoration Act ("RFRA"), the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), or the Free Exercise Clause of the First Amendment—all of which are premised on a plaintiff's inability to exercise their sincerely held religious beliefs.

Obviously, however, that is not the case. *See, e.g.*, *Doster v. Kendall*, 54 F.4th 398, 410 (6th Cir. 2022) (class of servicemembers found by a military chaplain "to have sincerely held religious beliefs that are substantially burdened by the [Air Force's] vaccine mandate"), *cert. pending*, No. 23-154; *Mayweathers v. Newland*, 314 F.3d 1062, 1065-66 (9th Cir. 2002) (class of Muslim inmates challenging prison rules that penalized attendance at Friday *Jumu'ah* services); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F. Supp. 3d 1187, 1203-04 (M.D. Fla. Aug. 18, 2022) (class of "religiously objecting Marines" who had been determined by a chaplain to sincerely object to a vaccine mandate), *appeal pending*, No. 22-13522 (11th Cir.); *U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 776-77 (N.D. Tex. 2022) (class of "servicemembers . . . who have submitted religious accommodation requests"), *appeal dismissed as moot sub nom. U.S. Navy SEALS 1-26 v. Biden*, 72 F.4th 666 (5th Cir. 2023); *Dowdy-El v. Caruso*, No. 06-11765, 2012 WL 6642763, at *1 (E.D. Mich. Dec. 20, 2012) (two classes of "Muslim inmates who desire but have been denied" religious accommodations); *Willis v. Commissioner*, 753 F. Supp. 2d 768, 769 n.1 (S.D. Ind. 2010) (class of inmates who identified themselves "as requiring a kosher diet in order to properly exercise their religious beliefs"); *Abdul-Malik v. Goord*, No. 96 CIV. 1021

(DLC), 1997 WL 83402, at *1 (S.D.N.Y. Feb. 27, 1997) (class of "Muslim inmates . . . who seek to maintain a Halal diet"); *Monroe v. Bombard*, 422 F. Supp. 211, 218 (S.D.N.Y. 1976) (subclass of inmates "required to grow beards in accordance with the free exercise of their religious beliefs").

Obviously, none of these courts perceived any problem with a class definition that focused in part on persons' religious beliefs, which are inherently personal. To be sure, in many (but not all) of these cases, the courts were not called upon to resolve a definiteness argument similar to the one the State advances here. But this fact carries limited weight, for courts possess "an independent obligation to decide whether an action brought on a class basis is to be so maintained." *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 563 (7th Cir. 2011) (quoting treatise). Moreover, the frequency with which courts certify classes defined in terms of persons' religious beliefs should not be surprising: while these beliefs are certainly personal, they are rarely idiosyncratic, and so governmental action impinging on these beliefs frequently affects numerous persons in fundamentally the same manner.

In a series of cases not cited by the State, however, similar definiteness contentions have been soundly rejected. In *DeOtte v. Azar*, 332 F.R.D. 188 (N.D. Tex. 2019), for instance, the plaintiffs—who challenged the contraceptive mandate of the Affordable Care Act as violative of the federal RFRA—sought to certify two classes (a class of employers and a class of individuals) explicitly defined in terms of members' "sincerely

held religious beliefs." *Id.* at 193-94. Said the court, in rejecting a definiteness argument on all-fours with the State's argument here:

> It is true a person's religious beliefs are deeply personal and subjective. But from the Court's perspective, the contours of those beliefs are purely objective. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982) ("It is not within 'the judicial function and judicial competence,' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'") (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). And as Plaintiffs argue, "[b]oth the *beliefs*—and the *actions* that inevitably follow from those beliefs—are clearly set forth in the proposed class definitions." The Court, therefore, need not—indeed, *may not*—"delve into each unidentified individual's or employer's state of mind." So long as those employers and individuals who opt into the proposed classes contend that the contraceptive mandate is forbidden by their sincerely held religious beliefs, the Court must accept those contentions.

Id. at 197 (internal citations cleaned up and record citation omitted). The same court reiterated these conclusions in certifying a class challenging, again under the federal RFRA, a regulation barring recipients of funding under Title X from discriminating against employees who perform or assist in performing abortions: "[D]efining the class based on the religious belief of the class members does not render the class unable to be ascertained." *Vita Nuova, Inc. v. Azar*, No. 4:19-cv-532-O, 2020 WL 8271942, at *4 (N.D. Tex. 2020) (internal citations omitted).

Similar conclusions were reached in a pair of cases arising out of class-action challenges, again under the federal RFRA, to COVID-19 vaccine mandates imposed by branches of the military. The courts in both *Doster*, 54 F.4th at 430-42, and *Austin*, 594 F. Supp. 3d at 1205-06—both of which addressed claims under the federal RFRA—relied on

the fact that the military had established a process for seeking religious-based exemptions to justify class treatment: this process "present[ed] an objective method—readily ascertainable by the [military]—to identify each sincerely objecting applicant." *Austin*, 622 F. Supp. 3d at 1206; *see also Doster*, 54 F.4th 441-42 (rejecting a similar argument concerning the class-wide scope of an injunction without explicitly addressing definiteness).

The State here, of course, has not established a process by which persons may seek a religious exemption from Indiana's near-total abortion ban. But that is a distinction without a difference, for the plaintiff in a RFRA case (whether state or federal) will *always* have to demonstrate an impingement on the ability to practice his or her religion. Indeed, it would be a curious state of affairs were the State able to avoid class treatment by refusing to provide a religious exemption to *anyone* when it could not do so were it to establish an exemption that it rarely awarded (as in *Doster* and *Austin*).

2. The limited authority relied on by the State does not compel a contrary conclusion

Against all this, the State relies primarily on two cases in which federal district courts concluded that a class could not be certified to pursue a religious-liberty claim. (*See* Appellants' Br. at 28-30 [describing *Lindh v. Director*, No. 2:14-cv-151-JMS-WGH, 2015 WL 179793 (S.D. Ind. Jan. 14, 2015), and *West v. Carr*, 337 F.R.D. 181 (W.D. Wis. 2020)]). The State's reliance on these cases is off-base.

The *Lindh* court's conclusion was made with virtually no analysis and, even then,

the court suggested that a different result might issue if the members of the putative class "ever specifically disclosed . . . their position as to whether their understanding of Islam requires them to wear their pants above their ankles," 2015 WL 179793, at *4—a strong indication that the State's definiteness concerns are more appropriately addressed at the relief stage of this litigation. Indeed, the same judge who refused certification in *Lindh* also allowed certification in *Willis*, 753 F. Supp. 2d at 769 n.1, where a class of prisoners who identified themselves as requiring a kosher diet prevailed in a challenge, under RLUIPA, to the failure of the Indiana Department of Correction to provide an appropriate diet. Obviously, *Lindh* is limited to the circumstances in which it arose.

And *West* is even further afield. In that case, the plaintiffs sought to certify a class consisting of prisoners belonging to eight different "umbrella religious groups" united not by any asserted belief but only by the periodic cancellation of religious services. 337 F.R.D. at 183-86. The court's definiteness ruling had very little to do with the religious beliefs of would-be class-members. Rather, its primary concern related to "gray areas" concerning whether the Wisconsin Department of Correction in that case had "actually cancelled a service or offered perfectly acceptable alternatives." *Id.* at 187. The *West* court would presumably have reached a different result if the prison system in that case had banned all religious services outright instead of merely cancelling them periodically and offering an array of alternatives that might or might not satisfy an individual prisoner's religious needs. But that is what Indiana has done: it has banned abortions outside of a

few narrow exceptions, even when religiously mandated.

3. Any division in authority over whether a class defined in part by reference to religious belief is sufficiently definite means only that the trial court did not abuse its discretion by choosing one side of the divide

To the extent that *Lindh* and *West* conflict with the abundant authority relied upon by the plaintiffs and by the trial court—and it is certainly not clear that they do—given the standard of review this Court need not resolve any split in authority. After all, the fact that reasonable jurists differ over whether a class defined in part by reference to religious belief is sufficiently definite means only that the trial court cannot be said to have abused its discretion by choosing one side of the divide. *See, e.g.*, *Vitrano v. United States*, 721 F.3d 802, 806 (7th Cir. 2013) ("An abuse of discretion occurs when a [trial] court resolves a matter in a way that no reasonable jurist would, or when its decision strikes us as fundamentally wrong, arbitrary, or fanciful.") (citation omitted).

The observations about the abuse-of-discretion standard reiterated in *Vitrano* and similar cases carry even greater weight in the class-certification context, where much depends on the trial court's assessment of its own ability to manage a class action. That is an assessment, of course, that the trial court is in the best position to make.

B. The class certified by the trial court is not "a fail-safe class"

Finally, the State argues that the class certified by the trial court is an improper "fail-safe" class that is defined in terms of the plaintiffs' success on the merits. (Appellants' Br. at 34-35). Not so.

A fail-safe class "is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. In such a class, the reliance on "a future decision on the merits to specify the scope of the class . . . makes it impossible to determine who [is] in the class until the case ends." *Campbell v. Nat'l RR. Passenger Corp.*, 311 F. Supp. 3d 281, 313-14 (D.D.C. 2018) (internal quotations and citation omitted). *Campbell*—in which the plaintiffs in a Title VII case sought to certify classes of employees who "have been discriminated against because of their race or color" or who "have been exposed to a racially hostile work environment," *id.* at 334—perfectly demonstrates what a fail-safe class actually is. There, any individual in the putative class had, *by definition*, been the victim of illegal discrimination.

That is simply not the case here. The easiest way to determine whether a plaintiff has proposed a fail-safe class is to ask whether it is possible for a class to exist but for the plaintiffs to nonetheless lose the case. Here, the class consists of persons "whose religious beliefs direct them to obtain an abortion" in situations now prohibited by Indiana law. The record demonstrates, and the State does not deny, that numerous such persons exist. And it is possible for this class to exist but fail on the merits: a court could accept the State's arguments that obtaining an abortion does not constitute religious exercise or that Indiana's abortion ban is justified by the State's asserted interests. When these possibilities exist, the proposed class is not a fail-safe one.

The State's argument to the contrary is that the class is a fail-safe because

membership "assumes" the answer to one merits-based question: whether a class member is "directed" by her religious beliefs to obtain an abortion. But this is simply to say that the class is defined in terms of the persons who will be injured by S.E.A. 1. This is both proper and necessary, for a class cannot include "persons who have suffered no injury at the hands of the defendant[s]." *Messner*, 669 F.3d at 825 (citation omitted). The State's argument is off-base.

IV. The trial court did not abuse its discretion, after reviewing the evidence, in determining that the numerosity requirement is met

Trial Rule 23(A)(1) demands that the class be "so numerous that joinder of all members is impracticable." This is not the onerous requirement that the State's argument suggests, and the evidence before the trial court certainly established that it was met.

The plaintiffs' obligation is to provide "'some evidence or reasonable estimate of the number of class members.'" *Jones v. Blinziner*, 536 F. Supp. 1181, 1189 (N.D. Ind. 1982) (quoting 3B MOORE'S FEDERAL PRACTICE ¶ 23.05(3) (2d Ed. 1978)). "[G]enerally a good faith estimate is sufficient where it is difficult to assess the exact class membership." *Id.* Therefore, "the fact that the number of class members cannot be determined with precision does not defeat certification." *Bowens,* 857 N.E.2d at 392 (citation omitted). Instead, "[a] finding of numerosity may be supported by common sense assumptions." *Bolka*, 693 N.E.2d at 616 (citation omitted). "[A]nd courts are generally forgiving where plaintiffs are unable to do no more that set forth commonsense assumptions." 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3.13 (6th ed. 2023) (footnote omitted).

Application of this common sense approach is illustrated by *California for Disability Rights, Inc. v. California Department of Transportation*, 249 F.R.D. 334 (N.D. Cal. 2008), where the court certified a class of persons who had mobility or vision disabilities and access difficulties on public walkways maintained by the California Department of Transportation. *Id.* at 350. The plaintiffs presented affidavits from 22 members of the putative class and asked the court to find numerosity based on this and the number of persons in California with relevant disabilities. *Id.* at 343, 347. Using common sense, the court concluded that it was "nonsensical" to conclude, given the large number of persons with relevant disabilities, that numerosity was not met, even though the exact number of class members could not be determined. *Id.* at 347.

Of course, the class does not have to be in the thousands, or even the hundreds, for numerosity to be met. Indeed, "while numerosity analysis does not rest on a 'magic' number, permissive joinder had been deemed impracticable where class members number forty or more." *Bolka*, 693 N.E.3d at 616.

So what do common sense and the numbers dictate here? There are four current plaintiffs who allege that S.E.A. 1 substantially burdens their religious exercise and belief. There are 45 members of Hoosier Jews for Choice who are able to bear children, and at least 13% of those persons have changed their behaviors solely to avoid the possibility of becoming pregnant and being placed into the position of needing an abortion that would not be available. As noted above, there are 26,045 Jews in Indiana, 41,000 Muslims,

approximately 2,000 Unitarian Universalists and hundreds if not thousands of Pagans. (*Supra* at 24). Indiana's female population comprises 50.3% of its population of 6,833,037.[8] And census data indicate that 38.9% of the female population consists of women between the ages of 18 and 49.[9] This means that at least 5,096 Jewish women in Indiana are between 18 and 49 (26,045 x 50.3% x 38.9% = 5,096). Using the 13% figure of the known members of Hoosier Jews for Choice who have altered their behavior because of S.E.A. 1 (*supra* at 19), there are more than 600 Jewish women (5,096 x 13% = 662.48) who are changing their behavior because of the Act. There are 778 Unitarian-Universalist women between 18-49 (2,000 x 50.3% x 38.9%= 391.34), and applying the 13% figure to that sum, leads to a figure of more than 50 Unitarian Universalist women of child-bearing age who are burdened by the Act (391.34 x 13%= 50.87). And this does not include the more than 8,000 Muslim women in Indiana of child-bearing age, at least some of whom undoubtedly subscribe to the view advanced by the plaintiffs' witness and grudgingly acknowledged

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[8] United States Census, QuickFacts Indiana, https://www.census.gov/quickfacts/IN (last visited September 19, 2023).

[9] Statistics from the Centers for Disease Control and Prevention note that as of 2019 there were more than 1.34 million females in Indiana between the ages of 19-49. Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System, 2019*, https://www.cdc.gov/reproductivehealth/contraception/pdf/data-and-statistics-contraceptive-services/indiana-508.pdf (last visited September 19, 2023). This is roughly 38.9% of the female population in Indiana. (6,833,037 x 50.3% = 3,437,017; 1,340,000/3,437,017 = 38.9%). The United States Census Bureau collects data concerning fertility from women between 15 and 50 years of age. United Sates Census Bureau, *American Community Survey-S1301-Fertility*, https://data.census.gov/table?q=S1301:+FERTILITY&tid=ACSST1Y2018.S1301&hidePreview=true (last visited September 19, 2023).

by the State's witness as a legitimate, even if an "outlier" view, *supra* at 22, that Islam demands that abortions be allowed under circumstances broader than the narrow exceptions in S.E.A. 480. It also does not include any Pagans, despite the fact that it is undisputed that in Putnam County alone there are between 200 and 300 Pagans.[10]

The State argues that numerosity is not met because there is no evidence as to the precise number of women within these religious and spiritual groups who will become pregnant and will seek an abortion that they believe is a religious necessity. (Appellants' Br. at 50). To the extent that the State is arguing that the class consists only of those who are or will become pregnant, as opposed to those who have changed their behaviors to avoid becoming pregnant as they would not be able to obtain a religiously-directed abortion, this is merely a reiteration of the argument that the class is not properly defined and is not meritorious. (*Supra* at 30-32). To the extent that the State is arguing that class members cannot be identified, the State is imposing a burden that is not required by Rule 23 as certification cannot be defeated because the exact number of persons in the class, or their identities, are not proven in advance. *Bowens*, 857 N.E.2d at 392.

Clearly, there are many more than 40 women in the class. But the class also

[10] Although appellees' expert on Paganism, J.D. Grove, admitted that Paganism was highly individualized and diverse, and not all Pagans believe that abortion prohibitions burden their religious or spiritual practice, most Pagans believe that women should be autonomous and female Pagans consistently demand control over their bodies. (Defs.' Class App. VIII at 20-21, 29-30, 33-34, 37). Obviously, S.E.A. 1 does not allow women to have full control over their bodies.

includes the constant stream of persons who will enter the class in the future. "When discussing the practicability of joining future claimants, courts generally state that the numerosity requirements are relaxed due to the difficulty in determining the number and identity of these future claimants." 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3.15 (6th ed. 2023) (footnote omitted). This is especially true in a case like this where only injunctive and declaratory relief is sought. "Because plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of [the] proposed [ ] class . . . is sufficient to make joinder impracticable." *Sueoka v. United States*, 101 Fed. App'x 649, 653 (9th Cir. 2004).

In addition to considering that the class contains future members, a court making the numerosity determination may also consider the fact that individual plaintiffs have "potential reluctance to sue individually." *Zelaya v. Hammer*, 342 F.R.D. 426, 433 (E.D. Tenn. 2022) (citations omitted). Thus, in *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620 (5th Cir. 1999), the court noted that the district court had, in concluding that numerosity was met, "reasonably presumed" that some class members might be unwilling to step forward and file their own suit because of feared retaliation. *Id.* at 625. This Court can certainly take notice of the fact that privacy concerns about abortion are acute and that these concerns would certainly cause some class members to refrain from stepping forward to file their own litigation.

The State's argument ignores the fact that numerosity is "generally [a] low hurdle." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009). As noted, the numerosity requirement is usually deemed satisfied if the class consists of at least 40 persons. *Bolka*, 693 N.E.2d at 616. The trial court did not abuse its discretion in finding, based on the evidence produced, that it credited, that the requirement was met here.[11]

V. The trial court did not abuse its discretion in finding that the class meets the commonality requirement of Trial Rule 23(A)(2)

The State repeats its argument, appropriately rejected by the trial court, that the commonality requirement of Rule 23(A)(2) is not met because the religious beliefs of each class member differ and how they are affected by S.E.A. 1 "cannot be answered in gross." (Appellants' Br. at 36). In many respects, this is a repetition of the State's erroneous argument that the class is not sufficiently definite that is responded to above. (*Supra* at 30-37). However, the State's argument also bespeaks of a mistaken view of the commonality requirement.

The commonality "requirement is satisfied if the individual plaintiff's class claims are derived from a common nucleus of operative fact, which is described as a common course of conduct." *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1271

[11] The State argues that the fact that prior to 2022 no one "brought a free-exercise claim to vindicate an alleged right to obtain a religiously motivated abortion" must mean that there is not a class of persons holding this belief.(Appellants' Br. at 50). Of course, from 1973 to June 24, 2022 the right to abortion was protected by the United States Constitution as interpreted in *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S.__, 142 S. Ct. 2228 (2022). There was therefore no need to file independent litigation based on free-exercise concerns.

(Ind. Ct. App. 2015) (quotation and citation omitted). As the United States Supreme Court has noted, this requires that the claims of the class members "must depend on a common contention" that is "of such a nature that it is capable of classwide resolution which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 349-50. "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id.* at 359 (cleaned up). The commonality requirement requires only that there be a question of "law *or* fact common to the class." Indiana Rule of Trial Procedure 23(A)(2) (emphasis supplied). This means that "the existence of factual differences does not prevent a finding of commonality when common legal questions are central to the case." *Carter v. City of Montgomery*, No. 2:15-cv-555-RCL, 2021 WL 2042090, at *5 (M.D. Ala. May 21, 2021) (citing 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:21 (5th ed. 2011-2020)). The commonality "requirement is easily met in most cases." 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:20 (6th ed. 2023) (footnote omitted). And despite the State's protestations to the contrary, the commonality requirement is met here.

The common question here, as the trial court recognized, is the legal question of whether the "harm of S.E.A. 1's failure to provide a religious exception to seek an abortion[ ] substantially burden[s] the Plaintiff's religious practices as protected by RFRA." (Defs.' Class App. II 29). This is the same legal question, albeit under the federal RFRA, that was found to satisfy the commonality requirement in *DeOtte* where the

putative classes challenging the Affordable Care Act's contraceptive mandate as violative of the federal RFRA was defined in terms of the class members' "sincerely held religious beliefs." 332 F.R.D. at 193-94. The court had no difficulty in finding that commonality was met as "the common issue of law raised by all members of each class—i.e., whether the same RFRA rights are violated by the same regulation—*is* each one of the class member's claims." *Id*. at 199 (court's emphasis) (quotation and citation omitted). Similarly, in *Vita Nuova*, the class of past and future healthcare providers who oppose abortions for sincere religious reasons was found to satisfy commonality where the common legal question was whether a provision prohibiting providers receiving Title X funds from discriminating against employees who participate in abortion care violated the federal RFRA. 2020 WL 8271942, at *1, *5. "Resolution of the alleged conflict between the [statute] and the RFRA's protections provides a common answer to a narrow question of law based in a specific alleged injury 'in one stroke' and, thus, establishes commonality for the proposed class here." *Id.* at *5 (quoting *Wal-Mart*, 564 U.S. at 350). Of course, the same is true here: the class is united by the common question of whether S.E.A. 1 conflicts with Indiana's RFRA, which can be answered "in one stroke."

Therefore, contrary to the State's argument, this case is not like *Wal-Mart* where the Court held that there was no evidence that the thousands of employment decisions across all Wal-Marts in the United States were sex-biased and therefore there was no "glue holding together the alleged reasons for all those decisions." 564 U.S. at 352

(emphasis omitted). Here, there is "glue"— S.E.A. 1 acts uniformly against every member of the class, and whether it substantially burdens the religious beliefs and exercise of everyone in the class is clearly a common question. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), although cited by the State, is also not helpful to it. The Seventh Circuit concluded that a class of a youth who suffered violations of special education law did not satisfy commonality because there was no single answer to a common question of law or fact as each class member could present different violations of the law. *Id.* at 497-98. The contrast here is clear as the class is united by one question: given their sincere religious beliefs, does S.E.A. 1's failure to contain a religious exemption violate Indiana's RFRA?

This is not an abstract question or generalized grievance. (Appellants' Br. at 39-40). In *Doster*, the Sixth Circuit found commonality because there were "concrete questions" about whether the Air Force had a policy of denying religious objections to otherwise mandatory vaccines in violation of RFRA. 54 F.4th at 437. This involved specific questions that could be resolved in one stroke. *Id.* The same was true in *Austin*, where the specific question was also whether the denial of religious accommodations concerning the military's vaccine mandate violated RFRA. 622 F. Supp. 3d at 1207. As stressed, here there is the same specific and concrete question: has the State of Indiana, through S.E.A. 1, which does not allow for religious accommodation, violated RFRA? Therefore, the trial

court did not abuse its discretion in concluding that commonality is met here.[12]

VI. The trial court properly concluded that the individual plaintiffs meet the typicality and adequacy requirements of Rule 23(A)(3)and (A)(4)

In arguing that the trial court erred in finding that the typicality and adequacy requirements of Trial Rule 23(A)(3) and (A)(4) were satisfied, the State relies entirely on its argument that the plaintiffs are not members of the class. (Appellants' Br. at 47-48). As noted above, this is not the case.

The United States Supreme Court has underscored:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

Gen. Tel. Co. of SW v. Falcon, 457 U.S. 147, 157 n.13 (1982).

A claim is typical if it flows from a common "course of conduct." *Hollowell*, 818

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[12] The trial court concludes its commonality analysis by noting that "[w]hile the question of whether Plaintiffs are actually burdened for the purposes of RFRA will have to be determined throughout this litigation, the Court is satisfied by the Plaintiffs' unified calls for a repeal of alleged restriction on their religious practices imposed by S.E.A. 1 satisfy the commonality criteria." (Defs.' Class App. II 29-30). The State interprets the trial court's reference to "unified calls" as a reference to the individual appellees' political views that is unsupported by the record and has nothing to do with commonality. (Appellants' Br. at 38-39). The trial court's language only refers to the fact that the plaintiffs and the class are united in arguing that RFRA requires that S.E.A. 1 must accommodate their religious needs. This is commonality.

N.E. 2d at 950; *Arreola*, 546 F.3d at 798. "'Typicality' does not require a showing that all plaintiffs' claims are identical. The 'typicality' prerequisite 'is satisfied if the representative plaintiffs' claims are neither in conflict with nor antagonistic to the class as a whole.'" *Hollowell*, 818 N.E.2d at 950 (citations omitted). The bottom line is that the claims of the class and the named plaintiffs must "have the same essential characteristics." *Arreola*, 546 F.3d at 798.

Clearly the claims of the plaintiffs and the class are not in any way antagonistic. Instead, they have the same essential characteristics as the religious exercises and beliefs of the plaintiffs and the class are all burdened by S.E.A. 1 and the claim that this burden violates RFRA is identical for both the plaintiffs-appellees and the class. As the trial court properly noted,

> [t]he Court is not persuaded that the differences in religious denomination nor the Defendants' distinction between putative class members who may become pregnant verses those who are altering their current behavior to avoid pregnancy sufficient to render Plaintiffs' claims atypical of the claims of the stated putative class since ultimately all members of the putative class would be claiming their religious practices have been allegedly substantially burdened by passage of S.E.A. 1.

(Defs.' Class App. II 31). The typicality requirement is met and the trial court certainly did not abuse its discretion in so holding.

The adequacy requirement of Rule 23(A)(4) requires that the class representatives and the putative class have no "antagonistic or conflicting claims," that the representatives "have a sufficient interest in the outcome to ensure vigorous advocacy,"

and that counsel for the plaintiffs "be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *Bolka*, 693 N.E.2d at 618 (further citation omitted). Adequacy is met here.

The State makes no objection to the abilities of plaintiffs' counsel to represent the class and it does not argue against the obvious fact that plaintiffs have pursued, and will continue, to pursue this case with vigorous advocacy. Given "[t]he lack of any appearance of conflict or antagonism between the plaintiffs and the class," the trial court clearly did not commit any error in finding that the adequacy requirement is satisfied. *Hollowell*, 818 N.E.2d at 952.

VII. The further requirements of Rule 23(B)(2) are met in this case

Finally, the State argues that the trial court erred in certifying the class insofar as "final injunctive or corresponding declaratory relief" is not appropriate "with respect to the class as a whole." (Appellants' Br. at 41-46). The State's argument is, again, simple. In its estimation, a single injunction would never be appropriate for the class because not all of its members have identical religious beliefs concerning the permissibility of abortion and, therefore, "[t]he diversity of views makes it impossible to give a single answer for all class members as to whether and under what circumstances enforcing S.B. 1 would materially burden a sincere religious exercise." (Appellants' Br. at 43). Again, the State errs.

As the United States Supreme Court has stressed, "[t]he key to the (b)(2) class is

the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (internal quotation and citation omitted). At the same time, the rule "does not require that the relief to each member of the class be identical, only that it be beneficial. That means that different class members can benefit differently from an injunction." *Barrows v. Becerra*, 24 F.4th 116, 132 (2d Cir. 2022) (cleaned up). And it "does not require that every jot and tittle of injunctive relief be spelled out at the class certification stage; it requires only reasonable detail as to the acts required." *Yates v. Collier*, 868 F. 3d 354, 368 (5th Cir. 2017) (quotation and citation omitted).

In granting the plaintiffs preliminary relief in this cause, the trial court enjoined "Defendants and their officers from enforcing the provisions of S.E.A. 1 against the Plaintiffs." (Defendants' App. II 59). This certainly is a single injunction that would apply to and benefit all class members. While the State objects to the appropriateness of this injunction as it prohibits the enforcement of S.E.A. 1 even in situations where abortions are not required by the class members' religious beliefs, this ignores the fact that the class is already defined in terms of persons "directed" by their religion to obtain an abortion not allowed by Indiana law.

More fundamentally, this is not the only way the trial court could choose to craft a final injunction. Religious or moral exemptions to generally applicable statutes are

exceedingly common. *See, e.g.*, 20 U.S.C. § 1681(a)(3) (exempting religious schools from prohibition on sex discrimination); 745 Ill. Comp. Stat. 70/4 (allowing medical professions to refuse to perform services "contrary to the[ir] conscience"); N.C. Gen. Stat. § 51-5.5 (allowing public officials to decline to perform a marriage "based upon any sincerely held religious objection"); N.D. Cent. Code § 50-12-07.1 (allowing child-placing agencies to refuse a placement if that placement conflicts with their religious or moral convictions). Indiana itself has established, and has no problem enforcing, such exemptions. *See* Ind. Code § 20-34-3-2 (religious exemption to certain school health and safety measures); Ind. Code § 22-5-4.6-5(a)(2) (religious exemption to employer vaccination requirements). Indeed, although not a religious exemption, S.E.A. 1 itself includes detailed provisions for a physician performing an abortion to certify that the abortion is allowed under one of the statute's limited exceptions. *See* Ind. Code § 16-34-2-1.

Although the request for relief in their complaint was perhaps inartfully drafted, on behalf of the class all the plaintiffs seek here is the establishment of a religious exemption to Indiana's near-total abortion ban that is not dissimilar from exemptions that are routinely established and enforced. Even though the State's ability to inquire into religious belief is limited, for "courts are not arbiters of scriptural interpretation," *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981), such an injunction would still allow the State to determine, in appropriate circumstances, that a particular

individual is not entitled to an exemption.[13] The Sixth Circuit in *Doster*, rejecting the precise argument the State advances here, recently reiterated that a class-wide injunction seeking a religious exemption may "enjoin . . . allegedly illegal policies, 'root and branch,' and bar the [government] from taking 'adverse action' against class members based on [those policies]" while leaving to future proceedings any concerns about an individual's "outright" entitlement to an exemption. 54 F.4th at 439-40; *see also Austin*, 622 F. Supp. 3d at 1205 (relying on similar principles in concluding that the requirements of Rule 23(b)(2) were met in a challenge to a vaccination requirement under the federal RFRA).

For a perfect example of how this works in practice, this Court need look no further than *Willis*, which concerned the Indiana Department of Correction's ("DOC's") failure to provide a kosher diet to inmates whose religion required such a diet. After concluding that the certified class was entitled to summary judgment on its claim under RLUIPA, *see* 753 F. Supp. 2d at 784, the district court enjoined the DOC to "provide certified kosher meals to all inmates who, for sincerely held religious reasons, request them in writing,"

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[13] At times the State's argument appears to contend that allowing a religious exemption to S.E.A. 1 will set up a difficult court-supervised inquisitorial process to assess the reasonableness of each adherents religious beliefs. This ignores the well-established and oft-reiterated principle that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). Even "the sincerity inquiry . . . must be handled with a light touch, or judicial shyness." *Moussazadeh v. Tex. Dep't of Crim. Justice*, 703 F.3d 781, 792 (5th Cir. 2012) (quotation and citation omitted). The prevalence of religious exemptions as noted above demonstrates that the State's argument that such exemptions are onerous and class-destroying is not meritorious.

see Final Judgment and Injunction (Dkt. 114), *Willis v. Commissioner*, No. 1:09-cv-00815-JMS-DML (S.D. Ind. Dec. 8, 2010), at 2 (Appellees' Appendix on Appeal of Class Certification II 3). This class-wide injunction, however, did not prevent the DOC from establishing a procedure for assessing the sincerity of prisoners' claimed religious needs in individual cases. *See* Ind. Dep't of Correction, *Policy & Admin. Proc. 04-01-301: The Development and Delivery of Food Services*, May 1, 2021, at 17-18, *available at* https://www.in.gov/idoc/files/04-01-301-FoodService-5-1-2021.pdf (last visited Sept. 24, 2023).

Similar relief could—and, in the plaintiffs' estimation, should—issue here. The State's position appears to be that, although the Indiana General Assembly may craft a religious exemption that applies class-wide, Indiana courts may not do so. That simply makes no sense. As underscored throughout, the named plaintiffs and the members of the class have all been injured by S.E.A. 1's lack of a religious exemption in fundamentally the same manner. "[F]inal injunctive relief or corresponding declaratory relief" requiring the establishment of such an exemption is most certainly "appropriate . . . with respect to the class as a whole." Ind. R. Trial P. 23(B)(2).[14]

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[14] This Court's decision in *Perdue*, relied on by the State, is not to the contrary. In that case, the plaintiffs, advancing a claim that their disabilities had not been reasonably accommodated as required by the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, sought to certify an obviously broad and diverse class of persons with disabilities who had been denied public benefits for certain specified reasons. *See* 915 N.E.2d at 503. Given that this class, if it prevailed on the merits, would require a potentially limitless number of different accommodations, this Court unsurprisingly concluded that the requirements of Rule 23(B)(2)

Conclusion

As properly found by the trial court, by prohibiting virtually all abortions in Indiana, S.E.A. 1 uniformly impacts a large number of women whose religious and spiritual beliefs and practices require that they be able to obtain abortions under circumstances prohibited by the law. Whether the Act violates Indiana's RFRA is "[t]he core of this case. . . [,] a single controversy that can be resolved in 'one stroke.' [This action] is, in many respects, the quintessential class action." *Doe 1 v. JPMorgan Chase Bank, N.A.*, No. 22-cv-10019 (JSR), 2023 WL 3945773, at *8 (S.D.N.Y. June 12, 2023) (quoting *Wal-Mart*, 564 U.S. at 350). The trial court certainly did not abuse its discretion in certifying the case as a class action. It should therefore be affirmed.

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were not met. *See id.* at 509. At the same time, however, the Court stressed that courts have certified classes of persons with disabilities when there is "some unifying criteria, such as a common disability or requested accommodation, for example, so that classwide evaluation of 'qualification' may be conducted without requiring a prohibitive number of individualized mini-trials." *Id.* at 510. While that unifying criteria was lacking in *Perdue*, it is not lacking here where the named plaintiffs and the members of the class all require the same religious exemption from S.E.A. 1's near-total abortion ban.

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Certificate of Service

I hereby certify that on September 27, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on September 27, 2023, the foregoing document was served upon the following persons using the IEFS.

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