UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANE DOE NO. 1, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-03247-RLY-MJD
	)	
ATTORNEY GENERAL OF INDIANA, *et al.*,	)	
	)	
	)	
Defendants.	)	

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, Jane Doe No. 1, Jane Doe No. 3, Dr. William Haskell, Cassie Herr, Kelly McKinney, and Women's Med Group, sue Defendants, the Attorney General of Indiana, the Commissioner of the Indiana Department of Health, the Indiana State Board of Nursing, the Marion County Prosecutor, and the members of the Medical Licensing Board of Indiana, for Indiana's enforcement of the fetal disposition and disclosure requirements (Ind. Code §§ 16-21-11-1 to 16-21-11-6; 16-34-2-1.1(a)(2)(H)–(J); 16-34-2-1.1(a)(3)(A); 16-34-2-6(b)–(c);[1] 16-34-3-1 to 16-34-3-6; 16-41-16-4(d); 16-41-16-5; and 410 Ind. Admin. Code 35-1-1 to 35-2-1). Plaintiffs levy a bevy of constitutional claims against these requirements, namely that the requirements violate the Due Process Clause (Count I), the Equal Protection Clause (Count II), the Free Speech Clause (Count

[1] This particular provision prohibits knowingly transporting an aborted fetus into or out of Indiana except for the purpose of cremation or interment. Plaintiffs do not connect this prohibition to any of their constitutional arguments. For that reason, it is not discussed any further.

III), the Establishment Clause (Count IV), and the Free Exercise Clause (Count V). Following the close of discovery, both Plaintiffs and Defendants moved for summary judgment. The court, having read and reviewed the parties' submissions, the designated evidence, and the applicable law, now **GRANTS in part and DENIES in part** Plaintiffs' motion for summary judgment and **GRANTS in part and DENIES in part** Defendants' cross motion for summary judgment.

I. Background

A. Statutory Background

Indiana law allows medical providers to dispose of human tissue, medical waste, and other infectious material through incineration, steam sterilization, chemical disinfection, thermal inactivation, and irradiation. Ind. Code § 16-41-16-3. Of these options, the standard method for disposing of medical waste is incineration. *See* (Filing No. 77-1, Case Decl. ¶ 19); *see also* (Filing No. 77-1, Haskell Decl. ¶ 7). Prior to the passage of the laws challenged here, Indiana permitted—but did not require—facilities to dispose of fetal tissue just like standard medical waste. (Filing No. 77-1, Defs. Resps. to Pls.' Reqs for Admis. at 5 (Req. 14)). Indiana law also provided a pregnant woman the "right to determine final disposition of" the aborted fetus, which allowed women to choose whether to bury, cremate, or treat as medical waste the fetal tissue. Ind. Code § 16-34-3-2.

In 2016, Indiana enacted HEA 1337, which imposed particular requirements on the disposition of fetal tissue. Among other changes, the law excluded fetal remains from the definition of infectious and pathological waste, thereby preventing abortion providers

from incinerating fetal tissue as with medical waste. Ind. Code §§ 16-41-16-4(d), 16-41-16-5. These laws instead require a healthcare facility to bury or cremate any fetal tissue in its possession. Ind. Code §§ 16-34-3-4(a); 16-21-11-6(b). The requirements apply to fetal tissue "irrespective of gestational age." Ind. Code § 16-18-2-128.7. While these laws did not remove the patient's right to "determine the final disposition of the aborted fetus," Ind. Code § 16-34-3-2(a), the laws require taking the fetal tissue home to exercise that right. (RFA Resps. at 5 (Req. 13–16) (admitting women cannot require abortion providers to dispose of their tissue according to their preference)). Where the patient takes the fetal tissue home, the patient can "dispose of [the tissue] however [they] choose." (Filing No. 77-1, Doe 1 Decl. ¶ 12).[2]

In 2020, Indiana created and clarified disclosure requirements that go along with the fetal disposition requirements. These laws require an abortion provider to inform patients orally and in writing that they (1) have a right to determine the disposition of the fetus; (2) they have a right to bury or cremate the fetus; (3) they have a right to require the abortion provider to bury or cremate the fetus; (4) that medication abortion patients will expel an aborted fetus; and (5) that the abortion provider must allow a medication abortion patient to return an aborted fetus. Ind. Code § 16-34-2-1.1(a)(2)(H)–(J). The laws also require the patient to inform the facility that they have received the information and which disposition option they choose for the fetal tissue. *Id.* § 16-34-3-2(b).

[2] Indiana does not dispute that at home fetal tissue can be treated in any way the patient pleases. Nor does there seem to be any provision of the Indiana code that imposes any restrictions on the treatment of fetal tissue at home.

B. Prior Challenges

Following the passage of the fetal disposition requirements in 2016, a district court enjoined the requirements because the laws did not survive rational basis scrutiny. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017). The Seventh Circuit affirmed on the same grounds. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018).

Following a petition for certiorari, the Supreme Court reversed. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The Court held that "Indiana's stated interest in the humane and dignified disposal of human remains" was legitimate and concluded that the requirements were "rationally related to the State's interest in [the] proper disposal of fetal remains" even if the requirements were "not perfectly tailored to that end." *Id.*

C. Factual and Evidentiary Background

Plaintiff Women's Med Group is a licensed Indianapolis-based abortion clinic. (Haskell Decl. ¶ 6). Plaintiff Haskell is the clinic's medical director, (*id.* ¶ 3), while Plaintiff McKinney provides nursing care at the clinic, (Filing No. 77-1, McKinney Decl. ¶ 3). These Plaintiffs collectively provide abortion—including first-trimester medication and aspiration abortions—and contraceptive services to women in the Indianapolis area. (Haskell Decl. ¶ 6). As part of that process, Women's Med provides patients with pre-abortion counseling, gives disclosures, and receives informed consent as required by Indiana law. (McKinney Decl. ¶ 13).

These disclosures include information that Plaintiff McKinney finds "stigmatizing," "misleading," and "inaccurate." (*Id.* ¶¶ 20, 21, 25). Specifically, they require the nurse to inform patients about some of their statutory rights following an abortion. (*Id.* ¶ 23). While this includes informing patients of the right to determine the final disposition of the aborted fetus and the right to have the facility take the tissue, it does not specifically include discussing the right to dispose of fetal tissue at home with medication abortion patients. (*Id.* ¶¶ 21–25). According to Plaintiff McKinney's uncontested testimony, these disclosures are "not consistent with the informed consent process used in other areas of medicine." (*Id.* ¶ 24). Even still, the disclosures were not relevant to the Doe Plaintiffs' decision to get an abortion. (Filing No. 82-13, Doe 1 Dep. 33:23–34:15; Filing No. 82-14, Doe 3 Dep. 38:23–39:17). Nor has there been any evidence submitted showing the disclosures have prevented a woman from receiving an abortion.

Plaintiffs Jane Doe No. 1 and Jane Doe No. 3 had aspiration abortions at Women's Med. (Doe 1 Decl. ¶ 10; Filing No. 77-1, Doe 3 Decl. ¶ 14). Women's Med is storing the tissue from the Plaintiffs' abortions until the final disposition of this case because both believe that treating fetal tissue as anything other than medical waste violates their moral and religious beliefs. (Doe 3 Decl. ¶¶ 24, 28; Doe 1 Decl. ¶¶ 13, 15, 19).

Specifically, Doe 3 explained that as a matter of her Baptist faith she understands the Bible to indicate that "life begins at the first breath, following birth" rather than in the womb. (Doe 3 Decl. ¶¶ 3, 6 (discussing Genesis 2:7)). Accordingly, Doe 3 believes that "burial and cremation are religious rituals reserved for people and animals with souls."

(*Id.* ¶ 7). Not only do her religious beliefs prohibit her from "burying or cremating the tissue from my abortion," but they also require "that the tissue should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means." (*Id.* ¶ 24).

Doe 1, alternatively, holds a moral, rather than religious, belief that fetal tissue is not the remains of a person. (Doe 1 Decl. ¶ 15; Filing No. 82-13, Doe 1 Tr. 28:23–29:1 (describing this belief as a moral one)). Consequently, she does not believe that her fetal tissue should "be buried or cremated." (Doe 1 Decl. ¶ 15). Instead, she believes the tissue should be disposed of "using standard medical means" and sued so that she "could have the right to ask Women's Med to dispose of [her] tissue by standard medical means that do not mark it as a person." (*Id.* ¶¶ 15, 19). Both Doe Plaintiffs believe that burying or cremating the tissue signified that the fetal tissue was a person. (*Id.* ¶ 13; Doe 3 Decl. ¶ 7). They further believe that treating the tissue as standard medical waste signifies that the fetal tissue is not a person. (Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 24).

II. Legal Standard

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). That requires reviewing the record in the "light most favorable to the nonmoving party and draw[ing] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009). The mere existence of an alleged factual dispute is not sufficient to defeat a motion for summary judgment. *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–588 (1986). That

is because "[i]t is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which [it] relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008).

III. Discussion

A. Free Exercise and Free Speech (Counts V, III)

The Constitution is a cohesive document. Nowhere is that more apparent than the Free Exercise and Free Speech Clauses of the First Amendment which necessarily "work in tandem." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). While the Free Exercise Clause ensures protection for religious exercise regardless of communicative content, the Free Speech Clause "provides overlapping protection" for religious exercise with a communicative component. *Id.* This result is a necessary consequence of "the framers' distrust of government attempts to regulate religion and suppress dissent," *id.*, because throughout "Anglo-American history, . . . government suppression of speech has . . . commonly been directed *precisely* at religious speech." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis original). This is one such case.

1. Free Exercise (Count V)

The Free Exercise Clause, in part, protects those holding religious beliefs by prohibiting laws requiring them to engage in "the performance of (or abstention from) physical acts." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

The Clause does not, however, prohibit the application of "neutral" or "generally applicable laws" to religious conduct. *Id.* at 872. So a plaintiff bears the initial burden of showing that the limitation on their sincere religious practice is pursuant to a statute that is (1) not neutral because the "object" of the policy is to suppress religious exercise, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); (2) not generally applicable because it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); or (3) accompanied by "official expressions of hostility to religion,"[3] *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n.*, 138 S. Ct. 1719, 1732 (2018)). If any of those deficiencies are shown, the government must satisfy strict scrutiny by demonstrating the law advances a "compelling state interest" and that the law is narrowly

[3] Plaintiffs argue that the fetal disposition requirements evince official expressions of hostility toward their religious exercise. For that proposition, however, Plaintiffs cite to deposition testimony by a professor of medical humanities, *see* (Filing No. 82-3, Curlin Decl. ¶¶ 28–29, 45), and ex parte statements by a singular lawmaker, *see* Liz Brown, *Sen. Brown: Remains From an Aborted Fetus are Human, Deserve Dignity*, IndyStar (Mar. 1, 2020, 5:00 a.m.), https://www.indystar.com/story/opinion/2020/03/01/sen-brown-remains-aborted-fetus-human-deserve-dignity/4896542002/. These are not the official expressions of hostility considered by *Masterpiece Cakeshop*. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n.*, 138 S. Ct. 1719, 1732 (2018) (explaining the official expressions came from the "commissioners' comments" during adjudicative proceedings).

tailored to "the least restrictive means" to "justify an inroad on religious liberty." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

Plaintiffs have shown that the fetal disposition law is neither generally applicable nor neutral.[4] Strict scrutiny, therefore, applies. As the court explains below, the law fails to sufficiently advance the government's asserted interest and is not tailored to the least restrictive means. For that reason, the fetal disposition requirements violate the Free Exercise Clause.

a. Burden on Sincere Religious Belief

As a threshold matter, Plaintiffs have proved the fetal disposition law burdens their sincere religious and moral beliefs of treating aborted fetuses as medical waste.[5]

The Free Exercise Clause protects "sincerely held" religious beliefs, even if those beliefs are not mandated by a particular organization or shared among a congregation. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989). These beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (internal quotation marks omitted). Indeed, the beliefs need not be religious at all: sincerely held moral "beliefs dealing with issues of ultimate concern that . . . occupy a place parallel to that filled by . . . God" also

[4] Even though, a law need only fail one of these tests to trigger strict scrutiny, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022), "[n]eutrality and general applicability are interrelated, . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Lukumi*, 508 U.S. at 557 (noting "the terms are not only 'interrelated' but substantially overlap") (Scalia, J., concurring) (internal citation omitted).

[5] Under Seventh Circuit precedent, a sincerely held moral belief that "deal[s] with issues of ultimate concern" similar to religious beliefs receives protection under the Free Exercise Clause. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005).

receive protection. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (internal quotation marks omitted).

Jane Doe 3 declared that as a matter of her Baptist beliefs "burial and cremation are religious rituals reserved for people and animals with souls." (Doe 3 Decl. ¶¶ 4, 7). She further clarified her belief that fetal tissue "should be treated like any other human tissue resulting from a medical procedure and disposed of by standard medical means, like incineration." (*Id.* ¶ 24).

Jane Doe 1 similarly declared that because she did "not believe that an embryo or fetus is a person" she "did not want my embryo from my abortion to be buried or cremated." (Doe 1 Decl. ¶ 15). Under her beliefs, "burial and cremation are religious rituals that signal the death of a person" and are not appropriate for a fetus. (*Id.* ¶ 13). She sued so that she could "dispose of my tissue by standard medical means that do not mark it as a person." (*Id.* ¶ 19). She believed this was a moral decision because "[i]t was based off what [she] believed was correct." (Filing No. 82-13, Doe 1 Tr. 28:23–29:1).

With no evidence to the contrary, this evidence demonstrates the Doe Plaintiffs hold sincere religious and moral beliefs that the fetal tissue is not equivalent to a person and should be disposed of as medical waste.[6] By its plain terms, the fetal disposition law burdens this religious and moral belief by making it more difficult, if not impossible, to

[6] Indiana's argument that the Plaintiffs' religious and moral beliefs do not require Plaintiffs to "dispose of fetal remains via incineration with other medical waste," (Filing No. 83, Defs.' Br. in Opp. at 24), is belied by the direct testimony of the Doe Plaintiffs. While the Plaintiffs' beliefs do not expressly require incineration, they do require treating fetal tissue as medical waste which utilizes incineration as the standard disposal method. *See* (Case Decl. ¶ 19; Haskell Decl. ¶ 7).

dispose of fetal tissue as medical waste. *See* Ind. Code § 16-41-16-4(d) (excluding "an aborted fetus or a miscarried fetus" from the definition of "infectious waste"). After drawing all inferences in favor of Indiana, the Plaintiffs have successfully demonstrated the fetal disposition requirements burden their sincere religious and moral beliefs.[7]

That the Plaintiffs' have demonstrated a sincere religious and moral belief regarding the status of fetal tissue is an unremarkable conclusion. The Supreme Court has consistently recognized that beliefs surrounding abortion and the personhood of fetuses are "ageless," "fundamental moral question[s]." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022). In *Roe v. Wade*, the Court explained that even those "trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" regarding "the difficult question of when life begins." 410 U.S. 113, 159 (1973); *see also Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 850 (1992) (explaining some people "always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy"). As "[a]bortion presents a profound moral question," it is no surprise that some will have firmly held religious and moral beliefs as to the status of fetal tissue. *Dobbs*, 142 S. Ct. at 2284.

Indiana's argument to the contrary is not persuasive. In its view, because the fetal disposition requirements allow women to take the fetal tissue home and dispose of it how they please, the law accommodates, rather than burdens, Plaintiffs' religious and moral

[7] The disclosure requirements do not burden the asserted religious and moral beliefs. Plaintiffs testify the disclosures had no effect on their decisions regarding their abortions. (Doe 1 Dep. 33:23–34:15; Doe 3 Dep. 38:23–39:17).

beliefs. The fetal take-home provision does not stop the law from burdening the Doe Plaintiffs' religious exercise for two reasons. Foremost, Plaintiffs have put forward uncontested evidence that patients do not take standard medical waste home, which is instead incinerated. (RFA Resps. at 7 (Reqs 21) (admitting "[t]he Challenged Laws treat human tissue from an abortion or miscarriage differently from human tissue from all other surgical procedures"); Doe 1 Decl. ¶ 16 ("In the dental practices where I have worked, we do not give patients tissue from their biopsies . . . because it is biohazardous material."); Filing No. 77-1, Hartsock Decl. ¶ 20 (noting "the Disposition Requirement" as a whole "requires clinicians to adhere to standards that are contrary to the medical standard for disposal of human tissue"); Case Decl. ¶ 20 (explaining "in no other areas" does she "have to bury or cremate tissue resulting from the procedure" and that the "standard methods of medical disposal" include incineration)). As the relevant religious belief is treating the fetal tissue "like any other human tissue resulting from a medical procedure," (Doe 3 Decl. ¶ 24), allowing the Doe Plaintiffs to take their fetal tissue home—something that would not occur were fetal tissue treated like any other human tissue—does not accommodate their religious and moral beliefs.

And even if it did, the take-home fetal tissue option still treats those exercising the religious and moral beliefs at issue differently than those without such beliefs. The Free Exercise Clause protects against unequal treatment toward religious practices. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Because the fetal take-home provision requires more from those seeking to exercise their belief that

fetal tissue is like any other human tissue than those who do not, the free exercise of those religious and moral beliefs is, at a minimum, burdened by the statutory scheme.

b. General Applicability

The fetal disposition requirements are not generally applicable. The requirements are significantly underinclusive so that they do little to advance the state's interests.

A law is not generally applicable where it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Laws selectively impose those prohibitions on "conduct motivated by religious belief" where the government pursues its interests "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. That most obviously occurs where the law is underinclusive of the State's asserted interests. *Id.* at 543. A statute is underinclusive when the statute regulates one aspect of a problem (religious practices) while declining to regulate a different aspect of the problem (secular practices) that affects its stated interest in a comparable way. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015); *see also Lukumi*, 508 U.S. at 543 (noting the general applicability analysis is similar to the Free Speech inquiry).

For example, the law in *Lukumi* that prohibited the killing of animals targeted religious animal sacrifice because it was underinclusive to the State's interest. The State asserted that the purpose of the law was to prevent cruelty to animals, but "[m]any types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision." *Lukumi*, 508 U.S. at 543. Were the law actually designed to prevent cruelty to animals, it would not allow the "[e]xtermination of mice and rats within a

home," the "euthanasia of stray, neglected, abandoned, or unwanted animals," the "infliction of pain or suffering" on animals "in the interest of medical science," or the use of animals "to hunt wild hogs." *Id.* at 543–44. Because the law allowed these "secular killings" but burdened the religious ones even though both fell "within the city's interest in preventing the cruel treatment of animals," the law was underinclusive. *Id.* at 544.

Indiana asserts three interests that justify the fetal disposition requirements: first, allowing patients to select disposition methods that accord with their religious beliefs; second, protecting abortion patients' mental health; and third, the humane and dignified disposal of fetal remains.

The fetal disposition law is plainly underinclusive as to the first two interests. The freedom for religious beliefs interest excludes the religious belief that fetal tissue is equivalent to medical waste. As described above, the fetal disposition requirements changed the statutory scheme to expressly exclude that religious belief. *See* Ind. Code § 16-41-16-4(d). That makes the statute less inclusive and undermines Indiana's asserted freedom of religion interest.

Similarly, after properly drawing the inference for Indiana that requiring burial or cremation benefits patients' mental health, the law is still quite underinclusive to that interest. To truly protect abortion patients' mental health, the laws would have to apply more broadly and require burial or cremation for all fetal tissue not just fetal tissue at medical facilities. Patients taking fetal tissue home undoubtedly feel a strain on their mental health in a comparable way to having an abortion at a clinic. *See* (Case Decl. ¶¶ 17–18 (noting the laws, including the requirement to take tissue home "are a source of

frustration and shame" for patients)). Those patients do not receive the supposed mental health benefits of burying or cremating their fetal tissue. And by not giving those patients the mental health "benefits," the requirements prohibit plaintiffs' religious conduct while declining to regulate non-religious conduct in the same way. *See Williams-Yulee*, 575 U.S. at 451. What this really means is that the law is not about its mental health benefits; it is about preventing people like Plaintiffs from treating their fetal tissue as medical waste.

The law is also underinclusive with respect to Indiana's interest in the humane and dignified disposal of fetal remains. Under the fetal disposition requirements, the only fetal remains that must be given a humane and dignified disposition are those at medical facilities. The statute allows the disposal of fetal tissue pursuant to at-home medicated abortions and fetal tissue taken home to be done in any way the patient pleases. (McKinney Decl. ¶ 22). And Indiana decided not to apply the fetal disposition requirements to preimplantation embryos resulting from in vitro fertilization, (RFA Resps. at 4 (Reqs 6)), even though that process involves "the fertilization of eggs by sperm to produce embryos" that are then either "implanted . . . or disposed of," (Filing No. 77-1, Maienschein Decl. ¶ 28). Put simply, Indiana does not attempt to pursue this interest in the context of at-home medicated abortions, at-home miscarriages, and in vitro fertilization, all of which involve the same "unique and independent human physical life" that Indiana asserts as critically important. (Defs.' Br. at 16).

Indiana disputes that in vitro fertilization is a proper comparison for the statute. The court, however, need not decide that issue because even if Indiana were correct that

in vitro fertilization is different, the fetal disposition requirements do not materially advance the State's interest because the statute does not care about giving humane and dignified dispositions to fetal tissue passed at home or taken home from the hospital.

Ultimately, the consequence of this statutory scheme is that the fetal disposition requirements are underinclusive when judged against Indiana's asserted interest. That "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring" a particular religious belief. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). After all, it is not truly possible for Indiana to be concerned with the humane and dignified disposal of human remains when its statutory scheme allows some fertilized fetal tissue that is identical to the tissue covered by the statutory scheme to be treated in any way the possessor pleases. This enforcement of interests against only the religious beliefs articulated by the Plaintiffs is the "precise evil" the "requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 546.

c. Neutrality

Plaintiffs also prevail in demonstrating that the fetal disposition requirements are not neutral because the object of the law is to suppress the Plaintiffs religious conduct. After taking the evidence in the light most favorable to Indiana, Plaintiffs have shown that the object of the statute is to prevent them—and those with similar beliefs—from treating aborted fetuses as medical waste.

In determining whether a law is religiously neutral, courts not only look to whether the law discriminates on its face, but also to the lines drawn by the statute to

ensure the statute is not "gerrymandered with care to proscribe" religious conduct. *Lukumi*, 508 U.S. at 540, 542. The Free Exercise Clause forbids even "subtle departures from neutrality." *Gillette v. United States*, 401 U.S. 437, 452 (1971). Thus, the Clause requires a meticulous survey of the circumstances and lines drawn by the statute to ensure neutrality. *Lukumi*, 508 U.S. at 534 (citing *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

For example, in *Lukumi*, the Court explained that "the effect of a law in its real operation is strong evidence of its object" and that courts should look to the "specific series of events leading to the enactment." *Lukumi*, 508 U.S. at 535–38. The Court found the statute in *Lukumi* targeted religion because the legislature narrowed the proscribed category so that it only included the religious conduct at issue. *Id.* at 536. The same problem is present here.

The new fetal disposition requirements only impose burdens on women who have religious or firmly held moral beliefs that aborted fetuses should be treated as medical waste rather than as a person. Prior to the passage of the 2016 fetal disposition requirements, Indiana law allowed patients to require, at their request, burial or cremation for their miscarried or aborted fetuses while at the same time allowing women with differing beliefs to treat the fetal tissue as medical waste. *See* Pub. L. 127-2014, 2014 Ind. Acts 1472–73; *see also* Pub. L. 113-205, 2015 Ind. Acts 829; (RFA Resp. at 5 (Req. 14)). After 2016, Indiana law required burial or cremation for aborted and miscarried fetuses at medical facilities. Ind. Code § 16-34-3-4. The new law also expressly excludes "an aborted or a miscarried fetus" from the definition of infectious medical

waste. Ind. Code § 16-41-16-4(d). Both the current and former regime treat women who miscarry or abort their fetus away from a medical facility the same: they can dispose of the tissue how they like, such as by flushing it down the toilet, expelling it into a sanitary napkin, burying it, or cremating the tissue. *See* Ind. Code § 16-34-3-4 (only applying to medical facilities); *see also* (Case Decl. ¶ 9 (noting patients "typically" discharge the tissue into a sanitary napkin or toilet)); (McKinney Decl. ¶ 29 (describing that most patients "expect to pass their pregnancy at home on a toilet or in a sanitary napkin")); (Peters Decl. ¶ 10 (explaining medication abortion plaintiffs "usually expel the tissue into a sanitary napkin or a toilet" but may consider "interring or cremating the tissue")).

All this taken together demonstrates that the object of the law is the suppression of beliefs like Plaintiffs because the suppression of those beliefs is the only effect of the law. The only thing changed by the new fetal disposition requirements is that a woman can no longer require the medical facility to treat the fetal tissue as medical waste. Those who wanted to bury or cremate the fetal tissue could already do so. Those who have a miscarriage or abortion at home, or otherwise take the tissue home, are unaffected. Only those who have an abortion at a clinic and want the tissue treated as medical waste have their choice disregarded. As "the effect of a law in its real operation is strong evidence of its object," *Lukumi*, 508 U.S. at 535–38, this evidence of singular treatment cannot be ignored.

Indiana argues that the Court in *Lukumi* relied on specific evidence of hostility toward religious conduct which is not present here. *Lukumi* was not so narrow. While Justice Kennedy did analyze "evidence [of] significant hostility exhibited by" proponents

of the law, that analysis failed to capture a majority of the Court. *Lukumi*, 508 U.S. at 523, 541 (The hostility analysis occurs in Part II-A-2 but Justice Kennedy "delivered the opinion of the Court, except as to Part II-A-2."). The thrust of the *Lukumi* analysis is not that a legislature must display animus for there to be a Free Exercise violation, but rather that strict scrutiny applies where a law has carefully selected its terms such that its impact is narrowly focused on religious conduct. The Court's later reading of *Lukumi* confirms that conclusion because it notes that neutrality and hostility are two separate inquiries. *Kennedy*, 142 S. Ct. at 2422 n.1 (discussing the *Lukumi* analysis while noting plaintiffs "may also prove a free exercise violation by showing . . . 'official expressions of hostility'") (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

In conclusion, the fetal disposition requirements are not neutral. The effect of the requirements is to limit only the exercise of religious beliefs like the plaintiffs', which brings the law within the purview of *Lukumi*.

d. Scrutiny

Because the court concludes that the fetal disposition requirements are neither neutral nor generally applicable, strict scrutiny applies. The law fails for many of the same reasons discussed above: the law does not appropriately tailor itself to Indiana's asserted interests.

To satisfy strict scrutiny, the statute must advance "interests of the highest order" and be narrowly tailored. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Narrow tailoring requires that the government choose "the least restrictive means of achieving a compelling state interest." *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383

(2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). This test "really means what it says," and few laws will survive. *Smith*, 494 U.S. at 888. In short, strict scrutiny is "a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.). It is not satisfied here.

Assuming the requirements serve a compelling interest, the law fails the tailoring inquiry for the reasons discussed above. To repeat briefly, the law targets protected conduct unnecessarily because the state could have retained the old scheme which gave patients the choice to treat fetal tissue as medical waste while still allowing for cremation and burial. Because the statute targets conduct that it need not target to further the state's interest, the scheme is not using the least restrictive means. Further, the statute is underinclusive as to each of Indiana's three asserted interests. That deficiency means the law is not actually "protecting an interest" as it "leaves appreciable damage . . . unprohibited." *Lukumi*, 508 U.S. at 547 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment) (citation omitted)).

This does not mean that every law requiring fetal tissue be buried or cremated is unconstitutional or that the Constitution placed the ability to regulate the disposition of fetuses outside the powers of the government. What it does mean is that this is an area where officials must ensure the regulation is not drawn so exclusively as to target a particular set of beliefs. The Constitution prohibits "mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 547. The fetal disposition requirements are contrary to that principle of the Free Exercise Clause and are void. Therefore, Plaintiffs are entitled to summary judgment.

2. Free Speech (Count III)

a. Fetal Disposition Requirements

Because the decision to provide certain or no funerary customs is expressive conduct, the Free Speech Clause requires any law that compels or prohibits such conduct be justified by an interest unrelated to the expression. Instead of following that command, Indiana justifies the law by reference to the message communicated by the suppressed conduct. Therefore, the fetal disposition requirements are presumptively unconstitutional and are only valid if they satisfy strict scrutiny. They do not.

While not all conduct can "be labeled 'speech' whenever the person engaging in the conduct intends . . . to express an idea," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Free Speech Clause does protect conduct that is "sufficiently imbued with elements of communication," *Spence*, 418 U.S. at 409. That occurs where a party has "an intent to convey a particularized message" and there is a high likelihood "that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11). The conduct needs to be "inherently expressive" such that the conduct "comprehensively communicate[s] its own message without additional speech." *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)). If there is no inherently expressive conduct, the First Amendment inquiry is at an end.

But where the conduct is inherently expressive, the court evaluates "whether the State's regulation is related to the suppression of free expression." *Johnson*, 491 U.S. at

403. If it is, the court applies strict scrutiny. *Id.* at 412 (applying "the most exacting scrutiny") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). If it is not, the court applies the more lenient *O'Brien* test.[8] *Johnson*, 491 U.S. at 403.

Plaintiffs have demonstrated they intended to convey a message by treating their fetal tissue as medical waste. Both Doe Plaintiffs indicate that they thought burying or cremating tissue conveyed the message that the fetal tissue was a person and deserved an equivalent amount of respect as a person. (Doe 1 Decl. ¶ 13; Doe 3 Decl. ¶ 7). They sought to incinerate the tissue, just like medical waste, because it signified that the fetal tissue was not a person. (Doe 1 Decl. ¶ 19; Doe 3 Decl. ¶ 24). Thus, Plaintiffs intended to convey a particular message about whether fetal tissue constitutes a person and the respect it deserves through treating their fetal tissue as medical waste.

So too have Plaintiffs demonstrated that "the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. "[H]uman communities have uniformly shown respect to human beings by treating their remains respectfully" and affording those persons funerary rites. (Curlin Decl. ¶¶ 14, 15). Providing burial or cremation to fetal tissue conveys the message to any observer that the fetal tissue is equivalent to a person and should receive the same respect. (Maienschein Decl. ¶¶ 8, 12 & n.3; Peters Decl. ¶¶ 11, 13–14, 29–38). The opposite is equally true. Deliberately choosing to not

[8] Under the *O'Brien* test, a limitation on expressive conduct is constitutional so long as the regulation (1) "is within the constitutional power of the Government;" (2) "furthers an important or substantial governmental interest;" (3) the interest "is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

provide funerary rites expresses that the fetal tissue does not require the respect owed to human remains. Thus, the choice to treat fetal tissue as ordinary medical waste instead of human remains necessarily informs onlookers about the patient's disposition toward the status of their fetus. Accordingly, treating fetal tissue as medical waste is expressive conduct that receives First Amendment protection.

Indeed, the performance, or lack thereof, of funerary rites is an inherently expressive activity. The Supreme Court explained that funerary rites "are a sign of the respect a society shows for the deceased and for the surviving family members." *Nat'l Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 168 (2004). And the sign of respect demonstrated by funerary rites is so ubiquitous as to be understood and "respected in almost all civilizations from time immemorial." *Id.* at 167–68. People intuitively understand the messages conveyed by these rituals as they have "been practiced from the very dawn of human culture" and represent "the conscious cultural forms of one of our most ancient, universal, and unconscious impulses." *Id.* (quoting 26 Encyclopaedia Britannica 851 (15th ed. 1985) and 5 Encyclopedia of Religion 450 (1987)). There can be no question that giving or refusing to give funerary rites inherently conveys a message.

Indiana seemingly agrees. Indiana submits that the purpose of the law is to "ensure[] that the remains of unborn humans are buried or cremated in a dignified and respectful manner[.]" (Defs.' Br. at 16). In its view, giving funerary rites to fetal tissue "acknowledge[s] the human dignity of the fetus." (Defs.' Reply Br. at 4). This purpose presupposes that anyone who views, hears of, or takes part in the burial or cremation

understands the respect and dignity being given to the fetal tissue. It is simply impossible for a disposition method to acknowledge and respect the human dignity of a fetus while at the same time communicating no message at all. Were Indiana correct that giving (or deciding to not give) funerary rites to fetal tissue communicates no message about the personhood of the fetus or the respect and dignity properly due to the fetal tissue, the fetal disposition requirements would concurrently fail to advance Indiana's asserted interest. Yet Indiana strenuously argues—and puts forward considerable evidence attempting to demonstrate—the opposite. *See, e.g.*, (Curlin Decl. ¶¶ 11, 14, 26); *see also* (Filing No. 92-4, Coleman Decl. ¶¶ 10, 51 (noting, among other things, that the disposition requirements "inherently equate fetal remains with other human remains")).

Indiana's assertion of the law's purpose also demonstrates that the object of the law is directly related to the suppression of free expression. If the purpose of the law is to acknowledge and signify the personhood and dignity given to fetal tissue, which simultaneously prohibits expressing the opposite view, there can be no conclusion other than that the law is squarely aimed at suppressing expression. Thus, strict scrutiny applies. *Johnson*, 491 U.S. at 412. As discussed above, the requirements do not survive strict scrutiny.

Indiana raises three arguments to justify the fetal disposition law. Each of them fails. Foremost, Indiana argues that funerary rites are not expressive conduct because the Supreme Court has only recognized three broad categories of expressive conduct: conduct displaying respect for the flag; demonstrations, parades, and protests; and artistic expression. Such a wooden framework ignores that the Supreme Court finds conduct to

be expressive whenever there is "an intent to convey a particularized message" and the "message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. Under that analysis, deciding not to provide funerary rites to fetal tissue is expressive.

Next, Indiana argues that subjecting the fetal disposition requirements to strict scrutiny will subject all burial and cremation laws to the First Amendment and will necessarily trigger strict scrutiny. Not so. This *ipse dixit* drastically oversimplifies the First Amendment analysis. At the outset, Indiana's fear that burial and cremation requirements will be newly subject to First Amendment scrutiny is gratuitous; these laws were already subject to constitutional scrutiny, First Amendment included. *See, e.g.*, *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644, 652–53 (1999) (applying First Amendment scrutiny to government action that prohibited the immediate burial of a body while finding the challenged law did not violate *Smith*).[9] The Free Speech Clause does not create a carve out for laws regulating the disposition of human remains. Far from being beyond the scope of the First Amendment, where disposition requirements regulate speech or expressive conduct, they are subject to First Amendment scrutiny just like any other law that "abridg[es] the freedom of speech." U.S. Const. amend. I.

More concretely, this argument ignores how the fetal disposition requirements are different from other laws regulating the disposition of human remains. Laws requiring

[9] As the Supreme Court explained, free exercise and free speech claims often go hand in hand as the "Clauses work in tandem." *Kennedy*, 142 S. Ct. 2421. For example, there was no question that a silent prayer triggered scrutiny under both the Free Exercise and Free Speech Clauses. *See generally id.* Here too here as well. !

the disposition of human remains apply generally to remains regardless of whether those remains are in the home or the hospital, and such laws are justified—as are most statutes regulating the disposition of biohazardous material—by the State's interest in public health. That is not the case here. The fetal disposition requirements prevent one specific way of disposing of the fetal remains to effectuate the government's interest in promoting respect for fetal tissue. Put succinctly, whereas most disposition laws justify themselves without reference to expression, the fetal disposition requirements do not.

That distinction is paramount. Where a legislature draws lines to exclude certain disposition methods because of their potential to create biohazardous waste, their legislative findings on those facts are entitled to great deference. *Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). But where the legislature draws lines based on message, such as based on the respect or dignity communicated by a particular method of disposing of the remains, the law triggers strict scrutiny. *Boos*, 485 U.S. at 322 (subjecting content-based laws to the most exacting scrutiny). Put differently, "while the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995). Most disposition laws do the former; the fetal disposition requirements do the latter.

Lastly, Indiana contends that it may "express[] a preference for childbirth over abortion." *Casey*, 505 U.S. at 883; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). While this is a superficially correct statement, Indiana's application of that precedent here is misplaced. Just because the government may use its voice to espouse an idea does not mean it can compel other voices to speak its message. *Compare Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 215–17 (2015), *with Wooley v. Maynard*, 430 U.S. 705, 715–16 (1972). And while there are situations where the government can compel speech, Indiana, wisely, does not argue that situation occurs here. *See, e.g.*, *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005).

The unexceptional, bedrock principle of the Free Speech Clause is that freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld*, 547 U.S. at 61. It thereby also prohibits the government from "compel[ling] conduct that would evince respect" for things a person does not think warrant respect. *Johnson*, 491 U.S. at 415 (holding compelling conduct that evinces respect for the flag unconstitutional); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that compelling a salute demonstrating respect for the flag violated the constitution); *Street v. New York*, 394 U.S. 576, 592–94 (1969) (holding even "defiant or contemptuous" speech on otherwise respected topics is protected so long as they are not fighting words). That principle includes showing respect to whatever the State thinks should be treated like a person. As the fetal disposition requirements can only justify

themselves by compelling Plaintiffs to show respect to fetal tissue that they do not want to respect, while prohibiting them from speaking their message, the fetal disposition requirements offend the Free Speech Clause. Accordingly, Plaintiffs are entitled to summary judgment.

b. Disclosure Requirements

Plaintiffs also challenge the requirements that abortion providers give information to patients about their right to bury or cremate fetal tissue under the Free Speech Clause. *National Institute of Family and Life Advocates v. Becerra* squarely controls whether those disclosure requirements trigger strict scrutiny under the Free Speech Clause. 138 S. Ct. 2361 (2018). There, the Court explained that regulations are "plainly" content-based regulations where the regulations compel an individual or organization to speak a message that "alters the content" of their speech. *Id.* at 2371 (quoting *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Such altering occurs when the State compels a party to say something they would not otherwise say. *Id.* at 2371. Those content-based regulations are then subject to strict scrutiny. *Id.*

There are only two narrow situations where "more deferential review" will be applied: first, required disclosures of factual, noncontroversial information in the course of commercial speech, and second, regulations on professional conduct that only "incidentally involve[] speech." *Id.* at 2372 (collecting cases). The first of those situations applies solely to commercial speech, which is speech that "propos[es] a commercial transaction." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978). That is not applicable here.

Neither is the second category applicable to this case.[10] That category allows the State to regulate "[l]ongstanding torts" by defining the boundaries of professional malpractice. *NIFLA*, 138 S. Ct. at 2373. Thus, laws requiring disclosures to facilitate informed consent relating to medical procedures do not offend the First Amendment. *See Casey*, 505 U.S. at 885 *overruled on other grounds by Dobbs*, 142 S. Ct. 2228.

Even still, courts need to be wary because "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Thus, the reach of the State's ability to regulate in this area is limited by those requirements of informed consent that are "firmly entrenched in American tort law." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). At its most firmly rooted point, informed consent requires informing patients of the substantial risks that if disclosed would cause "reasonable persons . . . [to] reject[] the proposed treatment." *Spar v. Cha*, 907 N.E.2d 974, 979–80 (Ind. 2009) (quoting Dobbs, *The Law of Torts*, § 250 (2001)). Consequently, the State can only require disclosures that relate to the risks or benefits of the procedure that might affect whether reasonable patients would reject the treatment. *Compare NIFLA*, 138 S. Ct. at 2373–74, *with Casey*, 505 U.S. at 885.

[10] Some of the disclosure provisions challenged by Plaintiffs quite obviously regulate conduct and are, thus, constitutional. For example, the provision that requires patients to confirm their receipt of information and mark which disposal option they desire regulates conduct surrounding the procedure rather than speech. *See* Ind. Codes §§ 16-34-2-1.1(a)(3)(A); 16-34-3-4(b)–(f); 16-34-3-5; 16-34-3-6; 410 Ind. Admin. Code 35-2-1(b). These are constitutional. So too are the provisions that merely define words as used in the statute or state when the chapter is effective. *See* Ind. Codes §§ 16-21-11-1 to 16-21-11-3; 16-34-3-1; 410 Admin. Code 35-1-1 to 35-1-5.

Many of the disclosures required by Indiana law do not relate to the risks and benefits of abortions and are irrelevant to informed consent. While the requirement to disclose that a drug-induced abortion patient "will expel an aborted fetus" relates to the expected consequences of an abortion,[11] Ind. Code § 16-34-2-1.1(a)(2)(J)(i), the rest of the disclosures do not. Instead, those provisions seek to inform women about their statutory rights following an abortion instead of the risks and benefits of the procedure.[12] Indeed, Plaintiffs introduce uncontested evidence that the disclosures here are "not consistent with the informed consent process used in other areas of medicine." (McKinney Decl. ¶ 24). There is also uncontested evidence that these disclosures are irrelevant to patients' decisions on whether to get an abortion. (Doe 1 Dep. 33:23–34:15; Doe 3 Dep. 38:23–39:17).

In sum, these disclosures do not relate to the risks and benefits of the procedure, are as a factual matter, inconsistent with other informed consent disclosures, and have no effect on the decision-making process. Instead, they merely inform women of their rights relating to fetal disposition. But requiring disclosures so that patients "know[] their rights and the health care services available to them" is a regulation on speech not professional conduct. *NIFLA*, 138 S. Ct. at 2369. Accordingly, the disclosures "regulate[] speech as

[11] As this section of the statute is an informed consent requirement, it is constitutional so long as it is truthful and non-misleading. *See Casey*, 505 U.S. at 882. As there is no indication that this statement is untrue or misleading, this disclosure survives constitutional scrutiny.

[12] Subsection (H) requires disclosing that "the pregnant woman has a right to determine the final disposition of the remains." Ind. Code § 16-34-2-1.1(a)(2)(H). Subsection (I) requires disclosing "that the pregnant woman has a right" to "dispose of the remains . . . by interment . . . or cremation" and that the "woman has a right" to "have the health care facility or abortion clinic dispose of the remains of the aborted fetus by interment . . . or cremation." *Id.* § (I)(i), (ii).

speech" and are subject to strict scrutiny under the First Amendment. *NIFLA*, 138 S. Ct. at 2374.

As the court already concluded the requirements do not survive strict scrutiny for failing to tailor themselves to the least restrictive means, the disclosure requirements violate the Free Speech Clause.

B. Establishment Clause (Count IV)

Next, Plaintiffs challenge the fetal disposition and disclosure requirements as a violation of the Establishment Clause. But because the fetal disposition and disclosure requirements do not establish any religion, the requirements do not violate the Establishment Clause. That Clause prohibits laws "respecting an establishment of religion." U.S. Const. amend. I. Those words "must be interpreted by reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (plurality opinion)). Whether a law offends the Establishment Clause turns on "the understanding of the Founding Fathers" such that the line between permissible and impermissible "accords with history." *Town of Greece*, 572 U.S. at 577 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

The Establishment Clause has not been historically understood to prohibit laws that only "coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 336 U.S. 420, 442 (1961). For example, just because prohibiting murder "agrees with the dictates of the Judaeo-Christian religions" does not mean the State establishes those religions by criminalizing murder. *Id.* at 442. Similarly, even where a

statute promulgates and reflects "traditionalist values toward[] abortion," there is no Establishment Clause violation without more. *Harris v. McRae*, 448 U.S. 297, 319–20 (1980).

While the exact boundaries of what more a law needs to do to establish religion are unclear, the court need not reach that issue today. That is because Plaintiffs have not shown anything more than the fetal disposition and disclosure requirements coinciding with certain religious beliefs. On this record, it is uncontroverted that even though some persons hold religious beliefs surrounding the burial or cremation of human remains, (Maienschein Decl. ¶ 15; Filing No. 77-1, Espada Tr. 70:5–11), many non-religious persons bury or cremate their dead and the respectful treatment of human remains is not strictly religious, (Peters Dep. 43:5–8 (Pls.' Expert); Curlin Decl. ¶ 20 (Defs.' Expert)).[13] Indeed, "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial," because they represent "a sign of the respect a society" shows the deceased even if that person is not religious. *Favish*, 541 U.S. 157, 167–68 (2004). To the extent that the fetal disposition and disclosure requirements do advance "traditionalist values" toward fetal personhood, the laws only coincide or harmonize with religious tenets and do not violate the Establishment Clause. *McRae*, 448 U.S. at 319–20.

[13] Curiously, in making this point, Dr. Curlin gives the example that "[i]n Homer's *Iliad*, the gods are outraged when Achilles defiles Hector's corpse" which demonstrates that Greek culture emphasized treating enemies' remains with respect. (Curlin Decl. ¶ 20). For that proposition, Curlin cites "Mistreating the enemy's body: The judgment of Zeus" from the "Law and Religion Forum." *Id.* n.20. Given that the proposition is that respect for the dead is not necessarily religious, citations to the actions of the gods, Zeus, and the Law and Religion forum may not entirely support the point. Regardless, plaintiffs' expert testimony is sufficient to show that the burial or cremation of remains is not strictly a religious practice.

The Supreme Court's recent opinion in *Kennedy* belies Plaintiffs' contention that this Court should apply the *Lemon* test or failing that, the coercion test. 142 S. Ct. at 2427. Under the *Lemon* test, the court questions "(1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether government activity fosters an excessive entanglement with religion." *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). "Governmental action is violative" of the Establishment Clause "if it violates any one of these three prongs." *Id.* However, the Supreme Court "long ago abandoned *Lemon*" and instead applies the historic approach described in *Town of Greece*. *Kennedy*, 142 S. Ct. at 2427. Moreover, the coercion test still requires religious action which, as described above, is absent here. Therefore, Defendants are entitled to summary judgment on Plaintiffs' Establishment Clause claim.

C. Due Process (Count I)

Plaintiffs contend that the fetal disposition and disclosure requirements substantially burden their fundamental right to abortion under the Due Process Clause. Given the Supreme Court's opinion in *Dobbs*, 142 S. Ct. 2228, the court concludes that the fetal disposition and disclosure requirements do not violate the Due Process Clause of the Fourteenth Amendment.

Laws burdening abortions face "rational-basis review" if attacked on Due Process grounds. *Dobbs*, 142 S. Ct. at 2284. Under that standard, the law must only be "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

The fetal disposition requirements at issue in this case are rationally related to a legitimate government interest. *Box*, 139 S. Ct. at 1782 (explaining that the issue "is whether Indiana's law is rationally related to the State's interest" and concluding "that it is") (upholding the fetal remains requirement).

The disclosure requirements are also rationally related to a legitimate government interest. The State has a legitimate interest in making its citizens aware of its laws and programs. Requiring the disclosures at issue here furthers that legitimate interest.

Defendants are entitled to summary judgment on Plaintiffs' Due Process claims.

D. Equal Protection (Count II)

Finally, Plaintiffs argue the requirements violate equal protection. Because the Plaintiffs' Equal Protection claims are duplicative of their other Constitutional claims, however, the court holds that the fetal disposition and disclosure requirements do not violate the Equal Protection Clause. The thrust of Plaintiffs' argument is that because the fetal disposition and disclosure requirements apply to individuals exercising fundamental constitutional rights, the requirements violate the Equal Protection Clause. That argument, however, misunderstands the interrelation of fundamental constitutional rights and equal protection.

In relation to other substantive rights, the Equal Protection Clause complements, but does not duplicate. *See, e.g.*, *Obergefell v. Hodges*, 574 U.S. 644, 670–74 (2015) (explaining how the Equal Protection Clause synergizes with but is independent from other substantive rights). To that end, the Equal Protection Clause prohibits excluding or distinguishing between members of a particular class without sufficient justification. *City*

of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). It is not violated merely when a substantive right is burdened—even where that burden is unconstitutional. Plaintiffs have not cited a case where a court has found an equal protection violation purely because the statute violated the First Amendment as to some class of people.

There is no equal protection violation here because the fetal disposition and disclosure requirements do not distinguish or exclude based on the exercise of a fundamental right. The laws instead only burden fundamental rights. The Equal Protection Clause requires more than parasitic claims. Were it otherwise, every instance where a court found viewpoint discrimination, or a free exercise violation, would require finding a concomitant equal protection violation. That is not how these cases are decided. *See Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 835–37 (1995) (striking down regulation for viewpoint discrimination with no discussion of equal protection); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (discussing viewpoint discrimination but not equal protection); *Lukumi*, 508 U.S. at 533–45 (striking down statutes for targeting only one religion with no equal protection analysis).

The only remaining question, then, is whether the classifications drawn by the fetal disposition and disclosure requirements survive rational basis review. *See Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002) (explaining when "no suspect class or fundamental right is involved, we employ a rational basis test to determine" constitutionality). They do. *See Box*, 139 S. Ct. at 1782; *see also supra* Section III-C. Therefore, Defendants must receive summary judgment on the equal protection claim.

IV. Conclusion

For the reasons discussed above, the court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Summary Judgment (Filing No. 76) and **GRANTS in part** and **DENIES in part** Defendants' Cross-Motion for Summary Judgment (Filing No. 82). Plaintiff's Motion to Exclude Expert Testimony (Filing No. 88) is **DENIED as moot**.

The disposition of these claims are as follows:

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count I (Due Process).

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count II (Equal Protection).

The court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion for Summary Judgment with respect to Count III (Free Speech).

The court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion for Summary Judgment with respect to Count IV (Establishment Clause).

The court **GRANTS** Plaintiffs' Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment with respect to Count V (Free Exercise).

IT IS SO ORDERED this 26th day of September 2022.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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