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**IN THE INDIANA COURT OF APPEALS**

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No. 22A-PL-02938

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

Defendants-Appellants,

v.

ANONYMOUS PLAINTIFF 1, et al.,

Plaintiffs-Appellees.

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Interlocutory Appeal from the Marion Superior Court,  
Trial Court No. 49D01-2209-PL-031056

The Honorable Heather A. Welch, Judge

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**BRIEF OF AMICI CURIAE HISTORIANS OF RELIGION, REPRODUCTION,  
AND THE LAW, IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Individual Amici are professional historians and scholars from across the United States and the state of Indiana who specialize in the study of religion, law, and debates about reproductive health.<sup>2</sup> They have particular expertise in the history of how different religious communities have approached issues of abortion and contraception in Indiana and beyond. The Amici are: Gillian Frank, Affiliate Fellow, Center for Culture, Society and Religion, Princeton University; Jennifer Holland, L.R. Brammer, Jr., Presidential Professor of History, University of Oklahoma; Rachel Kranson, Associate Professor of Religious Studies and Director of Jewish Studies, University of Pittsburgh; Brooke Lansing, Ph.D. Candidate, Johns Hopkins University; Elizabeth Reiner Platt, Director, the Law, Rights, and Religion Project, Columbia Law School; William Stell, Ph.D. Candidate, Princeton University; Lauren MacIvor Thompson, Assistant Professor of History, Kennesaw State University; Heather R. White, Visiting Assistant Professor, University of Puget Sound; and Mary Ziegler, Martin Luther King, Jr. Professor of Law, U.C. Davis School of Law.

Additional Signatories include: Jacqueline D. Antonovich, Assistant Professor of History, Muhlenberg College; Rev. Barbara Child, Transitions Minister, Retired, Unitarian Universalist Association; Rebecca L. Davis, Miller Family Endowed Early Career Professor of History, University of Delaware; Hasia Diner, Paul And Sylvia Steinberg Professor of American Jewish History (Emeritus), New York University; Rev. Dr. Anne Bain Epling, Minister of Word and Sacrament (PCUSA); Janet Golden, Professor of History, Emerita, Rutgers University; Rev.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

<sup>2</sup> Individuals' institutional affiliations are included for identification purposes only and do not constitute or reflect institutional endorsement.

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Catherine J Romano Griffin, Senior Minister, All Souls Unitarian Church Indianapolis, IN; Karissa Haugeberg, Associate Professor of History, Tulane University; Rabbi Sharon Kleinbaum, Senior Rabbi, Congregation Beit Simchat Torah; Kevin M. Kruse, Professor of History, Princeton University; SooJi Min-Maranda, Executive Director, ALEPH: Alliance for Jewish Renewal; Rev. Sara Ofner-Seals, Associate Pastor, Plymouth Congregational Church, Fort Wayne, IN; Sharrona Pearl, Associate Professor of Bioethics and History, Drexel University; Rabbi Danya Rutttenberg, Scholar in Residence, National Council of Jewish Women; Rabbi Dennis C. Sasso, Senior Rabbi, Congregation Beth-El Zedeck, Indianapolis, IN; Rabbi Sandy E. Sasso, Senior Rabbi Emerita, Congregation Beth-El Zedeck, Indianapolis, IN; Rickie Solinger, Historian; Stacie Taranto, Associate Professor of History, Ramapo College of New Jersey; Courtney E. Thompson, Associate Professor of History, Mississippi State University; and Rabbi Rachel Timoner, Senior Rabbi, Congregation Beth Elohim.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

Under Indiana’s Religious Freedom Restoration Act (RFRA), “a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.” Ind. Code § 34-13-9-8 (2015). The law defines the “exercise of religion” as “*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.” Ind. Code § 34-13-9-5 (emphasis added).

In seeking to enforce S.B. 1, Defendants argue that the Plaintiffs cannot invoke RFRA because their religious objections are insincere. To be sure, courts may inquire into the sincerity of a religious objection raised under RFRA and routinely do so as a way of eliminating false claims, both under RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq. Nevertheless, by questioning Plaintiffs’ sincerity,



Defendants invite the Court both to set aside the sensitive, careful approach to sincerity shaped by the courts in past cases and to ignore a rich and extensive historical record.

In practice, in evaluating sincerity, courts must “steer[] well clear of deciding religious questions” and use great sensitivity to the place that faith plays in the lives of Hoosiers. *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). Courts also take care to shield the sincere religious objections of all believers and “must not presume to determine ... the plausibility of a religious claim,” *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990), regardless of whether the believer raising that objection belongs to an unfamiliar tradition or to no established religion at all. In the context of RLUIPA, for example, “[t]he rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations.” *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991). The same is true of believers whose beliefs clash with those of clergy. *See, e.g., Ford v. McGinnis*, 352 F.3d 582, 593–94 (2d Cir. 2003) (holding that the role the Eid ul Fitr feast played in a prisoner's practice of Islam dictated whether there had been a substantial burden, and not the testimony of Muslim clerics).

Plaintiffs offer compelling evidence of their own sincerity. Amici do not directly address this evidence but rather seek to put it in broader historical context. Faith communities across the state of Indiana and the United States have a long record of viewing access to abortion or contraception as a matter of faith. Amici hope to illuminate this evidence.

## ARGUMENT

### **I. Sincerely Held Religious Beliefs About Contraception and Abortion Are Apparent in Theology, Individual Practice, And Public Action.**

Sincerely held religious belief can manifest in myriad ways, including in theology, individual practice, and public action. Defendants and their Amici suggest that the idea of a sincere belief in the importance of abortion and contraception is implausible, a recent invention designed

to win cases like this one. The historical record suggests that the opposite is true. In Indiana and beyond, beliefs and practices of people of faith surrounding both contraception and abortion have deep roots. Indiana has long been home to religious leaders and practitioners whose faith has compelled their commitment to protecting a person's right to choose to bear or not to bear a child. Motivating their commitment was a religious belief that pregnancy, birth, life, and family were sacred, and thus decisions about when or whether to give birth and grow a family were also sacred. This Court should evaluate the sincerity of Plaintiffs' beliefs against this historical backdrop.

Religious ideas about contraception underpinned subsequent theologies and religious practices about abortion, especially among mainline Protestants and Jews. Since the early 20th century, Hoosiers subscribed to and participated in the development of religious beliefs that sanctioned birth control and abortion. The struggle for birth control information and devices by people of faith underpinned the subsequent religious struggles for access to abortion.<sup>3</sup>

Religious leaders and devout Hoosiers joined with co-religionists across the United States to demand the right to contraceptive information and devices. The ecumenical intertwinement of faith and birth control advocacy in Indiana was demonstrated in the leadership of clergy in Indiana's birth control movement, the location of birth control movement gatherings in Indiana's churches and synagogues, and the repeated articulation of theologies of family planning by Indiana's faith leaders.<sup>4</sup>

Women's inability to safely plan pregnancies motivated clergy to challenge prohibitions against birth control. Clergy recognized that such prohibitions allowed predatory entrepreneurs to

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<sup>3</sup> For a fuller accounting of this history, see Gillian Frank, *A Sacred Choice: Liberal Religion and the Struggle for Reproductive Freedom Before Roe v Wade* (Chapel Hill: University of North Carolina Press, forthcoming).

<sup>4</sup> "Birth Control League Organized in Indiana," *Garrett Clipper*, February 8, 1932, pg. 2.

peddle false information and dangerous devices that harmed and killed women.<sup>5</sup> Legalization, contraceptive advocates averred, takes “this information out of the hands of the quacks and charlatans and [puts] it within the reach of the thousands of earnest men and women who need it.”<sup>6</sup> For Protestants and Jews alike, access to birth control information and devices was both an issue of maternal health and religious freedom.<sup>7</sup>

By World War II, support for reproductive freedom had become tightly interwoven into Protestant and Jewish religious communities. In church and synagogue newsletters, there were countless notices for sermons on the morality of birth control. Rabbis and ministers in Indiana and nationwide continued to preach the moral rightness of family planning.<sup>8</sup> Birth control advocates regularly gave presentations at synagogues and churches. In premarital interviews with prospective newlyweds and in church and synagogue sponsored family life classes, ministers and rabbis incorporated materials such as *Marriage Counsel in Relation to Planned Parenthood: An Outline for Clergymen*.<sup>9</sup> As Jews asserted the moral obligation to plan families, mainline Protestants reiterated “The right of the child to be wanted, loved, cared for, educated, and trained in the ‘discipline and instruction of the Lord’ (Eph. 6:4).<sup>10</sup> By the 1950s, Protestants and Jews took as axiomatic that birth control was essential to nurturing children’s spiritual and psychological development, maternal health, economic security, and the sanctity of family life.

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<sup>5</sup> “Remarkable Debate on Birth Control,” *The Evansville Press*, June 12, 1925, pg. 11.

<sup>6</sup> “Margaret Sanger May Land in Jail If She Attempts to Stage Her Birth Control Clinic in Indiana” *Fort Wayne Daily News*, July 27, 1916, pg. 3.

<sup>7</sup> “Protestants and Jews Attack Catholic Opposition to Birth Control Program,” *San Bernardino County Sun*, December 16, 1935, pg. 2.

<sup>8</sup> “Birth Control To Be Topic of Rabbi,” *Evansville Courier and Press*, January 15, 1960, pg. 16.

<sup>9</sup> L. Foster Wood and Abraham Stone, *Marriage Counsel in Relation to Planned Parenthood: An Outline for Clergymen*. New York: Planned Parenthood Federation of America, 1944.

<sup>10</sup> “Responsible Parenthood,” *Christian Century*, March 29, 1961, pg. 396-398.

By the late 1950s, mainline Protestant and Jewish advocacy for contraceptive rights coincided with an increasingly assertive advocacy for abortion rights. Two years after the 1965 *Griswold v. Connecticut* decision (381 U.S. 479), which legalized access to contraception for married couples, a Texas born Baptist minister would invoke the decision to reason that, “If the bedroom of the home is sacrosanct in regard to violation by law, how much more so is the ‘uterus of a woman?’” For Reverend Howard Moody, prohibitive abortion laws were nothing less than “an infamous invasion of individual privacy and denial of the freedom of choice.” These violations would be ongoing, Moody warned, causing thousands of women “immeasurable anguish and criminal stigma” until legislators and the courts struck down abortion restrictions.<sup>11</sup>

## **II. Religious Beliefs Underpinned Ecumenical Support for Abortion Rights Before *Roe v. Wade*.**

By 1960, Jewish and Protestant denominations had been advocating for the religious freedom to use contraceptives for decades. A number of Jewish rabbis and mainline Protestant clergy, informed by these earlier contraceptive battles, inspired by tenets of their faith, and guided by their pastoral counseling frameworks, identified abortion restrictions as immoral.

Clergy’s challenge to abortion prohibitions arose in response to the growing enforcement of such laws in the 1940s and 1950s. Previously, many communities had skilled abortion providers who operated with varying degrees of openness. Postwar crackdowns on abortion, however, made these resources harder to access.<sup>12</sup> Clergy and congregants learned from national religious publications like *The Christian Century*, the leading journal of mainline Protestantism, grim facts about abortion restrictions. “[A]rchaic state and church laws,” it editorialized in January of 1961,

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<sup>11</sup> Howard Moody, “Man’s Vengeance on Woman: Some Reflections On Abortion Laws,” *Renewal*, Vol 7 No. 2, February 1967, pg. 6.

<sup>12</sup> Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (Berkeley: University of California Press, 1997).

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“drive nearly a million American mothers each year to abortion mills where approximately 5,000 of them die at the hands of bungling quacks and filthy midwives.”<sup>13</sup> This column, alongside local reporting, contributed to mounting concerns among Jews and Protestants that millions of women were seeking out illegal abortions and countless numbers of these abortion-seekers were being injured or dying.<sup>14</sup>

Through pastoral counseling, clergy also learned that women in their communities pursued dangerous illegal abortions because of the everyday circumstances that led to unwanted pregnancies: contraceptive failures, unplanned sex, sexual violence and changes in life circumstances. A parish parson for twenty-five years, Reverend David G. Colwell supported abortion access and preached the following to his congregation in 1969: “I can testify to you that this is a serious problem for more persons like most of us than you might think.” Colwell had “seen the agony of marriage when an unexpected pregnancy occurs” and reported that he had “sat with young unmarried people, both male and female, as they tried to decide whether they should become married, whether the child should be carried to term and put up for adoption or kept, or whether they should seek release by finding an illegal abortionist.”<sup>15</sup>

Not only did faith leaders bear witness to these heart-wrenching decisions, in accordance with their faith, they tried to help women access safe abortion services. The editors of *The Christian Century* called for a “relaxing of those abortion laws which compel the bearing of children conceived through rape, incest and irresponsibility by minor or mentally incompetent girls.”<sup>16</sup> These religious

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<sup>13</sup> “Abortion Laws Should Be Revised,” *Christian Century* 78, no. 2 (January 11, 1961)).

<sup>14</sup> See for example: “Estimates Number of U.S. Abortions,” *Palladium-Item* (Richmond, Indiana), May 14, 1960, pg. 15.

<sup>15</sup> David G. Colwell, “Toward a View of Life (A sermon stimulated by the pending legislation relating to abortion),” Plymouth Congregational Church, Seattle, February 16, 1969.

<sup>16</sup> “Abortion Laws Should Be Revised,” *Christian Century* 78, no. 2 (January 11, 1961).

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leaders wanted compassionate abortion laws that accounted for the circumstances of conception, not just existential threats to a pregnant woman's life. Similarly, the National Council of Churches (an organizing body for mainline Protestants) issued a statement sanctioning abortion "when the health or life of the mother was at stake." The term "health" was capacious and included physical and mental health. The NCC, in other words, acknowledged the social circumstances that led women to seek abortions and called upon Christian scholars to study the practice of abortion and its "ethical complexities."<sup>17</sup>

Individual congregations, regional denominational bodies and ecumenical study groups followed the lead of the *Christian Century* and the NCC. By the middle of 1962, the United Presbyterian General Assembly adopted a report calling for an "enlightened Christian attitude toward sexual and family relations" and encouraged Presbyterians to support "uniform state laws defining and regulating therapeutic abortion."<sup>18</sup> Notably, Presbyterians asked for abortion law to be responsive to women's concrete situations declaring that, "each case concerning whether to give priority to either the mother or child when a medical problem develops must be judged separately." We "sweated out the Bible study," recalled the Reverend George P. Morgan, a Presbyterian minister, who concluded that, "there is not a single Biblical statement condemning, forbidding or even warning against it."<sup>19</sup> Concurrently, the Episcopal Church's Department of Christian Social Relations pronounced that a decision to have an abortion, "is probably decided among Episcopalians on the basis of the moral judgment of the individual, her family, the parish priest and her physician."<sup>20</sup>

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<sup>17</sup> "Responsible Parenthood," *National Council of Churches of Christ*, February 28, 1961.

<sup>18</sup> "United Presbyterians in Action," *The Christian Century*, June 13, 1962, pg. 750.

<sup>19</sup> George P. Morgan, "Reflections on the Clergy Consultation Service," *Church and Society*, November/December 2002, pg. 4-6.

<sup>20</sup> Quoted in: Lawrence Lader, *Abortion*. (Bobbs-Merrill, 1966), Pg. 99.

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Jewish rabbis joined the ecumenical conversation about the moral rightness of abortion in the early 1960s. Citing centuries of Jewish thought, they explained that abortion was permitted and that the mother's health and wishes took priority.<sup>21</sup> For example, when *The Chicago Sentinel* polled Rabbis about their views on abortion in 1962, Jewish newspapers across the country republished their proclamation that "Jewish religious law sanctions abortion when the mother's life or mental well-being is at stake."<sup>22</sup> Two years later, Rabbi Maurice Eisendrath, the head of the Union of American Hebrew Congregations, explained Judaism's support for abortion and contraception: "Then let each of His children be conceived in love and delivered—not unwanted—into the arms and hearts of their eager parents... Make child-bearing the most precious and joyous *choice* of a mother's and father's love, make parenthood voluntary, redeem so holy a responsibility as the creation of a human being, a child of God, from being the accidental by-product of passion or lust, and we will pave the way toward the speedier solution of innumerable of the challenging problems of our time."<sup>23</sup>

Protestants and Jews understood restrictive abortion laws as emanating from Catholic traditions and advocated for abortion rights as part of securing religious freedom.<sup>24</sup> For example, in 1967, Rabbi Joachim Prinz, representing the Conference of Presidents of Major American Jewish Organizations, emphasized Judaism's perspective on fetal life: "We are discussing the legalization of the removal of a fetus, a nonperson, an undeveloped organism." For Prinz, abortion

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<sup>21</sup> See Daniel C. Maguire, *Sacred Rights: The Case for Contraception and Abortion in World Religions*. (Oxford University Press, 2003).

<sup>22</sup> "Chicago Rabbis Sanction Abortion When Mother's Life is Endangered," *Jewish Telegraphic Agency Daily News Bulletin*, September 12, 1962, pg.4.

<sup>23</sup> Maurice Nathan Eisendrath, *Can Faith Survive?: The Thoughts and Afterthoughts of an American Rabbi*. New York: McGraw-Hill, 1964.

<sup>24</sup> "Abortion Laws Should Be Revised," *Christian Century* 78, no. 2 (January 11, 1961).

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reform would offer “protection of human beings against untold misery” while calling contemporary laws “outmoded, outdated and unethical.”<sup>25</sup>

While most Jewish and Protestant religious groups (including the Southern Baptist Convention and National Association of Evangelicals) initially called for abortion law reform—carving small exceptions in the law—the scope of demands expanded in many denominations.<sup>26</sup> In 1963, Unitarian Universalists sanctioned abortion access for reasons “physical, psychological, mental, spiritual, or economic.” Equally, they decried “the laws which narrowly circumscribe or completely prohibit termination of pregnancy by qualified medical practitioners.”<sup>27</sup> Reverend Robert West elaborated this Unitarian viewpoint, describing restrictive abortion laws as presuming “unverifiable theological speculation about ‘soul’ as of primary importance above human dignity and spirituality and worth and freedom of individual choice.”<sup>28</sup> In Indiana, Unitarian fellowships studied abortion issues and also advocated on behalf of abortion rights.<sup>29</sup>

Religious women also understood their right to access abortion in religious terms. In 1965, the National Federation of Temple Sisterhoods, representing 615 Reform Jewish congregations, issued a statement calling for the dissemination of birth control information and the liberalization of abortion laws. The rationale of the NFTS was plain: “... we believe planned parenthood is, for those who desire it, a vital contribution to responsible family life.” In calling for greater abortion access, Reform Jewish women insisted that abortion laws should make a “distinction between pregnancies which occur voluntarily and those which happen involuntarily, either through force

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<sup>25</sup> Edith Evans Asbury, “Abortion Called Moral Question,” *New York Times*, Feb 11, 1967, pg. 18.

<sup>26</sup> Linda Greenhouse, and Reva B. Siegel, “Before (and After) *Roe v. Wade*: New Questions About Backlash.” *The Yale Law Journal* 120, no. 8 (2011): 2028–87.

<sup>27</sup> Unitarian Universalist Association, “Reform of Abortion Statutes,” July 1, 1963.

<sup>28</sup> Kay Fish, “The Religions, Their Stand: Is Abortion Ever Right?” *Democrat and Chronicle*, December 7, 1965, pg. 24.

<sup>29</sup> “Unitarian Fellowship,” *Journal and Courier* (Lafayette, Indiana), January 3, 1970, pg. 6.



or otherwise.” “Social patterns are challenging the purity and sanctity of family life,” explained Daisy Monsky, a past-president of NFTS. “It is because we want to preserve it that we have taken up these matters,” she stated.<sup>30</sup> Other women’s religious organizations like the Young Women’s Christian Association passed similar resolutions and local YWCA branches spearheaded lobbying and abortion referral efforts.<sup>31</sup> Again, Indiana women were active participants in these conversations.<sup>32</sup> And Unitarian women continued to enunciate a religious rationale for abortion. “Motherhood by choice is an affirmation of life,” declared a 1971 statement by the Unitarian Universalist Women’s Federation.<sup>33</sup>

Hoosiers actively participated in religious efforts to lift abortion restrictions. In 1967, the state legislature voted to modify the state’s abortion law by allowing for abortions in case of rape, incest or when a pregnancy endangered the life of the pregnant woman. Dr. Irving Rosenbaum, a noted pediatrician and devout Jewish leader co-authored the bill with support from the Jewish community.<sup>34</sup> For example, Maurice Davis, Rabbi for the Indianapolis Hebrew Congregation, blessed the legislation in the pages of *The Indiana Jewish Post and Opinion* where he explicated the Jewish viewpoint on abortion.<sup>35</sup> The Indiana Council of Churches, which represented mainline Protestant denominations, also endorsed the legislation.

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<sup>30</sup> “Birth Control, Liberalized Abortion Laws Supported by Jewish Women,” *Fort Worth Star-Telegram*, November 19, 1965, pg. 3.

<sup>31</sup> “YWCA Group Urges Liberal Abortion Laws,” *The Tampa Times*, April 28, 1967, pg. 9.

<sup>32</sup> Preston F. Kirk, “Muncie Women Attend YWCA National Event,” *The Star Press*, April 12, 1970, pg. 21.

<sup>33</sup> “Unitarian Women Will Hold Abortion Law Repeal Parley,” *The Sacramento Bee*, January 17, 1971, pg. 84.

<sup>34</sup> “Dr. Irving Rosenbaum Dies; Indianapolis Physician 33 Years,” *Indianapolis Star*, Feb. 13, 1979.

<sup>35</sup> Rabbi Maurice Davis, “The Rabbi Writes a Letter on The Abortion Bill,” *Indiana Jewish Post and Opinion*, March 3, 1967, pg. 8.

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Even with growing advocacy from clergy, many legislatures held the line against loosening restrictions, especially in states where Catholic bishops wielded significant political power. In New York State, the failure of abortion reform bills in two consecutive legislative sessions prompted a group of Protestant and Jewish clergy to mobilize. In May 1967, these ecumenical faith leaders announced the formation of a group called the Clergy Consultation Service on Abortion (CCS) and declared they would offer abortion counseling and referrals to any woman who asked for it. Within five years, the CCS would be active in approximately 40 states and would enlist thousands of rabbis and ministers as well as dissident priests and nuns. Its New York City leader, Howard Moody, explained the rationale for the CCS: amidst a public health crisis, in which backstreet butchers were mutilating and killing women, “we believe that it is our pastoral responsibility and religious duty to give aid and assistance to all women with problem pregnancies.”<sup>36</sup>

The theology of the Clergy Consultation Service was in lockstep with Jewish and Protestant beliefs about abortion. Contrary to the beliefs of conservative Catholic leaders, the CCS affirmed “that there is a period during gestation when, although there may be embryo life in the fetus, there is no living child upon whom the crime of murder can be committed.”<sup>37</sup>

These theological perspectives reflected national conversations. In Dallas, Texas, the Methodist minister J. Claude Evans sermonized that he did not believe that “the fetus is to be treated as a full human self.” A Presbyterian colleague in Florida, Charles Landreth, preached the same from the pulpit of First Presbyterian Church in Tallahassee: “Many of the present restrictive abortion laws are based on religious dogmas which hold that the soul enters the fetus upon

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<sup>36</sup> Edward B. Fiske, “Clergymen Offer Abortion Advice,” *New York Times*, May 22, 1967, 1.

<sup>37</sup> “Joint statement,” February 24, 1967, folder 2, box 1, series 1, Bernard C. Smith Papers, 1963-1969, M.E. Grenadier Special Collections and Archives, State University of New York at Albany.

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conception.” “Protestants,” he reminded his colleagues, “do not share with our Roman Catholic brethren in the belief in the instant animation of the fetus.” Evans and Landreth concurred further. In the spirit of a Christianity that seeks a “life of promise...for all, child and parent,” Evans explained to his Texas congregation, “children must be wanted, must know they are wanted, and in receiving love learn to respond in love.” Evans concluded his sermon by calling for his congregation to work “removal of the laws that make aseptic, medically-sponsored abortion a criminal offense.” The goal, he explained, was to enable reproductive choice. Only once “government [is] out of our bedrooms” he declared, would “our choices—for marriage, or for a home for unwed mothers, or for a legal abortion... be free, moral choices under God.”<sup>38</sup>

The inability of abortion rights proponents to loosen restrictions in Indiana prompted faith-based abortion rights activism including the founding of an Indiana branch of the CCS. After Governor Roger Branigin vetoed the 1967 abortion reform proposal, Protestants and Jews protested. Reverend Richard West, a UCC minister, implored: “Let people make their own decisions.”<sup>39</sup> Demonstrating a commitment to protecting their religious freedoms, it was clergy, alongside doctors, who brought suit against the state of Indiana, challenging its abortion law. In spring of 1970, three Indianapolis clergymen (a Unitarian, an Episcopalian and a Jew) sought to remove “any criminal penalty for performing, obtaining or advising to obtain an abortion.”<sup>40</sup> In

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<sup>38</sup> J. Claude Evans, “The Problem of Unwanted Pregnancies” April 12, 1970. Sermons, 1932-2001, Box 8, Folder “The Problem of Unwanted Pregnancies,” J. Claude Evans Family Papers, David M. Rubenstein Rare Book & Manuscript Library, Duke University.

<sup>39</sup> Ann Carey, “Priests, Ministers Trade Views on Abortion, Killing, Natural Law,” *The Evansville Press*, June 3, 1967, pg. 4.

<sup>40</sup> “Group Challenging State Abortion Laws,” *The Evansville Press*, March 26, 1970, pg. 30.; Patricia Swanson, “Why Some Won’t Accept Pregnancy,” *The Evansville Press*, December 5, 1970, pg. 1.

their filing, the clergy asserted that the laws intruded on the “minister-parishioner relationships” and restricted the “free practice of religion.”<sup>41</sup>

Against this backdrop, faith leaders formed an Indiana branch of Clergy Consultation Service on Abortion (ICCS). Organized under the banner “Freedom to Choose,” ICCS was active in 23 Indiana towns and cities.<sup>42</sup> Baptists, Congregationalists, Methodists, Presbyterians, and Unitarian ministers all joined the ICCS in support of the ecumenical group’s twofold mission: to seek the “cheapest, and best possible medical services” and to “help women through what some have called ‘their deepest crisis.’”<sup>43</sup>

Through the ICCS, clergy put their religious beliefs about abortion rights into action: they counseled thousands of women and provided them the best information possible on where to obtain abortions; they participated in a network that vetted physicians and clinics to ensure Indiana women had the safest and most affordable options possible; and they distributed bumper stickers that stated “Legalize Abortion” in the hopes of making abortion increasingly local and accessible.<sup>44</sup>

### **III. In the Decades After *Roe v. Wade*, Devout Hoosiers Continued to Defend a Religious Right to Abortion as a Matter of Faith.**

In the immediate months after *Roe v. Wade*, 410 U.S. 113 (1973), the Indiana CCS continued to help abortion seekers find local or out-of-state medical help.<sup>45</sup> It prevailed upon Indiana doctors to offer abortions so that women could have safe, local and legal options.<sup>46</sup> These

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<sup>41</sup> “Role of ‘Friend’ Studied in Fight on Abortion Law,” *Indianapolis Star*, March 27, 1970, pg. 16.

<sup>42</sup> Olga Curtis, “Clergymen Direct Women to Qualified Practitioners,” *Indianapolis Star*, June 3, 1970, pg. 12.

<sup>43</sup> ICCS, “Unwanted Pregnancy,” Box 82, Folder “Indiana,” Judson Memorial Church Archive, Fales Library and Special Collections, New York University.

<sup>44</sup> ICCS, “Memo,” December 26, 1972, Box 82, Folder “Indiana,” Judson Memorial Church Archive, Fales Library and Special Collections, New York University.

<sup>45</sup> “Local Groups Plan Program on Abortions,” *The Evansville Press*, September 18, 1973, pg. 20.

<sup>46</sup> “Abortion Referrals Rise After Ruling,” *The South Bend Tribune*, March 28, 1973, pg. 13.

actions reflected a broader national pattern. Across the country, clergy groups worked with Planned Parenthoods, founded their own abortion clinics, and continued to make abortion services accessible.<sup>47</sup>

Religious leaders also defended *Roe*. In September 1974, Protestant and Jewish representatives formed the Indiana Religious Coalition for Abortion Rights (IRCAR) in order to “preserve the legal option of abortion for Indiana women.” The co-chairs of the group were Reverend Elmer W. Bostow, a Presbyterian minister and founder of the ICCS, and Enid Brodsky, a member of the National Council of Jewish Women. The state’s coordinator, Carol Lich, was a Unitarian layperson.<sup>48</sup> A number of religious denominations and women’s religious groups supported this effort to preserve abortion access, including the United Presbyterian Church; National Council of Jewish Women of Indianapolis; the Unitarian-Universalist Women’s Federation; the Unitarian-Universalist Legislative Conference; Temple Sisterhood of South Bend; and the Indianapolis Hebrew Congregation.<sup>49</sup>

After *Roe*, religious leaders in Indiana continued to understand reproductive freedom as religious freedom. Reverend Ivan Horn, chair of IRCAR, underscored this point in 1976, declaring: “During this bicentennial year, we of the Indiana Religious Coalition for Abortion Rights pledge ourselves to the preservation of this rich American heritage of the freedom of religion.” Two years after its foundation, IRCAR drew widespread support from Jewish, Catholic and Protestant denominations and women’s religious groups including the Unitarian Universalist Women’s Federation; the Unitarian Universalist Legislative Conference; Catholics for a Free

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<sup>47</sup> See: Sexing History, “Season 4, Episode 1: A Sacred Calling,” December 20, 2022. <https://www.sexinghistory.com/episode-41>.

<sup>48</sup> Indiana Forms Coalition for Women’s Rights, *The Vidette-Messenger* (Valparaiso), September 23, 1974, pg. 3.

<sup>49</sup> “New Abortion-Rights Coalition is Formed,” *The Indianapolis Star*, September 11, 1974, pg. 29.

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Choice; the Indiana Council of Churches; the National Council of Jewish Women, Indianapolis; the Temple Sisterhood, South Bend; the Indiana Jewish Community Relations Council; and B'nai B'rith Women, Indianapolis. This broad based support reflected the breadth and depth of sincerely held religious beliefs about a right to abortion access.<sup>50</sup>

Concurrently, Jewish groups in Indiana maintained their steadfast and specific support for abortion rights.<sup>51</sup> *The Indianapolis Jewish Post* continued to inform its readers about the Jewish theological traditions sanctioning abortion. A 1976 article, for example, written by the editor of the paper clarified that Jewish law mandates therapeutic abortion: “The Jewish tradition also does not limit its definition of what constitutes a therapeutic abortion to physical danger to the mother. Potentially hazardous psychological effects have also been considered sufficient cause to allow abortion as a therapeutic measure.”<sup>52</sup>

By defending the right to abortion on First Amendment grounds and asserting that such rights allowed Jewish women to terminate a pregnancy according to their own religious conscience, *The Post's* article reflected the mainstream of Jewish thought. In 1976, American Jewish Congress' leaders supported reproductive rights, on the grounds that the abortion issue was “fundamental” to “privacy and the integrity of the Jewish soul”<sup>53</sup> That same year, Leo Pfeffer, the founder of the Commission of Law and Social Action of the AJC, argued before the House of Representatives' Subcommittee on Civil and Constitutional Rights that proposed “Human Life Amendments” aimed at legislatively invalidating the right to abortion infringed upon the First Amendment rights

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<sup>50</sup> “Reaffirms Abortion Stand,” *The Vidette Messenger* (Valparaiso), January 17, 1976.

<sup>51</sup> “Abortion Rights to Be Topic of Council Meeting Sunday,” *The Jewish Post* (Indianapolis), January 10, 1975.

<sup>52</sup> Terri Kiser, “Jews' Views on Abortion Not Dictated by Tradition,” *The Jewish Post* (Indianapolis), March 19, 1976.

<sup>53</sup> Minutes of Executive Committee of AJ Congress March 23<sup>rd</sup>, 1976, AJHS, AJCong I-77, box 833 folder 26.

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of American Jews. Pfeffer clarified that such violations also infringed upon the free exercise of American Jews by burdening those who determined, in consultation with their religious leaders, that terminating their pregnancies would be the most ethical course of action.<sup>54</sup>

In the decades after *Roe*, the view that abortion restrictions had the potential to violate First Amendment free exercise rights was nearly universal among American Jews. The National Jewish Relations Advisory Council, an umbrella organization representing all the major American Jewish religious and political organizations, released multiple statements in support of reproductive freedom. The only constituent organizations that dissented from the blanket statements in support of legal abortion were the Orthodox Union (modern Orthodox) and Agudath Israel (Ultra-Orthodox), who then, as now, represented only 10% of the American Jewish population. Notably, the Orthodox Union's dissenting statements – while never going so far as to support unfettered access to legal abortion – nonetheless indicated that “situations in which maternal health, rather than maternal life are involved pose complex problems requiring rabbinic authority who will review the medical data and render advice in accordance with Jewish law.” By 1986, the Orthodox Union noted that “the question of abortion is a sensitive one and personal decisions in this area should be made in consultation with recognized halachic authorities.”<sup>55</sup>

In the 1980s, antiabortion organizing intensified. Even as some antiabortion organizations pursued a constitutional amendment recognizing fetal personhood and prohibiting all abortions,

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<sup>54</sup> “Statement of Leo Pfeffer to the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on Proposed Constitutional Amendments Dealing with Abortion,” March 24<sup>th</sup>, 1976, AJHS, American Jewish Congress papers I-77, box 225 folder 12, 4, 7.

<sup>55</sup> For all of these statements and dissents, see “NJCRAC Joint Program Plan 1974-1975,” AJHS, NJCRAC I-172, box 2 folder 4 page 42; “NJCRAC Joint Program Plan 1976-1977,” AJHS, NJCRAC I-172, box 2 folder 8 page 26; “NJCRAC Joint Program Plan 1984-1985,” AJHS, NJCRAC I-172, box 2 folder 9 page 56; NJCRAC Joint Program Plan 1986-1987,” AJHS, NJCRAC I-172, box 2 folder 9, page 36.

some extremists, frustrated by the pace of change, began attacking clinics and doctors, firebombing facilities, kidnapping doctors, and writing manifestos justifying violence against clinicians.<sup>56</sup> By the mid-1980s, antiabortion lawyers had changed course, focusing on strategies to shape judicial nominations and reverse *Roe v. Wade*.<sup>57</sup>

As the fight to reverse *Roe v. Wade* gained momentum, an ecumenical coalition of faiths and religious organizations maintained their ongoing support for abortion access and understood their efforts as protecting religious freedom.<sup>58</sup> The Indiana Council of Churches adopted a “Message on Abortion Rights” in which it opposed “any constitutional amendment prohibiting abortion.”<sup>59</sup>

The idea that reproductive freedom was a religious freedom issue continued to be held by American Jews in Indiana and across the United States. In 1980, in *Harris v. McRae*, the Supreme Court upheld the federal Hyde Amendment, a ban on Medicaid reimbursement for abortion, and rejected several arguments raised by people of faith. The majority concluded that the Hyde Amendment did not violate the Establishment Clause of the Fifth Amendment because the Hyde Amendment was more “a reflection of ‘traditionalist’ values towards abortion” than “an embodiment of the views of any particular religion.”<sup>60</sup> The Court further dismissed a claim based

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<sup>56</sup> See Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015), 32-50. On the escalating violence of the 1980s, see David Cohen and Krysten Connen, *Living in the Crosshairs: The Untold Story of Antiabortion Terrorism* (New York: Oxford University Press, 2016).

<sup>57</sup> See Mary Ziegler, *Abortion and the Law: Roe v. Wade to the Present* (New York: Cambridge University Press, 2020), 90-98.

<sup>58</sup> On anti-abortion violence and terrorism see: Karissa Haugeberg, *Women Against Abortion: Inside the Largest Moral Reform Movement of the Twentieth Century*, (Urbana: University of Illinois Press, 2017); and Cohen and Connon, (2016), n. 65.

<sup>59</sup> “Council of Churches O.K. Abortion Rights,” *Rushville Daily Republican*, June 12, 1981, pg. 8.

<sup>60</sup> *Harris v. McRae*, 448 U.S. 297, 319-320 (1980).



on the Free Exercise Clause because the plaintiffs challenging the Hyde Amendment lacked standing.<sup>61</sup>

Even when the *McRae* decision might have disincentivized them from doing so, American Jews continued to argue that abortion restrictions burdened their religious free exercise. In the ensuing decades, the American Jewish Congress protested abortion restrictions on the grounds that “adherents of faiths which permit (or sometimes even require) abortion as a moral choice would not be permitted to make decisions according to the teachings of their faith.”<sup>62</sup> This free exercise-based justification for abortion law animated an amicus brief submitted in response to *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), a case that was coordinated by Planned Parenthood and the ACLU and to which nearly all the constituent organizations of the NJCRAC signed on.<sup>63</sup> A biannual survey of the Indianapolis Jewish community showed that while local opinion varied on a whole host of political issues “Abortion was about the only issue that found Indianapolis Jews as liberal as ever.”<sup>64</sup>

In Indiana, an ecumenical coalition continued to support a religious right to contraception and abortion in theology and in practice. The historical record is replete with examples: In 1986, the Unitarian Universalist Church of Indianapolis hosted a pro-choice gathering marking the 13th anniversary of *Roe*.<sup>65</sup> As the antiabortion group Operation Rescue blockaded clinics and accumulated thousands of arrests in the 1980s, Reverend Cam Miller, an Episcopal minister in

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<sup>61</sup> *Id.* at 320-321.

<sup>62</sup> American Jewish Congress Policy on Abortion Coalitions and Demonstrations, December 27, 1989, AJHS, AJCong I-77, box 226 folder 3, 2-3.

<sup>63</sup> Memo to Sign-on Coordinators, January 25<sup>th</sup>, 1989, AJHS, American Jewish Congress I-77, box 575 folder 2.

<sup>64</sup> Tom Rose, “Taking the Jewish Community’s Pulse,” *Indianapolis Star*, August 14, 1996, pg. 15.

<sup>65</sup> Ruth Holladay, “Pro-choice group hails abortion anniversary,” *Indianapolis Star*, January 22, 1986, pg. 7.

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Indianapolis, joined with other volunteers to escort women so they could safely get inside of clinics.<sup>66</sup> Fourteen years after *Roe*, in 1987, as antiabortion protesters marched on Washington in protest, the Religious Coalition for Abortion Rights and their supporters formed a symbolic “wall of separation” in front of the Supreme Court building in order to show “their conviction that efforts to overturn *Roe vs. Wade* would infringe on religious liberty.”<sup>67</sup> By 1990, the Covenant for Freedom of Choice, an Indiana reproductive rights group that was “Religiously Pro-Choice,” lobbied legislators.<sup>68</sup>

As sustained attacks on abortion rights continued into the 21st century, religious Hoosiers continued to assert a religious right to abortion in the name of religious freedom. In 2004, Indiana’s Religious Coalition for Abortion rights reconstituted as the Indiana Religious Coalition for Reproductive Choice (IRCRC). Members and supporters of IRCRC included American Baptists; Catholics; Disciples of Christ; Episcopalians; Methodists; Presbyterians; Reform and Conservative Jews; Congregationalists; and Unitarian Universalists. The group’s ongoing and varied educational and advocacy activities can be summarized in the three words of IRCRC’s slogan: “Faith and Freedom.” This slogan, “Faith and Freedom,” and IRCRC’s official motto, “Pro-Faith, Pro-Family, Pro-Choice” are deeply rooted in Indiana’s history and offer an urgent reminder that many Hoosiers continue to hold sincere religious beliefs in support of abortion and contraception access.

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<sup>66</sup> Kathy Whyde, “Pro-Choice Minister Jeered as Escort at City Clinic,” *Indianapolis Star*, October 29, 1988, pg. 1, 25.

<sup>67</sup> “Abortion Decision Recalled,” *Pharos-Tribune*, January 22, 1987, pg. 7.

<sup>68</sup> “To Our Legislators and Governor Bayh,” *Indianapolis Star*, February 21, 1990, pg. 8.; “Pro-Choice,” *Indianapolis Star*, September 29, 1990, pg. 12.

## CONCLUSION

The ability to practice family planning and abortion is a religious obligation and sacred choice for communities and individuals of faith. American history in general and Indiana's history in particular clearly demonstrate the longstanding faith-based practice and belief surrounding birth control and abortion among Jews and mainline Protestants. Indiana's Religious Freedom Restoration Act provides broad and flexible protection for the sincere religious objections of people of faith. To question the sincerity of the plaintiffs in this case is to ignore the historical record, in this state and beyond it, and to insult the profound commitments of countless people of faith.

RESPECTFULLY SUBMITTED this 2nd day of March 2023.

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