State of Indiana
Hamilton County Superior Court 1

Indiana Family Institute, Inc.; Indiana Family Action, Inc.; and **The American Family Association of Indiana, Inc.**; *Plaintiffs* *v.* **The City of Carmel, Indiana; City Attorney for the City of Carmel, Indiana; Douglas Haney**, in his official capacity as City Attorney for the City of Carmel, Indiana; **The City of Indianapolis-Marion County, Indiana; The City of Indianapolis-Marion County Equal Opportunity Advisory Board; Jason Sondhi**, in his official capacity as Chairman of the Indianapolis-Marion County, Indiana, Equal Opportunity Advisory Board; and **Ronald Covington, Sarah Dillinger, Janai Downs, Joseph Feeney-Ruiz, Doug Huntsinger, Remo Mezzetta, Jason Sprinkle, Gregory Stowers, Sue Tempero, Tod Tolson, Alice Watson, Erica Williams**, and **Marshawn Wolley**, in their official capacities as members of the City of Indianapolis-Marion County Equal Opportunity Advisory Board; *Defendants*	**Civil Case No.** 29D01-1512-MI-10207

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs complain as follows:

Introduction

1. This case challenges (**I**) the nondiscrimination ordinance of the City of Carmel ("Carmel Ordinance") and Indianapolis-Marion County ("Indianapolis Ordinance") for violating RFRA and state and federal constitutions protections; and (**II**) the amendment to the Indiana Religious Freedom Restoration Act ("RFRA")[1] that provides an Exclusion (with Exceptions) that excludes

[1] As used herein, "**RFRA**" refers to Indiana Code § 34-13-9; "**Exclusion**" refers to Indiana Code § 34-13-9-0.7, which excludes "providers" from RFRA's religious-free-exercise protection when de-

certain persons from RFRA's protection and is unlawful under the Indiana and federal constitutions.

Jurisdiction and Venue

2. This Court has jurisdiction under Ind. Code §§ 33-29-1-1.5 and 34-13-9-10 and 42 U.S.C. § 1983.Venue is proper under Ind. T.R. 75(A)(5) and Ind. T.R. 75(A)(10).

3. Declaratory relief is authorized by Ind. Code §§ 34-14-1-1 and 34-13-9-10, 42 U.S.C. § 1983, and Ind. T.R. 57.

Parties

4. Plaintiff Indiana Family Institute, Inc. ("IFI") was organized in 1989 and serves as a non-partisan public education and research organization recognized by the Internal Revenue Service as a 501(c)(3) corporation. IFI has professional staff, a Board of Directors, and numerous volunteers. IFI is located in Carmel, Indiana.

5. Plaintiff Indiana Family Action, Inc. ("IFA") was organized in 2005 and serves as the advocacy arm of IFI. The Internal Revenue Service recognizes IFA as a 501(c)(4) corporation. IFA is located in Carmel, Indiana.

6. Plaintiff American Family Association of Indiana, Inc. ("AFA") was organized in 1993 and serves as a non-partisan, non-profit organization recognized by the Internal Revenue Service as a 501(c)(3). AFA has a professional staff, a Board of Directors, and volunteers. AFA is located in Indianapolis, Indiana.

7. The City of Carmel, Indiana enacted a "City Nondiscrimination Policy" which is enforced

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when declining to offer services, public accommodations, employments, etc. on defined bases; and "**Exceptions**" refers to Indiana Code § 34-13-9-7.5, which provides limited exceptions to its broad definition of "provider" (sweeping in individuals and groups not excepted).

by the city attorney of the City of Carmel, Indiana. Carmel City Code, § 6-8.

8. The City Attorney for the City of Carmel, Indiana enforces the "City Nondiscrimination Policy." Carmel City Code, § 6-8.

9. Defendant Douglas Haney is the city attorney for Carmel, Indiana. As the city attorney, Haney prosecutes city ordinance violators, including those that violate the "City Nondiscrimination Policy." Carmel City Code, § 6-8. He is sued in his official capacity as city attorney.

10. The City of Indianapolis-Marion County, Indiana enacted a "Human Relations; Equal Opportunity" ordinance which is enforced by the City of Indianapolis-Marion County Equal Opportunity Advisory Board. MCC § 581.

11. The City of Indianapolis-Marion County Equal Opportunity Advisory Board enforces the "Human Relations; Equal Opportunity" ordinance. MCC § 581.

12. Defendant Jason Sondhi is the Chairman[2] of the City of Indianapolis-Marion County Equal Opportunity Advisory Board ("Board"). MCC § 581-202. As Chairman, he may "refer any complaint to the state civil rights commission for proceedings in accordance with the Indiana Civil Rights Law or the Indiana Fair Housing Law." *Id.* at § 581-409. "[A]fter receipt of a complaint . . . the administrator shall initiate an investigation of the alleged discriminatory practice charged in the complaint." *Id.* at § 412(a). "[T]he administrator [may] endeavor to eliminate the alleged discriminatory practice through a conciliation conference." *Id.* at § 412(c). He is sued in his official capacity as Chairman.

13. Defendants Ronald Covington, Sarah Dillinger, Janai Downs, Joseph Feeney-Ruiz, Doug

[2] Marion County Code ("MCC") § 581 provides for an administrator; but the Equal Opportunity Advisory Board's website identifies none. *See* www.indy.gov/eGov/City/OCC/DEO/PAges/about.aspx. Plaintiffs' counsel contacted the Board's attorney, Maxine Russell, who indicates there is a chairperson, not an administrator. Plaintiffs believe the chairperson functions as administrator, but if the Board advises otherwise, Plaintiffs would amend their complaint accordingly.

Hutsinger, Remo Mezzetta, Jason Sprinkle, Gregory Stowers, Sue Tempero, Tod Tolson, Alice Watson, Erica Williams, and Marshawn Wolley are members of the City of Indianapolis-Marion County's Board. The Board oversees the Office of Equal Opportunity, investigates claims of discrimination within Marion County, and carries out public policy as stated in the Indiana Civil Rights Law and the Indiana Fair Housing Act. MCC § 581-301. The Board has authority to "institute legal proceedings for enforcement of any written agreement or undertaking executed . . . ." *Id.* at § 412(c). The Board members are sued in their official capacities as Board members.

Legal Context

14. The challenged **Carmel Ordinance** is titled "City Nondiscrimination Policy." Carmel City Code ("Carmel Code")§ 6-8.[3]

15. The Carmel Ordinance states, Carmel Code § 6-8:

> No person, corporation, partnership, company, or other individual or entity located within, or conducting business within, the City's corporate limits shall discriminate against any other person in the provision of and/or opportunity to participate in or enter into a place of business, obtain housing, use public accommodations, obtain an education, obtain and maintain employment, enter into a contract, and/or participate in or obtain any program, service, or amenity provided to the general public on the basis of the latter's race, color, religion, national origin, gender, disability, sexual orientation, gender identity or expression, family or marital status, ancestry, age, and/or veteran status.

16. The Carmel Ordinance, Carmel Code § 6-8, provides that the nondiscrimination policy shall not apply to:

> (1) Religious worship and clergy while engaged in religious duties or activities; however, business activities by religious institutions or clergy are not excepted;
> (2) A not-for-profit membership club organized exclusively for fraternal or religious

[3] Carmel's website provides links to the city's codes and ordinances at www.carmel.in.gov/index.aspx?page=205. As of December 8, 2015, Carmel's new nondiscrimination policy is not posted in the "Carmel City Code" at the link provided, http://library.amlegal.com/nxt/gateway.dll/Indiana/carmel/cityofcarmelcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:carmel_in. The Carmel Ordinance is to be codified at Carmel Code § 6-8.

purposes and/or any not-for-profit social club that is not open to the general public, so long as the same is exempt from taxation under the Internal Revenue Code, as amended;
(3) Any persons or property expressly exempted under Indiana Code § 22-9 *et seq.*,[4] Indiana Code 22-9.5 *et seq.*,[5] or any other applicable and binding law or court decisions;
(4) A private residence or private gathering not open to the general public;
(5) The maintenance of separate restrooms or dressing rooms for the exclusive use of persons of one gender;
(6) The hiring or referral for employment of a person for a job position on the basis of sex, religion, and/or age in those certain instances where the same are lawful bona fide occupational qualifications for the job position at issue.

17. Violators of the Carmel Ordinance face the following substantial burdens for noncompliance:

> [I]n addition to any fines, penalties, and other terms and conditions imposed by any federal, state, or county court or administrative agency of competent jurisdiction, be subject to a fine of up to Five Hundred Dollars ($500.00), plus reasonable attorney fees and costs, for each such violation, each act of discrimination against a person and each day during which an act of discrimination continues constituting a separate violation.

18. The challenged **Indianapolis Ordinance** is titled "Human Relations; Equal Opportunity." MCC § 581.[6]

19. The Indianapolis Ordinance intends, MCC § 581-101(b)(5),

> [t]o provide all citizens of the city and county equal opportunity for education, employment, and access to public accommodations without regard to race, religion, color, disability, sex, sexual orientation, gender identity, familial status, national origin, ancestry, age, or United States military service veteran status.

20. The Indianapolis Ordinance applies, *id.* at § 581-401,

> to any discriminatory practice . . . which relates to:
> (1) Acquisition of real estate;
> (2) Employment;

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[4] Ind. Code § 22-9 is Indiana's Civil Rights Law.

[5] Ind. Code § 22-9.5 is Indiana's Fair Housing Law.

[6] Available at https://www.municode.com/library/in/indianapolis_-_marion_county/codes/code_of_ordinances?nodeId=TITIIIPUHEWE_CH581HUREEQOP.

(3) Education controlled by any public board or agency; or
(4) Public accommodations.

21. In the Indianapolis Ordinance, "*[d]iscriminatory practice* means and includes . . . [t]he exclusion from or failure or refusal to extend to any person equal opportunities or any difference in the treatment of any person by reason of race, sex, sexual orientation, gender identity, religion, color, national origin or ancestry, disability, age, or United State military service veteran status." *Id.* at § 581-103(b).

22. In the Indianapolis Ordinance, "*[p]ublic accommodation* means an establishment which caters to or offers its services, facilities or goods to the general public." *Id.*

23. The Indianapolis Ordinance exempts, *id.* at § 581-404:

> (a) any non-profit corporation, or association organized exclusively for fraternal or religious purposes, or to any school, education, charitable or religious institution owned or conducted by, or affiliated with, a church or religious institution, []or any exclusively social club, corporation or association that is not organized for profit and is not in fact open to the general public.

24. The Indianapolis Ordinance provides a variety of actions against persons who violate the ordinance. *Id.* at §§ 581-412 through -416.

25. RFRA was enacted during the First Regular Session 119th General Assembly (2015) and is codified in a new Chapter 9, titled "Religious Freedom Restoration," Ind. Code § 34-13-9.

26. RFRA (Senate Enrolled Act 101) was originally passed in the Senate with a vote of 40-10 (Roll Call 225), followed by the House with a vote of 63-31(Roll Call 305). Once the bill was returned to the Senate, the Senate concurred. Governor Michael Pence signed the RFRA bill into law on March 26, 2015.

27. RFRA provides that, Ind. Code § 34-13-9-8:

> (a) A governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

(b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates the application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

28. RFRA applies to, *id.* at § 34-13-9-1:

all governmental entity statutes, ordinances, resolutions, executive or administrative orders regulations, customs, and usages, including the implementation or application thereof, regardless of whether they were enacted, adopted, or initiated before, on or after July 1, 2015.

29. RFRA defines "demonstrates" as follows, *id.* at § 34-13-9-4: "'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."

30. RFRA defines "exercise of religion" as follows, *id.* at § 34-13-9-5: "'exercise of religion' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

31. RFRA defines "governmental entity" as follows, *id.* at § 34-13-9-6:

"Governmental entity" includes the whole or any part of a branch, department, agency, instrumentality, official, or other individual or entity acting under color of law of any of the following:

(1) State government.

(2) A political subdivision (as defined in Ind. Code 36-1-2-13).

(3) An instrumentality of a governmental entity described in subdivision (1) or (2), including a state educational institution, a body politic, a body corporate and politic, or any other similar entity established by law.

32. RFRA defines "person" as follows, *id.* at § 34-13-9-7:

"person" includes the following:

(1) An individual.

(2) An organization, a religious society, a church, a body of communicants, or a group organized and operated primarily for religious purposes.

(3) A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that:

(A) may sue and be sued; and

(B) exercises practices that are compelled or limited by a system of religious be-

lief held by:
(i) an individual; or
(ii) the individuals;
who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.

33. A person may assert a RFRA "violation or impending violation as a claim or defense," and a government entity is not required to be a party, but may intervene, *id.* at § 34-13-9 -9:

> A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding. If the relevant governmental entity is not a party to the proceeding, the governmental entity has an unconditional right to intervene in order to respond to the person's invocation of this chapter.

34. Under RFRA, available relief includes the following, *id.* at § 34-13-9-10:

> (b) Relief against the governmental entity may include any of the following:
> (1) Declaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter.
> (2) Compensatory damages.
> (c) In the appropriate case, the court or other tribunal also may award all or part of the costs of litigation, including reasonable attorney's fees, to a person that prevails against the governmental entity under this chapter.

35. As a result of media turmoil over the RFRA legislation, the legislature decided to "fix" RFRA (Senate Bill 50) by adding an amendment (codified at Ind. Code §§ 34-13-9-0.7 and 34-13-9-7.5). As noted above, *see supra* note 1, the amendment contains what is called herein an Exclusion (*id.* at § 34–13-9-0.7) with Exceptions (*id.* at § 34-13-9-7.5), which provisions together allow some persons to have RFRA's protection, but not others.

36. After conference committees, the amendment (the Exclusion and Exceptions) passed the Senate with a vote of 34-16 (Roll Call 368) and the House with a vote of 66-33 (Roll Call 370).

37. The challenged RFRA **Exclusion** provides "[a]ntidiscrimination safeguards," Ind. Code § 34-13-9-0.7:

This chapter [RFRA] does not:

(1) authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service;

(2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service; or

(3) negate any rights available under the Constitution of the State of Indiana.

38. The challenged RFRA **Exceptions** provision defines "provider" broadly, with exceptions, *id.* at § 34-13-9-7.5:

Sec. 7.5. As used in this chapter, "provider" means one (1) or more individuals, partnerships, associations, organizations, limited liability companies, corporations, and other organized groups of persons. The term does not include:

(1) A church or other nonprofit religious organization or society, including an affiliated school, that is exempt from federal income taxation under 26 U.S.C. 501(a), as amended (excluding any activity that generates unrelated business taxable income (as defined in 26 U.S.C. 512, as amended)).

(2) A rabbi, priest, preacher, minister, pastor, or designee of a church or other nonprofit religious organization or society when the individual is engaged in a religious or affiliated educational function of the church or other nonprofit religious organization or society.

Facts

Plaintiffs IFI and IFA

39. Plaintiff **IFI** is an ideologically-conservative, non-profit corporation (501(c)(3)) that focuses on public policy, research, and education regarding the health and well-being of all Hoosier families.

40. IFI is committed to strengthening and improving the marriages and families of all Hoosiers. IFI seeks to follow the biblical teaching on marriage and human sexuality in all of its em-

ployment and programs, which teaching is that marriage must be between one man and one woman and that sexual relations must be within that marriage context.

41. IFI offers programs to the general public such as Hoosier Leadership Series and Hoosier Commitment.

42. The Hoosier Leadership Series, offered on an annual basis, identifies, educates, and connects conservative leaders from around Indiana and mobilizes these leaders to impact social, cultural, political, and spiritual landscape of Indiana.

43. IFI taught Hoosier Commitment, the marriage enrichment program, for 6 years, but the program was discontinued for funding reasons. IFI intends to reinstate the program should funding is available.

44. IFI allowed persons to participate in such programs offered to the general public who do not believe, and practice, the biblical teaching on marriage and human sexuality. However, IFI would not allow same-sex married couples into their Hoosier Commitment program with its own funds because they do not uphold the biblical teaching on marriage and human sexuality.

45. IFI will not agree to accept funding for educational programs that are inconsistent with their biblical teaching on marriage and human sexuality.

46. Plaintiff **IFA**, the advocacy arm of IFI, is an ideologically-conservative, nonprofit corporation (501(c)(4)). IFA's mission is to educate the public regarding public policy issues concerning life, marriage, and religious freedom.

47. IFA seeks to follow the biblical teaching on marriage and human sexuality in all of its employment and programs, which teaching is that marriage must be between one man and one woman and that sexual relations must be within that marriage context.

48. IFA intends to employ 5-6 more field staff in 2016. This will provide IFA with 7-8 em-

ployees. The field staff employees will educate voters throughout the state on life, marriage, and religious freedom issues. IFA is considered an "employer," Ind. Code § 22-9-1-3(i), which is "any person employing six (6) or more persons within the state . . . ."[7] IFA will not employ (or retain) employees who do not believe, and practice, the biblical teaching on marriage and human sexuality.

49. IFI and IFA require their board of directors and employees to sign a statement of faith that affirms that they believe in, and will abide by, Christian principles and precepts, which include the biblical teaching on marriage and human sexuality.

50. IFI and IFA intend to only employ (or retain) individuals who uphold the principles and precepts of IFI's and IFA's faith and share the same biblical worldview, which requires that such persons agree with, and practice, the biblical teaching on marriage and human sexuality.

51. IFI and IFA are governed by the Carmel Ordinance because IFA intends to "employ six(6) or more" individuals, Ind. Code § 22-9-1-3(i), and IFI provides "program[s] . . . to the general public." Carmel Code § 6-8.

52. IFI and IFA are not protected by the Carmel Ordinance exceptions because they are not "religious worship," "clergy," or "a membership club organized exclusively for . . . religious purposes." *Id.*

53. IFI and IFA are considered "persons," under the RFRA definition, Ind. Code § 34-13-9-7, because both are "corporation[s] . . . that exercises practices that are compelled or limited by a system of religious belief held by . . . the individuals[] who have control and substantial owner-

[7] The third exception to the Carmel Ordinance cross references the Indiana's Civil Rights Code (Ind. Code § 22-9) where "Employer" is defined. That statute has exceptions to the "Employer" definition, but IFA does not meet these exceptions, specifically because it is not a "non-profit corporation or association organized *exclusively*. . . for religious purposes." Ind. Code § 22-9-1-3(i)(1).

ship of the entity . . . ." *Id.* at § 34-13-9-7(3).

54. The RFRA Exclusion withdraws RFRA's religious-free-exercise protection from "providers" that "provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public." Ind. Code § 34-13-9-0.7. IFI and IFA are both nonprofit (501(c)(3) and 501(c)(4) respectively) corporations, and are "provider[s]," Ind. Code § 34-13-9-7.5, because they are "organization[s]" that "offer or provide services, facilities, [and] employment . . . to members of the general public." *Id.* at § 34-13-9-0.7.

55. Although IFI and IFA are not associated with a particular church or religious organization—and are not themselves "[a] church or other nonprofit religious organization or society," Ind. Code § 34-13-9-7.5—IFI and IFA emphasize evangelical Christian principles and precepts within the organizations, including the biblical teaching on marriage and human sexuality.

56. The Exclusion provision stripped IFI and IFA of RFRA's heightened religious-free-exercise protection. IFI and IFA are not within the Exceptions to the "provider" definition because they are not "[a] church or other nonprofit religious organization or society, including an affiliated school." Ind. Code § 34-13-9-7.5 (Exceptions to RFRA's Exclusion).

Platiniff AFA

57. Plaintiff **AFA** is an non-profit corporation (501(c)(3)) that exists to educate Hoosiers on the moral, cultural and political issues of the day and how those issues impact Hoosier families and the institutions which support the family.

58. AFA is dedicated to reducing destructive sexual behavior by promoting Judeo-Christian values through education, active community partnering, and empowering individuals at the local, state, and national level.

59. In the last fifteen years, AFA has expanded its emphasis into a wide variety of issues im-

pacting Hoosier families, including but not limited to: marriage, divorce, parenthood, welfare, education, the right to life, and religious liberty.

60. AFA seeks to follow the biblical teaching on marriage and human sexuality in all of its employment and programs, which teaching is that marriage must be between one man and one woman and that sexual relations must be within that marriage context.

61. AFA requires their board of directors and employees to sign a statement of faith that affirms that they believe in, and will abide by, Christian principles and precepts, which include the biblical teaching on marriage and human sexuality.

62. AFA hosts a variety of programs, events, and activities open to the general public, including educational training, workshops, and fundraisers and intend to host regular events and programs in the future.

63. The Grassroots Training Conference, offered throughout the year, to educate those wanting to learn how to organize for sustained public policy issues, run for office, or volunteer to support conservative, pro-family candidates. Individuals can now receive training services online.

64. AFA uses a conference room in their building for meetings and discussions on issues. AFA often allows other individuals and organizations to use this conference space.

65. AFA will not allow persons to participate in such programs, receive services, or use their conference room offered to the general public who do not believe, and practice, the biblical teaching on marriage and human sexuality. For example, AFA will not allow same-sex married couples or advocates of same-sex marriage into their Grassroots Training Conference with its own funds because they do not uphold the biblical teaching on marriage and human sexuality.

66. AFA fits within the Indianapolis Ordinance because it offers "public accommodations." Marion County Code § 581-401.

67. AFA does not fit within the Indianapolis Ordinance exceptions because it is not "organized *exclusively* . . . for religious purposes" or "owned or conducted by, or affiliated with, a church or religious institution." MCC § 581-404.

68. AFA are considered "persons," under the RFRA definition, Ind. Code § 34-13-9-7, because it is a "corporation . . . that exercises practices that are compelled or limited by a system of religious belief held by . . . the individuals[] who have control and substantial ownership of the entity . . . ." *Id.* at § 34-13-9-7(3).

69. The RFRA Exclusion clarifies that RFRA does not apply to "providers" that "provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public." Ind. Code § 34-13-9-0.7. AFA is a nonprofit (501(c)(3)) corporation, and "provider," Ind. Code § 34-13-9-7.5, because it is an "organization" that "offer[s] or provide[s] services, facilities, use of public accommodations [and] goods . . . to members of the general public." *Id.* at § 34-13-9-0.7.

70. AFA is not associated with a particular church or religious organization—and are not "[a] church or other nonprofit religious organization or society," Ind. Code § 34-13-9-7.5—AFA emphasizes Christian principles and precepts within the organizations, including the biblical teaching on marriage and human sexuality.

71. The Exclusion stripped AFA of this heightened protection. AFA is not within the Exceptions to RFRA's Exclusion to the "provider" definition because they are not "[a] church or other nonprofit religious organization or society, including an affiliated school." Ind. Code § 34-13-9-7.5 (Exceptions to RFRA's Exclusion).

72. All Plaintiffs intend to engage in substantially similar activities in the future.

73. All Plaintiffs' religious beliefs are sincerely held religious beliefs.

74. All Plaintiffs are presently suffering injuries in fact, caused by challenged provisions, and such harms will be remedied by requested relief, so they have standing and this case is ripe.[8]

75. All Plaintiffs are suffering irreparable harm and have no remedy at law.

Count I
RFRA's Exclusion & Exceptions Are Unconstitutional.

76. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

77. Plaintiffs want to engage in free-speech, free-association, and free-exercise-of-religion activities, based on their own religious beliefs, without the restrictions imposed by the Carmel Ordinance or the Indianapolis Ordinance. Plaintiffs, their beliefs, and their activities based on those beliefs are all protected by state and federal constitutional provisions, *see* Count III, as well as the strict scrutiny provided by RFRA, *see* Count II.

78. Regarding RFRA, Plaintiffs qualify as RFRA "persons," Ind. Code § 34-13-9-7 (definition), and so should be entitled to RFRA's protection for their religious-free-exercise based on their own religious beliefs. But they are stripped of RFRA's protection because their activities fit within those set out in the Exclusion, *id.* at § 34-13-9-0.7 (providing services, public accommodations, employment, etc.), and they are not within the Exceptions (to the definition of "pro-

[8] Plaintiffs stand presently stripped of RFRA protection by the Exclusion and Exceptions. And the challenges to the ordinances are ripe though this is a pre-enforcement challenge because the challenged provisions are non-moribund and there is a credible threat of prosecution for noncompliance. *See, e.g.*, *Doe v. Bolton,* 410 U.S. 179, 188 (1973). A non-moribund statute that "facially restrict[s] expressive activity by the class to which the plaintiff belongs" presents such a credible threat. *New Hampshire Right to Life PAC v. Gardner,* 99 F.3d 8, 15 (1st Cir.1996). A presumption of a credible threat for a pre-enforcement challenge is particularly appropriate when, as here, the presence of a statute tends to chill the exercise of First Amendment rights. *See Wilson v. Stocker,* 819 F.2d 943, 946 (10th Cir.1987); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Moreover, self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. American Bookseller's Association*, 484 U.S. 383, 393 (1988). For a preenforcement challenge, it is enough to "allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed . . . ." *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

vider"), *id.* at § 34-13-9-7.5.

79. Plaintiffs challenge the RFRA Exclusion, *id.* at § 34-13-9-0.7, and its Exceptions, *id.* at 34-13-9-7.5, as unconstitutional, as applied and facially, for violating

(a) the **equal-rights protections** of the Privileges and Immunities Clause of the Indiana Constitution (Art. 1, § 23) and the Equal Protection Clause of the U.S. Constitution (Amend. XIV);

(b) the **free thought, speech, association, and expressive-association protections** of the Freedom of Thought and Speech Clause of the Indiana Constitution (Art. 1, § 9) and the Free Speech Clause of the U.S. Constitution (Amend. I);

(c) the **religious-liberty protections** of the Freedom of Religion Clauses of the Indiana Constitution (Art. 1 §§ 2, 3, and 4) and the Free Exercise Clause of U.S. Constitution (Amend. I);

(d) the **no-government-favoritism-in-religion protections** of the No Preference Clause of the Indiana Constitution (Art. 1, § 4) and the No Establishment Clause of the U.S. Constitution (Amend. I);

(e) the **substantive-due-process protection** of the Indiana Constitution (Art. 1, § 12) and the Due Process Clause of the U.S. Constitution (Amend. XIV); and

(f) the **no-unconstitutional-condition protection** of the Indiana Constitution and the U.S. Constitution.

80. Plaintiffs also challenge the terms "nonprofit religious organization or society" in the Exceptions, Ind. Code § 34-13-9-7.5(1), as applied and facially, for violating the **no-vagueness protections (a)** in the *free-speech protections* in the Freedom of Thought and Speech Clause of the Indiana Constitution (Art. 1, § 9) and the Free Speech Clause of the U.S. Constitution

(Amend. I) and (**b**) in the *due-process protections* in the Indiana Constitution (Art 1, § 12) and the Due Process Clause of the U.S. Constitution (Amend. XIV).

81. Regarding **equal-rights protections**, *see supra* ¶79(a), Plaintiffs' rights are protected by both the state and federal constitutions.

82. Preliminarily, Plaintiffs note the highly unusual manner in which the legislature first *granted* heightened religious-free-exercise protection to *all* religious "persons"[9] in RFRA, then *withdrew* that protection from *some* persons and activities in the Exclusion and Exceptions.[10] This differs markedly from the usual approach of enacting a law that imposes nondiscrimination duties with some exceptions.[11] Unlike in the latter situation (duties imposed with exceptions), the former situation (RFRA followed by Exclusion and Exceptions) extended a benefit broadly then stripped that benefit from many persons and activities needing the benefit. Such an approach obviously triggers equal-rights protections, requiring special justification by the government. Plaintiffs stand currently stripped of that heightened protection, and the government bears the heavy burden of justifying the withdrawal of that protection under strict scrutiny because fundamental

[9] Protected RFRA "persons" include (1) individuals, (2) broadly defined religious organizations, i.e., any "group organized and operated primarily for religious purposes," and (3) entities (whether or not for profit) controlled and substantially owned by individuals wanting to operate the entity consistent with their religious beliefs. Ind. Code § 34-13-9-7.

[10] "[P]roviders" who retain RFRA's heightened religious-free-exercise protections after the Exclusion and Exceptions are only narrowly defined religious entities and clergy, entirely removing RFRA protections from (1) most individuals, (2) many religious organizations, and (3) all entities controlled and owned by religious persons expressing religious beliefs, Ind. Code § 34-13-9-7.5, in the situations defined by the Exclusion, *id.* at § 34-13-9-0.7.

[11] One would expect any state antidiscrimination duties and exceptions to be in the "Indiana Civil Rights Law," Ind. Code § 22-9-1-1 (specifying this title for Article 9, which is titled "Civil Rights"). That Law requires nondiscrimination on the basis of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran," *id.* at § 22-9-3(*l*), which list does not include sexual orientation, gender identity, or the like. Unlike RFRA and its Exclusion and Exceptions, the Indiana Civil Rights Law does not grant some heightened religious-free-exercise protection (i.e., a day in court with heightened scrutiny) to all religious persons then strip it from some.

rights are involved.

83. *Indiana's Privileges and Immunities Clause* provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, cannot equally belong to all citizens." Ind. Const. Art. I § 23.

84. Consequently, any "disparate treatment accorded by . . . legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes," and any "preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins v. Day,* 644 N.E.2d 72, 80 (Ind. 1994).

85. There are two types of privilege-and-immunities claims: "[1] claims that seek to invalidate enactments which grant special privileges and [2] claims that seek to impose special burdens." *Indiana High School Athletic Ass'n, Inc. v. Carlberg*, 694 N.E.2d 222 (Ind. 1997).

86. The main theme is that "where the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics." *Collins,* 644 N.E.2d at 78-79.

87. All who hold religious beliefs and believe that those religious beliefs should be expressed in their actions, private and public, want and need the protections offered by constitutional protections for religious-free-exercise and the high protection offered by RFRA. They are similarly situated. RFRA gives any such person the right to assert in court that his or her religious-free-exercise is entitled to protection against substantial burdens because the government cannot prove that the burdens are the least restrictive means of furthering a compelling governmental interest. Under RFRA, one might win or lose on such a claim, but RFRA gives all persons with

religious beliefs the opportunity for a day in court to make the government prove why its burdens on religious-free-exercise are justified under RFRA's high standards.

88. The Exclusion and Exceptions intentionally strip that day-in-court right (to make the government prove its case for imposing substantial burdens on religious-free-exercise) from certain persons, such as plaintiffs, who are not within the Exceptions but hold traditional religious beliefs of the same sort as persons who are within the Exceptions.

89. Moreover, persons whose religious-free-exercise is based on the traditional biblical view of marriage and human sexuality (which requires that sexual relations occur only within a biblical marriage between one man and one woman) are stripped of RFRA protection while those of different religious views are unaffected. So, for example, religions or denominations that have no objection to sexual relations outside this biblical view of marriage and human sexuality are not burdened by the Exclusion and Exception in their employment and offering of services and public accommodations, while those who adhere to the traditional, biblical view of marriage and human sexuality are burdened. Thus, the Exclusion and Exceptions favor, among other things, religious traditions that have no objection to same sex marriage (e.g., some Protestant denominations) over those religious traditions that oppose same-sex marriage (e.g., among Christians, Roman Catholics, Eastern Orthodox, Evangelicals, and Fundamentalists, and among other religions, Islam, much of Judaism, and most other religions). This is forbidden viewpoint discrimination in both the equal-protection and free-expression contexts. *See infra* ¶ 95.

90. The Exclusion and Exceptions violate the Privileges and Immunities Clause of the Indiana Constitution.

91. *The Fourteenth Amendment's Equal Protection Clause* requires that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Const. amend. XIV.

92. The Equal Protection Clause commands that individuals "similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

93. Courts exercise strict scrutiny of legislative classifications when fundamental constitutional rights are affected or suspect classifications are created. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 15 (1973). If a suspect class or fundamental right is implicated, the government must prove that the disparate treatment is "narrowly tailored to further a compelling governmental interest." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Strict scrutiny applies here because fundamental rights are implicated.

94. RFRA created one large class of broadly defined religious "persons" and gave them broadly defined, heightened protection for religious-free-exercise. That protection follows the pattern of the federal RFRA and the state RFRAs enacted by many states. Such protection is justifiable by a governmental interest in protecting religious-free-exercise (a liberty guaranteed in both state and federal constitutions).[12] It is tailored to protect those needing protection, i.e., religious "persons."

95. But then the Exclusion and Exceptions removed that protection for certain persons and situations, based on forbidden viewpoint discrimination.[13] In the context of the uproar that led to

[12] These constitutional guarantees of religious-free-exercise are as vital to individuals and societies today as they were when we the people ratified the constitutions providing such protection. For religious individuals and groups, their religious beliefs and belief-based actions remain central to their understandings of the meaning of existence, who they are, how they ought to live, and where they and all existence are headed. Regarding societies, those who framed and ratified our state and federal constitutions understood well the lesson of history that restricting religious belief and practice yields persecution and wars and the only way to avoid these is to allow freedom of thought, conscience, speech, and religious-free-exercise. Those abandoning this lesson in favor of some cause deemed now more urgent, risk repeating historic horrors. Compelling people to act against conscience is morally wrong, a liberty violation, and bad public policy.

[13] Viewpoint-discrimination is forbidden in both the free-expression and equal-protection contexts. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* at 940-41, 1459, 1507 (2d ed. 1988) (citations omitted). "Whenever the Court finds that a classification violates the First

enactment of the Exclusion and Exceptions— which uproar focused particularly on RFRA protection possibly protecting persons whose religious beliefs would not allow them in good conscience to endorse, facilitate, or participate in same-sex marriage—those provisions removed RFRA's heightened religious-free-exercise protection from persons whose religious beliefs would require them not to endorse, facilitate, or participate in activities contrary to the traditional, biblical view of marriage and human sexuality. By doing so, the Exclusion and Exceptions favored one set of religious beliefs over another and discriminated against one set. For example, while some Protestant denominations have no religious objections to endorsing, facilitating, or participating in activity inconsistent with the traditional biblical view of marriage and sexuality, most religions and denominations consider same-sex marriage improper, including Roman Catholics, Eastern Orthodox, Methodists, Southern Baptists, Muslims, orthodox and conservative Jews, and others.[14]

Amendment, it alternatively could rule that the classification violated equal protection." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* at 1167 (7th ed. at 2004) (citation omitted).

[14] An insightful statement on the Christian view of marriage is the March 2015 statement by Evangelicals and Catholics Together ("ECT"), titled "The Two Shall Become One Flesh: Reclaiming Marriage." *See* www.firstthings.com/article/2015/03/the-two-shall-become-one-flesh-reclaiming-marriage-2. As the ECT statement makes clear, *religious* marriage is far different from the *civil* marriage regulated by the state, and the biblical view of human sexuality also differs from that of much of current culture. For example, the statement says: "Maleness and femaleness are essential components of our unique dignity as human beings created in the image of God, for through these realities we participate in the divine creativity and its fruitfulness. Thus, from a Christian point of view, sexual union must be approached with reverence and in recognition of its intrinsic potential for new life." *Id.* Consequently, "[o]ur sexual acts have spiritual and moral dimensions; they are not merely physical or biological." And so, though, "[a]s Evangelicals and Catholics, we do not agree on the status of marriage as a sacrament of the Church . . . [,] [w]e affirm strongly and without qualification, following the clear testimony of Holy Scripture, that *marriage is a unique and privileged sign of the union of Christ with his people and of God with his -Creation-and it can only serve as that sign when a man and a woman are solemnly joined together in a permanent union.*" *Id.* (emphasis in original). Thus, from the religious perspective, "same-sex unions, even when sanctioned by the state, are not *marriages*. Christians who wish to remain faithful to the Scriptures and Christian tradition cannot embrace this falsification of reality, irrespective of its status in law." *Id.* (emphasis in original).

96. Given (i) these government-created classes within the group of religious persons who are similarly situated as religious persons for whom RFRA protections are important and needed and the (ii) disparate treatment in extending RFRA's heightened religious-free-exercise protection to some but not all, the government must prove that the Exclusion and Exceptions are narrowly tailored to a compelling governmental interest (though the provisions fail rational-basis scrutiny).

97. What interest might the government assert? Given that the public pressure that led to the Exclusion and Exceptions focused on potential discrimination regarding facilitating same-sex marriage, the government would likely assert an antidiscrimination interest. But that does asserted interest does not justify the Exclusion and Exceptions for at least two reasons.

98. First, RFRA itself poses no discrimination risk. It authorizes none. Rather, it protects religious-free-exercise rights by requiring strict scrutiny of substantial free-exercise burdens, even where there is a neutral law of general applicability. RFRA's heightened protection extends without discrimination to all RFRA "persons" (broadly defined) who experience a substantial burden on their religious free exercise. RFRA simply guarantees that a person whose religious-free-exercise is substantially burdened by government action gets a day in court to require the government to prove that the burden is the least restrictive means of furthering a compelling governmental interest. If she wins, the government must cease burdening her and those similarly situated. If the government wins, it may continue the burden. That is not discriminatory. (But withdrawing RFRA protection for some RFRA "persons" is.)

99. Second, if the government asserts that stripping certain people and situations of RFRA protection (as the Exclusion and Exceptions do) will prevent discrimination it is either (a) speculating (on a court outcome that will in neither case support stripping RFRA protections to prevent discrimination) or (b) making a legal concession (concerning how RFRA would operate without

the Exclusion and Exceptions).

100. Regarding (a), the government has no way of knowing how a particular RFRA case would be decided by a court. So to the extent its argument turns on the idea that RFRA decisions would be discriminating, it speculates. But either way a court decides, the government will have no anti-discrimination interest to justify the Exclusion and Exceptions. Suppose, for example, that a person refuses to facilitate same-sex marriage in violation of a nondiscrimination ordinance and (in an enforcement action against her) asserts RFRA's heightened protection for religious free exercise. Now, if the government *carries* its burden to justify the burden on religious-free-exercise, then arguably some level of discrimination might be prevented (at the expense of someone else's right to act according to religious beliefs), but it would have been prevented under RFRA *itself*, without the need for the Exclusion and Exceptions. If the government does *not* carry its burden to justify the burden on religious-free-exercise (e.g., a court holds that preventing the degree of discrimination involved does not provide a compelling interest to overcome the substantial burden on religious-free-exercise) then the government *has* no compelling anti-discrimination interest.

101. Regarding (b), if the government says that it can *not* justify a substantial religious-free-exercise burden so that some government-disfavored religious-free-exercise will occur under RFRA protection, that is a crucial legal concession. That concession shows that (i) nothing justifies stripping religious-free-exercise protection from persons who would succeed under such protection and (ii) the government is hostile to certain religious-free-exercise and does not want to be bothered by certain persons making RFRA claims in certain situations. None of that is constitutionally sufficient and the Exclusion and Exceptions fail strict scrutiny and are irrational.

102. The Exclusion and Exceptions are unconstitutional for violating the Equal Protection

Clause of the Fourteenth Amendment of the U.S. Constitution.

103. Regarding **free thought, speech, association, and expressive-association protections,** *see supra* ¶ 79(b), Plaintiffs' rights are protected by both the state and federal constitutions.

104. Preliminarily, note that many cases that could be decided on religious-free-exercise bases are decided instead on free expression and association grounds because many government burdens that substantially burden religious-free-exercise also burden those expressive and associational rights. *See, e.g.*, *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (flag-salute case). Such is the case here because stripping Plaintiffs, and those similarly situated, of RFRA's protections also strips them of the protections that RFRA offers to their free-speech and free-association rights regarding the same activities. For organizations promoting an ideology (as opposed to conducting business) the burden of being forced to endorse, facilitate, or participate in activities supporting an ideology contrary to their own imposes particularly severe burdens on such free expression and association rights. The more a person is engaged in expressive activities the greater the burden on their free-speech and free-association rights. And because the challenged provisions are content-based and based on viewpoint discrimination they are presumptively unconstitutional.[15]

105. *Indiana's Freedom of Thought and Speech Clause* provides that "[n]o law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak . .

[15] The challenged provisions herein are both viewpoint-based and content-based because they favor certain belief systems over others and even discriminate within belief systems as to who is exempted and who is not. In the free-expression and free-expressive-association contexts, such laws are presumptively invalid and must be justified by the government proving that they are narrowly tailored to a compelling interest, and that the chosen government action is the least restrictive means of achieving a compelling interest—a test the government usually fails. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, *Constitutional Law* at 1131-32 (citations omitted); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-643 (1994).

. on any subject whatever . . . " Ind. Const. Art. I § 9.

106. The clause embodies a "freedom-and-responsibility standard" under which "a legislature may not impair the flow of ideas; instead its sole authority over expression is the sanction individuals who commit abuse." *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993).

107. This clause is initiated when a statute affects speech, which is an established core constitutional value, the court uses "material burden" analysis. *Id.* at 960, 963. "[a] state regulation creates a material burden if it imposes a substantial obstacle on a core constitutional value." *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 984 (Ind. 2005).

108. Whether a statute imposes a material burden depends on the "magnitude of the impairment" analysis, which determines if there has been a substantial obstacle in the right to engage in speech, and "particularized harm" analysis, which determines if a speaker's actions are "analogous to tortious injury on readily identifiable private interests." *Whittington v. State,* 669 N.E.2d 1363, 1370 (Ind. 1996).

109. Plaintiffs are compelled to speak or endorse messages with which they disagree because state legislation does not protect them, substantially burdening a core constitutional value.

110. The RFRA Exclusion and Exceptions violate the Freedom of Speech and Thought Clause of the Indiana Constitution.

111. *The First Amendment* provides high protections for speech (including against compelled speech), association, and especially expressive association: "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of America v. Dale,* 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984)). "Forcing a group to accept certain members may impair the

ability of the group to express those views, and only those views, that it intends to express." *Id.*

112. Plaintiffs are compelled to speak, including by implied endorsement or facilitation, in ways favorable to conduct, including same-sex sexual conduct, with which they disagree, which are substantial burdens on free speech.

113. Plaintiffs are compelled to associate with activities and social, political, and ideological messages with which they disagree, which are substantial burdens on free association.

114. Plaintiffs are expressive associations, and forcing them to endorse activity, including same-sex sexual activity, with which they disagree substantially burdens their expressive association.

115. The RFRA Exclusion and Exceptions violate these First Amendment rights.

116. Regarding **religious-liberty protections**, *see supra* ¶ 79(c), Plaintiffs' free-exercise rights are protected by both the state and federal constitutions.

117. Preliminarily, note that RFRA was enacted expressly to provide heightened religious-free-exercise protection to a broadly defined group of "persons." Ind. Code §§ 34-13-9-7 and 34-13-9-8. And RFRA broadly defines "exercise of religion" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* at § 34-13-9-5. But the Exclusion and Exceptions strip the broad protection from many by restricting the situations in which, the bases on which, and the "providers" for whom RFRA's protections apply. *See supra* ¶ 37. That withdrawal of religious-free-exercise protection violates religious-liberty protections.

118. The *Indiana Constitution* provides that "All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience. No preference shall be given, by law, to any creed, religious soci-

ety, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent." Ind. Const. Art. I, § 2-4.

119. "The religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment," but rather "provide religious protections that exceed those of the First Amendment." *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-46 (Ind. 2001).

120. Indiana's constitutional provisions protect both religious belief and its free exercise:

> From the literal text of Sections 2 and 3, the discussions at the Constitutional Convention, and the surrounding circumstances, we conclude that the framers and ratifiers of the Indiana Constitution's religious liberty clauses did not intend to afford only narrow protection for a person's internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.

City Chapel 744 N.E.2d at 450.

121. "A right is impermissibly alienated when the State materially burdens one of the core values which it embodies." *Foreman v. State ex rel. Dept. of Natural Resources*, 180 Ind.App. 94, 102, 387 N.E.2d 455, 461-62 (1979). *See also Department of Fin. Insts. v. Holt*, 231 Ind. 293, 108 N.E.2d 629 (1952).

122. "Churches are subject to such reasonable regulations as may be necessary to promote the public health, safety, or general welfare" *Church of Christ v. Metropolitan Bd. Of Zoning App.*, 371 N.E.2d1331, 1334 (1978).

123. Plaintiffs wish to engage in religious-free-exercise according to the dictates of their conscience, but are unable to do so because they are coerced to accept those actively engaged in con-

duct with which they disagree, including same-sex sexual conduct, into their ministries which violates the precepts of the Plaintiffs' faith and biblical worldview. And Plaintiffs want the protections originally afforded by RFRA against such coercion, but the Exclusion and Exceptions have stripped them of RFRA's protections for their affected activities.

124. The Exclusion and Exceptions violate the Religious Liberty Clauses of the Indiana Constitution.

125. The *Free Exercise Clause of the United States Constitution* provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I.

126. The Free Exercise Clause protects religious observers against unequal treatment," in other words, "the government . . . cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43. "[T]the guarantee of the Free Exercise Clause is 'not limited to beliefs [that] are shared by all of the members of a religious sect.'" *Holt v. Hobbs,* 574 U.S.____, 135 S.Ct. 853, 863 (2015) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.,* 450 U.S. 707, 715-16 (1981)).

127. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3, 102 S.Ct. 1051, 1058, n.c, 71 L.Ed. 2d 127 (1982) (Stevens, J., concurring)).

128. But while *Smith* lowered the protection of the federal Free Exercise Clause in the context of valid, neutral, generally applicable laws, *Smith* offered considerable free-exercise protection by defining narrowly what is a neutral, generally applicable law. The law at issue in *Smith* was an

"across-the-board criminal prohibition" (regarding illegal drug use). *Id.* at 884. *Smith* relied on, and explained, *Sherbert v. Verner*, 374 U.S. 398 (1963), which held that a person refusing (for religious reasons) to work on the Sabbath could still receive unemployment compensation though the law required her to be available for work. The Court noted that because that requirement had "at least some" nonreligious exceptions it must also allow religious exceptions. *Smith*, 494 U.S. at 884. So if a law allows nonreligious exceptions, it is not a law of general applicability, and the strict scrutiny required by the Free Exercise Clause must apply.

129. A law can be made non-neutral, non-general by *categorical* exceptions, as made clear in the *Lukumi* case, which stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practices." 508 U.S. at 542. The Court decided that a ban on killing animals (targeted at animal sacrifice) had exceptions for hunting, fishing, extermination, and euthanasia, fell "well below the minimum standard" for general applicability. *Id.* at 543. Consequently, the high protections of the Free Exercise Clause were applied.

130. Where a law makes exceptions for nonreligious, but not religious, conduct where the alleged harm is the same, the government "devalues religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Id.* at 537-38. As then-judge (now Supreme Court Associate Justice) Alito held for the court in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), allowing nonreligious, but not religious, exceptions to a rule

> indicates that the Department has made a value judgment that secular . . . motivations . . . are important enough to overcome its general interest . . . but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

Id. at 366. Consequently, the *Newark* court struck down a rule forbidding police officers from wearing short beards for religious reasons, though short beards were allowed for medical reasons.

The court noted that, if the rule was imposed to hide the fact that police officers held different religious beliefs, then "we have . . . a policy the very purpose of which is to suppress manifestations of the religious diversity that the First Amendment safeguards." *Id.* at 367.

131. Given that a law is not a neutral law of general applicability (so as to avoid strict scrutiny under the Free Exercise Clause) if it has nonreligious exceptions, the question arises whether provisions challenged in this case have nonreligious exceptions. The challenged ordinances have nonreligious exceptions, as will be discussed below. But the RFRA Exceptions provisions that provides exceptions to the definition of "providers" excluded from RFRA's protections does not contain any nonreligious exceptions, only exceptions for certain religious organizations and persons that are too narrowly defined. But the absence of nonreligious exceptions at does not make the Exclusion and Exceptions neutral laws of general applicability for several reasons.

132. The Exclusion and Exceptions are not neutral, generally applicable laws in the sense of *Smith*'s general ban on nonprescription drugs that applied to everyone. 494 U.S. at 880-81. Rather than beginning with such a law that applies generally to all, the Exclusion and Exceptions strip protections for religious-free-exercise given by RFRA to those persons needing it, i.e., religious persons and organizations broadly defined. Then the Exclusion and Exceptions directly target certain activity motivated by religious belief and exclude it from protection otherwise provided by RFRA. So there is no neutral, generally applicable law to begin with in RFRA, and the Exclusion and Exceptions are not such neutral, generally applicable laws. Consequently, there is no need to find nonreligious exceptions to remove those the Exclusion and Exceptions from the category of neutral, generally applicable laws because they were never such to begin with.

133. The Exclusion and Exception are not "neutral, generally applicable law[s]" under *Smith, id.* at 880-81, because they were intentionally enacted to favor certain views, beliefs, and

religious-free-exercise expressions over others. The Exclusion and Exceptions were enacted under pressure by persons favoring nondiscrimination for those engaging in same-sex marriage and same-sex sexual activity, so the history and text of those provisions show that they targeted certain persons whose religious beliefs would cause them to not want to participate in, especially, same-sex-marriage-related activities. The "text" of the Amendment is not neutral. *Lukumi*, 508 U.S. at 533.

134. Alternatively, the Exclusion and Exceptions violate the Free Exercise Clause by presenting "subtle departures from neutrality," *id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)), "and covert suppression of particular religious beliefs," *id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). The Exclusion and Exceptions "target[] religious conduct for distinctive treatment" even if they were written with "facial neutrality." *Id.*

135. "Apart from the text" of the Indiana law, its "effect . . . in its real operation is strong evidence of its object." *Id.* "In determining if the object of a law is a neutral one under the Free Exercise Clause," *id.* at 540, one looks—as in Equal Protection challenges, e.g., *supra* Count 1—not only to the text but also to "direct and circumstantial evidence." *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This "includes, among other things, the historical background of the [law] under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* (citing *Arlington Heights*, 429 U.S. at 267-68).

136. Strict scrutiny also applies because Plaintiffs' religious-free-exercise claim is coupled with other claims, including free-speech, free-association, and free-expressive-association claims, making Plaintiffs' claim a "hybrid" claim to which strict scrutiny applies (even where

there might be an argument that a law is a neutral, generally applicable law). *See Smith*, 494 U.S. at 881-82 ("hybrid" claims of free exercise with free speech and association are fully protected by free-exercise constitutional protection).

137. Because the Exclusion and Exceptions are not neutral, generally applicable laws, the government has the burden of justifying them under strict scrutiny against the claim that they violate religious-free-exercise protections.

138. Under the required strict scrutiny, the government has the burden to show that the Exclusion and Exceptions are narrowly tailored to a compelling governmental interest. It cannot, as outlined next.

139. First, the government has no cognizable, let alone compelling, interest in extending heightened religious-free-exercise protection to all RFRA "persons" then stripping it from some persons in some situations. The Exclusion and Exceptions violates the Free Exercise Clause by bestowing "unequal treatment" on "religious observers[.]" *Id.* at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)). The Amendment violates "both the Free Exercise and the Establishment Clauses" by not "pursu[ing] a course of 'neutrality' toward religion," *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (op. of Souter, J.) (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)), and by "favoring . . . one religion over others []or religious adherents collectively over nonadherents." *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

140. Second, because there is no cognizable, let alone compelling, interest in giving RFRA religious "persons" heightened means and stripping it from others of different beliefs, there is no need to reach whether the Exclusion and Exceptions are the least restrictive means of advancing

a governmental interest, say, in nondiscrimination. Nonetheless, it is instructive to note the lack of any effort at careful tailoring in the Exclusion and Exceptions. If the goal were to prevent non-discrimination by all who might discriminate, are the persons who retain RFRA protections under the Exclusion and Exceptions (narrowly defined religious organizations and clergy) less likely to discriminate on the basis of religious beliefs than those who fit the RFRA "persons" definition but are excluded from RFRA protections by the Exclusion and Exceptions? The state would have no evidence for that, and an argument can be made that the narrowly defined religious organizations and clergy in the Exceptions might be *more* likely to discriminate on the basis of their religious beliefs. So the government obviously recognized that some accommodation for religious-free-exercise must be made and allowed narrowly defined entities to retain RFRA protection in the Exceptions. But given the recognition that accommodation for religious-free-exercise is required, why not extend that accommodation to all defined as RFRA "persons" because the state has already identified them as persons needing heightened religious-free-exercise protection? The state's effort at tailoring seems wholly detached from both who needs RFRA protection (whom the state already found to be all RFRA "persons") and who is most likely to discriminate based on religious beliefs. Rather, what tailoring there is seems targeted at persons of disfavored religious beliefs to prevent such disfavored persons from troubling anyone by seeking their day in court under RFRA's protection. That is impermissible tailoring.

141. The RFRA Exclusion and Exceptions violate the Free Exercise Clause of the First Amendment to the United States Constitution.

142. Regarding **no-government-favoritism-in-religion protections**, *see supra* ¶ 79(d), Plaintiffs rights are protected by both the state and federal constitutions.

143. The No Preference Clause of the Indiana Constitution (Art. 1, § 4) and the No Establish-

ment Clause of the U.S. Constitution (Amend. I) both protect against government establishing, preferring, or benefitting one religion or religious view over another. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of a religion . . . ." U.S. Const. amend. I.

144. The United States Supreme Court has created a three-part test to determine whether an Establishment Clause violation has occurred: if a law does not serve a secular legislative purpose, if a law advances or inhibits religion, or if a law fosters excessive entanglement with religion, it violates the Establishment Clause. *Lemon v. Kurtzmann,* 403 U.S. 602, 612 (1971); *see Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) ("the Establishment Clause may be violated even without a substantial burden on religious practice if the government favors one religion over another (or religion over nonreligion) without a legitimate secular reason for doing so.").

145. The RFRA Exclusion and Exceptions do not serve a valid secular legislative purpose. Their adoption was in response to protests against RFRA by those who want to force others to not just passively accept persons and conduct inconsistent with the biblical view on marriage and sexual relations but to compel active participation with, and support for, such persons and conduct regardless of a religious objection.

146. The Exclusion also advances those religions that have no objection to conduct inconsistent with the biblical view of marriage and sexual relations, i.e., that sexual relations must be confined to biblical marriage between one man and one woman, while discriminating against those religions that do by compelling objectors to speak and act contrary to their religious belief and depriving them of a religious defense in the event they do not comply. In short, while RFRA extends its heightened religious-free-exercise protection to all persons, without regard to their religious views, the Exclusion and Exceptions provisions expressly favor some religious views

over others, thereby violating the no-government-favoritism-in-religion protections of the state and federal constitutions.

147. The ordinances and Exclusion violate the No Preference Clause of the Indiana Constitution (Art. 1, § 4) and the No Establishment Clause of the U.S. Constitution (Amend. I).

148. Regarding **substantive-due-process protection**, *see supra* ¶ 79(e), Plaintiffs' substantive-due-process-rights are protected by the state and federal constitution.

149. The Exclusion states that RFRA "does not: . . . (2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service." Ind. Code § 34-13-9.0.7.

150. The Fourteenth Amendment provides that "[n]o state . . . shall deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV.

151. Life, liberty and property include "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Crowley v. McKinney*, 400 F.3d 965, 968 (7th Cir. 2005).

152. The RFRA Exclusion and Exceptions interfere with such rights to contract and freely exercise religious beliefs according to the dictates of conscience by proscribing for some the use of religious beliefs as a defense.

153. The RFRA Exclusion and Exceptions provisions violate substantive-due-process

protections of the Indiana Constitution and the Due Process Clause of the Fourteenth Amendment of the United States.

154. Regarding **no-unconstitutional-condition protection**, *see supra* ¶ 79(f), Plaintiffs' rights are protected by the state and federal constitution.

155. The Exclusion states that it "does not: . . . (2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service." Ind. Code § 34-13-9.0.7.

156. "[W]hat a government cannot compel, it should not be able to coerce." *Libertarian Party of Ind. v. Packard,* 741 F.2d 981, 988 (7th Cir.1984). "Understood at its most basic level, the unconstitutional conditions doctrine aims to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly." *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012).

157. A "denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." *Elrod v. Burns,* 427 U.S. 347, 361 (1976) (plurality opinion)."[T]he doctrine prevents the government from awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." *Planned Parenthood*, 699 F.3d at 986.

158. The RFRA Exclusion and Exceptions provisions provide some with the public benefit of a religious-free exercise defense (under heightened scrutiny), but not others, based on religious belief. They attempt to coerce expressive conduct and association by depriving those who do not

want to engage in such expressive conduct and association of the public benefit of an otherwise available religious-free-exercise defense for their decisions.

159. The RFRA Exclusion and Exceptions provisions are an unconstitutional condition in violation of the state and federal constitutions.

160. Regarding **no-vagueness protections**, *see supra* ¶ 80, Plaintiffs rights are protected by the state and federal constitutions.

161. The RFRA Exceptions provision employs the unconstitutionally vague terms "nonprofit religious organization or society," Ind. Code § 34-13-9-7.5, which are undefined. By contrast, RFRA's "person" definition includes a broad range of entities—"[a]n organization, a religious society, a church, a body of communicants, or a group"— with the qualifier that each entity must be "organized and operated primarily for religious purposes." *Id.* at § 34-13-9-7. And the intended narrowness of the definition of "provider" in the Exceptions provision, as compared to the RFRA "persons" definition, is evident in the further facts that the "provider" definition entirely leaves out

(i) the first class included in the RFRA "persons" definition, *id.* at § 34-13-9-7(1), i.e., individuals, except for a very narrow "clergy" class in very narrow situations, and

(ii) the third class included in the RFRA "persons" definition, *id.* at § 34-13-9-7(3), i.e., businesses owned and controlled by religious persons[16]) of the RFRA "persons" definition.

162. Protection against such vague laws is provided both in the First Amendment and the Fourteenth Amendment contexts (and parallel state-constitution provisions). Where "prohibitions

[16] This class consists of businesses like Hobby Lobby, which was held to have protection from federal-law requirements (abortifacient contraception under the Affordable Care Act, aka Obamacare) under the federal RFRA by the U.S. Supreme Court in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

are not clearly defined," they are "void for vagueness" for "trap[ping] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). "[I]n an area permeated by First Amendment interests," "the test is whether the language of [a restriction] affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms." *Buckley v. Valeo*, 424 U.S. 1, 41 (1976) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Id.* at 41 n.48 (quoting *NAACP*, 371 U.S. at 433). *Buckley* also recites the Fourteenth Amendment due-process requirement against vague laws: "vague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (citations and quotation marks omitted).

163. As touched on above, the RFRA "person" definition extends heightened religious-free-exercise protection to three classes: (1) [a]n individual," (2) "[a]n organization, a religious society, a church, a body of communicants, or a groups organized and operated primarily for religious purposes," and (3) entities controlled and owned by persons expressing religious beliefs in the entities' practices. Ind. Code 34-13-9-7. But the Exceptions provision defines "provider" to excludes the first class (i.e., individuals, except for a narrow exception reaching clergy et al. in limited circumstances) and the third class (entities controlled and owned by religious persons seeking to exercise their faith in their business. And regarding the second class, it restricts RFRA's protections to "[a] church or other nonprofit religious organization or society, including

an affiliated school." Ind. Code 34-13-9-7.5. The "religious organization or society" language of the Exceptions does not parallel the primarily-for-religious-purposes language of RFRA's "person" definition, so the two must mean different things, and the "provider" definition is clearly intended to be much narrower than RFRA's "person" definition. So what might a narrowed "religious organization or society" definition be?

164. By comparison the Indianapolis nondiscrimination ordinance excludes from its coverage, as relevant, only "any not-for-profit corporation or association organized *exclusively for* . . . religious purposes." Indianapolis-Marion County, Ind. Code of Ordinances § 581-404 (emphasis added). In the RFRA Exceptions provision, did the state legislature adopt the Indianapolis ordinance's "exclusively" requirement for "religious organization" as the legislature apparently adopted the Indianapolis ordinance's list of proscribed bases for discrimination in the Exclusion? *Compare id.* at § 581-103 (b) ("Discriminatory practice" definition with list) *with* Ind. Code § 34-13-9-0.7 (Exclusion's list). And also by comparison, the Carmel Ordinance provides an exception for its nondiscrimination ordinance that only extends, as relevant, to "[r]eligious worship" (an activity, not an entity) and "a not-for-profit membership club organized *exclusively* for . . . religious purposes." Carmel Ordinance § 6-8(c) (emphasis added).[17] Did the state legislature have a similarly restrictive view of the sort of religious organizations entitled to be excepted from the nondiscrimination requirements? Affected entities and enforcers cannot know. The RFRA

[17] Also by comparison the Indianapolis nondiscrimination ordinance excludes from its coverage, as relevant, only "any not-for-profit corporation or association organized *exclusively for* . . . religious purposes." Indianapolis-Marion County, Ind. Code of Ordinances § 581-404 (emphasis added). In the RFRA Exceptions provision, did the state legislature adopt the Indianapolis ordinance's "exclusively" requirement for "religious organization" as the legislature apparently adopted the Indianapolis ordinance's list of proscribed bases for discrimination in the Exclusion? *Compare id.* at § 581-103 (b) ("Discriminatory practice" definition with list) *with* Ind. Code § 34-13-9-0.7 (Exclusion's list).

Exceptions provision is unconstitutionally vague, chilling core First Amendment activities and putting persons engaged in protected free-speech, free-association, free-expressive-association, and religious-free-exercise activity at risk for arbitrary and discriminatory entrapment.

165. Because the terms "nonprofit religious organization or society" in the RFRA Exceptions provision are unconstitutionally vague, the provision is void for vagueness, and because the state legislature would not have adopted the Exclusion and Exceptions without some sort of religious-liberty exception for some groups, the provision is not severable and the Exclusion and Exceptions provisions are unconstitutional and must be struck facially.

166. In sum, the RFRA Exclusion and Exceptions provisions are unconstitutional as to Plaintiffs and others similarly situated under the cited constitutional protections. The Exclusion and Exceptions are also unconstitutional facially for a variety of reasons under the various doctrines cited, including the non-severability reason stated in the prior paragraph, the substantial-overbreadth doctrine applicable in First Amendment cases, *see, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and the fact that the Exclusion and Exceptions provisions have the unconstitutional purposes of stripping some persons of protections afforded others who are similarly situated and of preferring some religious views over others in extending the protections of heightened religious-free-exercise protection.

Count II

The Carmel Ordinance and Indianapolis Ordinance Are Unlawful Under RFRA.

167. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

168. Plaintiffs challenge the Carmel Ordinance and Indianapolis Ordinance as unlawful under RFRA.

169. RFRA, as originally passed, protects free exercise of religion by providing strict scrutiny to those meeting the "persons" definition and whose religious-free-exercise rights are substantially burdened by government action (such as ordinances). Under that strict scrutiny, the government must prove that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Ind. Code § 34-13-9-8.

170. Given that the RFRA Exclusion and Exceptions provisions are unconstitutional for the reasons stated in Count I, the Carmel Ordinance and Indianapolis Ordinance must be justified, as applied to Plaintiffs and their activities, under RFRA's strict scrutiny.

171. As applied to Plaintiffs, their activities, and those similarly situated, the Carmel Ordinance and Indianapolis Ordinance fail strict scrutiny because it "substantially burden[s]" Plaintiffs' "exercise of religion" and the government entities cannot demonstrate that the ordinance is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest," which test applies "even if the burden results from a rule of general applicability." *Id.*

172. The Carmel Ordinance and Indianapolis Ordinance is unlawful, as applied to Plaintiffs, their activities, and those similarly situated and facially, because it fails the strict scrutiny required by RFRA.

Count III

The Carmel Ordinance and Indianapolis Ordinance Are Unconstitutional.

173. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

174. Plaintiffs want to engage in free-speech, free-association, and free-exercise-of religion

activities governed and restricted by the Carmel Ordinance or Indianapolis Ordinance. Plaintiffs are not protected by the exceptions to the ordinances. Plaintiffs and their activities are protected from the ordinances' restrictions by the state and federal constitutional provisions described above in Count I and reiterated below.

175. Plaintiffs challenge the Carmel Ordinance and the Indianapolis Ordinance as unconstitutional, as applied and facially, for violating the following constitutional protections (for reasons similar to those outlined above for these constitutional provisions):

(a) the **equal-rights protections** of the Privileges and Immunities Clause of the Indiana Constitution (Art. 1, § 23) and the Equal Protection Clause of the U.S. Constitution (Amend. XIV);

(b) the **free thought, speech, association, and expressive-association protections** of the Freedom of Thought and Speech Clause of the Indiana Constitution (Art. 1, § 9) and the Free Speech Clause of the U.S. Constitution (Amend. I);

(c) the **religious-liberty protections** of the Freedom of Religion Clauses of the Indiana Constitution (Art. 1 §§ 2, 3, and 4) and the Free Exercise Clause of U.S. Constitution (Amend. I);

(d) the **no-government-favoritism-in-religion protections** of the No Preference Clause of the Indiana Constitution (Art. 1, § 4) and the No Establishment Clause of the U.S. Constitution (Amend. I); and

(e) the **substantive-due-process protection** of the Indiana Constitution and the Due Process Clause of the U.S. Constitution (Amend. XIV).

176. Regarding the Carmel Ordinance, Plaintiffs also challenge the undefined terms "religious worship" and "religious institutions," Carmel Ordinance, § 6-8(c)(1), and "gender identity or ex-

pression," *id.* at § 6-8(a),[18] as applied and facially, for violating the **no-vagueness protections (a)** in the *free-speech protections* in the Freedom of Thought and Speech Clause of the Indiana Constitution (Art. 1, § 9) and the Free Speech Clause of the U.S. Constitution (Amend. I) and **(b)** in the *due-process protections* in the Indiana Constitution and the Due Process Clause of the U.S. Constitution (Amend. XIV).

177. Regarding the Indianapolis Ordinance, Plaintiffs also challenge the undefined terms "equal opportunities" and "any difference in treatment," *see, e.g.*, MCC 581-103 ("[d]iscriminatory practice" definition), and the defined term "gender identity," *id.* ("[g]ender identity" definition), as applied and facially, for violating for violating the **no-vagueness protections (a)** in the *free-speech protections* in the Freedom of Thought and Speech Clause of the Indiana Constitution (Art. 1, § 9) and the Free Speech Clause of the U.S. Constitution (Amend. I) and **(b)** in the *due-process protections* in the Indiana Constitution and the Due Process Clause of the U.S. Constitution (Amend. XIV).

178. The challenged ordinance is unconstitutional, as applied and facially, for violating the cited constitutional protections.

Prayer for Relief

Wherefore, Plaintiffs pray for the following relief:

1. Declaratory judgment that the Exclusion and Exceptions are unconstitutional facially and as applied to Plaintiffs, and those similarly situated, under one or more state and federal constitutional provisions. (Count I.)

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[18] Regarding "gender identity or expression," note that after experimenting with expanding lists of gender options for Facebook users, Facebook now provides a "free-form field" to allow persons to self-identify such thing if one of the predefined options is inadequate. *See* https://www.facebook.com/facebookdiversity/posts/774221582674346. Given the substantial fines (per occurrence per day) and attorneys' fees involved, such vagueness is impermissible.

2. Injunctive relief forbidding Defendant to enforce the Exclusion and Exceptions in any way. (Count I.)

3. Declaratory judgment that the Carmel Ordinance and the Indianapolis Ordinance are unlawful under the strict scrutiny mandated by RFRA, as applied to Plaintiffs and those similarly situated. (Count II.)

4. Injunctive relief forbidding Defendant to enforce the Carmel Ordinance and the Indianapolis Ordinance as applied to Plaintiffs and those similarly situated. (Count II.)

5. Declaratory relief that the Carmel Ordinance and Indianapolis Ordinance are unconstitutional as applied to Plaintiffs, and those similarly situated, under one or more state and federal constitutional provisions. (Count III.)

6. Injunctive relief forbidding Defendant to enforce the Carmel Ordinance and the Indianapolis Ordinance as applied to Plaintiffs and those similarly situated. (Count III.)

7. The requested injunctive relief includes forbidding Defendant from administering or civilly enforcing, prosecuting, investigating, or referring for enforcement, any person under challenged provisions declared unlawful or unconstitutional, as applied or facially. *See, e.g., O'Keefe v. Chisholm,* 769 F.3d 936, 937-38 (7th Cir.2014).

8. Costs and attorneys' fees pursuant to 42 U.S.C. § 1988, Ind. Code § 34-13-9-10, and any other applicable statute or authority.

9. Any other relief that this Court in its discretion deems just and appropriate.

Respectfully submitted,

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Verification

I, Curt Smith, declare as follows:

1. I am the President of Indiana Family Institute, Inc.

2. I have personal knowledge of Indiana Family Institute, Inc., including those set out in the foregoing Verified Complaint for Declaratory and Injunctive Relief, and if called on to testify I would competently testify as to the matters stated herein.

3. I affirm, under the penalties for perjury, that the foregoing representations are true. Ind. T.R. 11(B).

Executed on 12-10-15, 2015.

Curt Smith

Verification

I, Curt Smith, declare as follows:

1. I am the President of Indiana Family Action, Inc.

2. I have personal knowledge of Indiana Family Action, Inc., including those set out in the foregoing Verified Complaint for Declaratory and Injunctive Relief, and if called on to testify I would competently testify as to the matters stated herein.

3. I affirm, under the penalties for perjury, that the foregoing representations are true. Ind. T.R. 11(B).

Executed on 12-10-15, 2015.

Curt Smith

Verification

I, Micah Clark, declare as follows:

1. I am the Executive Director of the American Family Association of Indiana

2. I have personal knowledge of American Family Association of Indiana, including those set out in the foregoing Verified Complaint for Declaratory and Injunctive Relief, and if called on to testify I would competently testify as to the matters stated herein.

3. I affirm, under the penalties for perjury, that the foregoing representations are true. Ind. T.R. 11(B).

Executed on 12-10-15, 2015.

Micah Clark

Certificate of Service

I hereby certify that a true and complete copy of the foregoing has been served upon the following persons on December 10, 2015, by U.S. Certified Mail:

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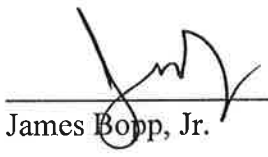

James Bopp, Jr.