Received: 2/29/2020 11:06 PM

In the
Indiana Court of Appeals

Case No. **19A-MI-02991**

Indiana Family Institute, Inc.; Indiana Family Action, Inc.; and **The American Family Association of Indiana**;

Plaintiffs-Appellants

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**; **The City of Bloomington, Indiana**; **The City of Bloomington Human Rights Commission**; **The City of Columbus, Indiana**; **The City of Columbus Human Rights Commission**; **The State of Indiana**; **Attorney General Curtis Hill**, in his official capacity as Attorney General of the State of Indiana;

Defendants-Appellees

Appeal from the
Hamilton County Superior Court 1

Case No. 29D01-1512-MI-010207

Hon. Michael A. Casati, Judge

Brief of Appellants Indiana Family Institute and Indiana Family Action

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Statement of Issues[1]

Pro-traditional-family Advocates challenged (**I**) the Amendment to Indiana's Religious Freedom Restoration Act ("**RFRA"**)[2] that stripped them of RFRA's protection as a "defense" and (**II**) antidiscrimination ordinances under RFRA (as a "claim") and constitutional protections, facially (given vague provisions) and as applied to Advocates' policy of excluding same-sex-married couples from otherwise public events and education ("**Exclusion Policy**"). The trial court found no standing or ripeness for any claim. Three issues are presented:

I. Whether IFI and IFA have standing and ripeness—including under public-standing doctrine—to challenge (i) the RFRA Amendment phrase "nonprofit religious organization or society" as unconstitutionally vague and (ii) being stripped of RFRA's strict-scrutiny protection as a defense.

II. Whether IFI and IFA have standing and ripeness—including under the First Amendment's lowered standard and ripeness mandates—to bring RFRA and constitutional claims against the Carmel, Bloomington, and Columbus antidiscrimination ordinances facially (for

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[1] **Explanation & Abbreviations:** Appellants, herein "**Advocates**," Ind. Appellate Rule 22(D), file two briefs, with each "adopt[ing] by reference" portions of the other, App. R. 46(G). The "**AFA Brief**" is for American Family Association of Indiana ("**AFA**"). The "**IFI Brief**" is for both Indiana Family Institute ("**IFI**") and Indiana Family Action ("**IFA**"). Advocates recommend reading the AFA Brief first, then the IFI Brief. In briefing applicable to all Advocates (by adoption), "Advocates" is used in lieu of "AFA" or "IFI/IFA" as appropriate. All Appellees are called collectively "**governmental entities**" and State- and city-defendant groups are called "**Indiana**," "**Indianapolis**," "**Carmel**," "**Bloomington**," and "**Columbus**."

[2] RFRA citations herein are to sections of Ind. Code § 34-13-9 (2020). Thus, the **Amendment** is at §§ 0.7 (the "**Provider-Exclusion**") and -7.5 (the "**Provider-Exceptions**").

vagueness) and as applied to their Exclusion Policy.

III. Whether the trial Court erred by (A) denying Advocates' request to judicially notice (i) a periodical article that Advocates said stated their Christian view of marriage, (ii) news articles showing the motives for enacting the Amendment and Carmel Ordinance, and (iii) a letter from sixteen bipartisan law professors to legislators in support of RFRA and (B) striking portions of Plaintiffs' Designation of Evidence and summary-judgment memorandum discussing such evidence.

Statement of Case

To avoid duplication, the AFA Brief's Statement of Case is adopted here by reference.

Statement of Facts

A. RFRAs have a strongly bipartisan history, same-sex marriage is recent, and this is a type of compelled-speech case called a compelled-inclusion-expressive-association case.

To avoid duplication, the AFA Brief's Facts(A) is adopted here by reference.

B. RFRA protected three classes of "persons," the Provider-Exclusion stripped protection from "providers," and the Provider-Exceptions restored it to some "persons."

To avoid duplication, the AFA Brief's Facts(B) is adopted here by reference.

C. IFI and IFA, like AFA, are RFRA "persons" as *Hobby-Lobby*-type entities, not as primarily-for-religious-purposes entities, so are not "nonprofit religious organizations or societies" as defined in RFRA, and were stripped of RFRA protection.

IFI and IFA are considered RFRA "persons" under the *Hobby-Lobby*-type entity category and were stripped of RFRA protection for the same reasons that AFA is. To avoid duplication, Facts(C) from the AFA Brief is adopted by reference here. IFI and IFA likewise verified that they

are *Hobby-Lobby*-type entities under RFRA § 7(3) and not primarily-religious-purposes entities under § 7(2), Appellants' App. Vol. 2, pp. 53, 63, 65-68 (Verified Second Amended Complaint for Declaratory and Injunctive Relief ("Compl.") ¶¶ 4-5, 57-58, 69, 73-74, 84), and that they are "providers" of "services," *id.* at 68 (Compl. ¶ 85). Though IFI and IFA emphasize Evangelical Christian principles and precepts within the organizations, including the biblical teaching on marriage and human sexuality, they are not associated with a particular church or religious organization and are not "[a] church or other nonprofit religious organization or society," § 7.5, so as to retain RFRA protection. *Id.* at 68-69 (Compl. ¶¶ 86-87). So they cannot be RFRA "nonprofit religious organizations and societies" within the meaning of RFRA's §§ 7 and 7.5 because § 7 establishes that such organizations and societies must be primarily-for-religious-purposes groups and because the Provider-Exceptions provision (§ 7.5) could not *restore* RFRA protection to entities that *lack* it as RFRA persons. As *Hobby-Lobby*-type entities, Advocates are part of the class of RFRA persons completely stripped of a RFRA defense protection by the Amendment when they decline to provide services on sexual-orientation grounds. As shown next, they do.

D. IFI and IFA, like AFA, are expressive-associations that advocate for their pro-traditional-family issue by providing services, including education, with a policy of excluding same-sex married couples from otherwise public programs.[3]

Organized in 1989, located in Carmel, Indiana, **IFI** is a nonpartisan public-education and research organization, recognized by the IRS as a 501(c)(3) corporation, that seeks to advocate its pro-traditional-family message in all it does. Appellants' App. Vol. 2, pp. 53 (Compl. ¶ 4). *See also id.* at 12-18 (verified facts about IFI); http://www.hoosierfamily.org/ (IFI's website, also

[3] Basic facts are provided here, with fact-interpretation conflicts addressed in Argument.

providing links to Facebook, Twitter, etc.). IFI is an expressive-association—made up of professional staff, board of directors, volunteers, and supporters—that promotes the traditional biblical view that sexual activity should be confined to marriage, which should be between one man and one woman. Appellants' App. Vol. 2, pp. 53, 63,78 (Compl. ¶¶ 4, 58, 129 & n.24 (theological basis for belief re marriage)). IFI challenges the RFRA Amendment and the Carmel, Bloomington, and Columbus Ordinances. *Id.* at 53 (Compl. ¶ 4).

IFI is ideologically conservative, focusing on public policy, research, and education regarding the health and well-being of all Hoosier families. IFI is committed to strengthening and improving the marriages and families of all Hoosiers. IFI offers programs to the general public such as, but not limited to, Hoosier Leadership Series and Hoosier Commitment. *Id.* at 63 (Compl. ¶¶ 57-59).

Hoosier Leadership Series ("HLS"), offered annually, identifies, educates, and connects conservative leaders from around Indiana and mobilizes them to impact the social, cultural, political, and spiritual landscape of Indiana. HLS offers education as indicated in the following mission statement:

> Missionally, the Hoosier Leadership Series is designed to pursue three related objectives:
> 1. To identify, educate, and connect conservative leaders from around Indiana
> 2. To equip those conservative leaders to utilize their respective platforms of influence to advance a conservative worldview in their life and leadership
> 3. To mobilize those conservative leaders as a part of an ongoing movement to collectively impact the social, cultural, political, and spiritual landscape of Indiana.

Id. at 63 (Compl. ¶¶ 60-61)[4] HLS application is open to anyone. And though the online descrip-

[4] For statement and application, *see* http://www.hoosierfamily.org/hoosier-leadership-series.

tion shows that HLS is focused on creating conservative Indiana leaders, conservativism knows no particular creed, political party, race, color, ancestry, and so on. The online "Candidate Selection Criteria" lists criteria comporting with that goal. It also states that "[c]andidates should . . . [p]ossess high standards of personal integrity," and the online explanation of HLS states that "[t]he HLS, the Indiana Family Institute, and our partners reserve the right to excuse participants from the program if attendance, ethical, or program standards are not met." *Id.* at 63-64 (Compl. ¶ 62).

IFI intends to expand the HLS program in various ways, including activities around the state. Appellants' App. Vol. 5, pp. 48-49 (3d IFI & IFA Aff. at ¶¶ 3-4). Because HLS is focused on leadership training grounded in the same biblical principles regarding marriage and human sexuality followed by IFI, candidates would be required to conduct themselves in accordance with those principles or be excused. This also means that individuals who reject these biblical teachings and IFI's message, by deed or by word, would not be considered for the program.

IFI taught Hoosier Commitment, the marriage enrichment program, for six years, but the program was discontinued when government funding ceased. IFI intends to reinstate the program should such funding become available again. 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 but IFI would not allow same-sex married couples into such a program paid for with its *own* funds because they do not uphold the biblical teaching on marriage and human sexuality. IFI will not accept funding for educational programs that are inconsistent with its biblical teaching on marriage and human sexuality. Appellants' App. Vol. 2, p. 13 (Compl. ¶¶ 63-65).

IFI intends to again offer marriage and relationship education programs, has received some funding for that purpose, and intends to raise the funds, design the courses, and retain teachers for offerings across Indiana, including most certainly in the key population centers of Indianapolis, Carmel, Columbus, and Bloomington. Appellants' App. Vol. 3, p. 49.

IFI has been selected, among seven state-based groups, for a forthcoming national-initiative $100,000 grant for church-leadership education and training. Initial projections call for hiring three to five additional staff members for this initiative, with one serving as the coordinator and the other four as regional directors. As with past initiatives involving church leaders, IFI would typically go to the state's large population centers to host and conduct training and teaching events with church leaders, professional and lay alike, including the communities of Indianapolis, Carmel, Bloomington, and Columbus. IFI is chilled from offering such events there because of these cities' nondiscrimination ordinances. *Id.* at 50.

IFA was organized in 2005 and is IFI's advocacy arm, since it is recognized by the IRS as a 501(c)(4) corporation. IFA is located in Carmel, Indiana. IFA challenges the RFRA Amendment and the Carmel, Bloomington, and Columbus Ordinances. Appellants' App. Vol. 2 p. 53 (Compl. ¶ 5). IFA has the same beliefs as IFI, and its mission is to educate the public regarding public policy issues concerning life, marriage, and religious freedom. *Id.* at 65 (Compl. ¶ 69). IFA's income comes primarily from donations (contributions, grants, etc.), which vary by year depending on various factors. For example, more donations are typically received in election years, and among election years donation level varies depending on the campaigns and issues in public debate. *Id.* (Compl. ¶ 70). IFA has participated in non-partisan voter registration and voter education efforts.

It also participated in voter education mailings and communications. It has hosted educational forums to discuss appropriate civic engagement with faith and other community leaders and the public. *Id.* at 65-66 (Compl. ¶ 73). 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. *Id.* at 66 (Compl. ¶ 75). IFA will not employ (or retain) employees who do not believe, and practice, the biblical teaching on marriage and human sexuality. *Id.* (Compl. ¶ 77). IFA is seeking funding for robust efforts across Indiana, including in Indianapolis, Carmel, Columbus, and Bloomington. Appellants' App. Vol. 3, p. 50 (3d IFI & IFA Aff. at ¶ 8).

IFI and IFA intend to offer public programs and education such as (without limitation and as examples only) Hoosier Leadership Series and Hoosier Commitment in Carmel, Bloomington, and Columbus.[5] Appellants' App. Vol. 2, p. 67 (Compl. ¶ 81).

Under the First Amendment's protection for expressive-associations, groups may exclude those whose presence they believe[6] alters their own message. *See* Facts(A). Because IFI and IFA believe that allowing same-sex-married couples[7] to attend their otherwise public programs would

[5] IFI and IFA have also conducted such educational services and programs in Indianapolis historically and intend to hold similar events in Indianapolis in the future. Appellants' App. Vol. 3, p. 48 (3d IFI & IFA Aff. ¶¶ 1, 3).

[6] Arguments that Advocates' belief is improper or irrational, that their policy conflicts with their goals, that a contrary policy would not interfere with their message, or the like are impermissible. *See, e.g.*, *BSA v. Dale*, 530 U.S. 640, 651 (2000) ("not the role of courts").

[7] IFI and IFA exclude those who, by word or deed, interfere with their own message, which could include more than just the presence of same-sex-married couples, but because same-sex marriage exclusion was a particular focus of the debate leading to the Amendment and is a particular focus of this case, they focus on same-sex marriage here. *Id.* at 67-68.

alter their pro-traditional-family message, they have an Exclusion Policy of excluding those known to be in same-sex marriages from their public programs and education. *Id.* at 67 (Compl. ¶ 16).[8]

Because IFI and IFA are based in Carmel, their intention to continue their public programs and education there is credible. Their intention to conduct public programs and education around the state, including in Bloomington and Columbus, is credible because they are a state-wide advocacy organization and have a long history of issue-advocacy by such events around the state.

Advocates verify that they intend to engage in substantially similar future activities and their religious beliefs are sincerely held. *Id.* at 72 (Compl. ¶¶ 106-07).

E. IFI and IFA are chilled and their chill is credible because the challenged, nonmoribund ordinances, by their plain terms, govern them and their intended activities.

Though IFI and IFA credibly intend public programs and education in defendant cities, as just established, they will not do them unless the ordinances are enjoined, as applied (or facially, given vagueness),[9] because the Exclusion Policy would violate the plain language of the challenged ordinances—as sexual-orientation discrimination—putting them at credible risk of en-

[8] Governmental entities argued below that Advocates don't actually *have* a policy of excluding known same-sex couples, but that fails because (i) governmental counsel asked about policies Advocates *don't* have, not the one they *do* have, *see* Part I.B.1.d, and (ii) anyway Advocates may seek relief for their policy *prospectively*, just like the wedding videographers and calligraphers in *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019) ("*Telescope*"), and *Brush & Nib Studios v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). *See* Facts(A).

[9] Advocates seek relief in particular as applied to their Exclusion Policy, but where vagueness exists a facial remedy is also appropriate and sought. For example, the Carmel Ordinance vaguely excludes from its coverage "religious worship" and *perhaps* "religious institutions" (though the language is so vague that the latter is uncertain). *See* Carmel Code § 6-8(d)(1). The vagueness of these provisions goes directly to whether Advocates are subject to the Carmel Ordinance, giving IFI and IFA standing and ripeness to challenge these provisions as vague.

forcement and penalties. *Id.* at 67-68 (Compl. ¶¶ 83 (chill verified)). For First Amendment purposes, both this credible risk of enforcement and chill provide standing and ripeness. *See* Part I. Crucially, no governmental entity disputes that it deems excluding same-sex-married couples from otherwise public programs and education *is* sexual-orientation discrimination under the ordinances or the Amendment.[10]

IFI and IFA are governed by the **Carmel Ordinance**, *see* Appellants' App. Vol. 2, pp. 55-56 (Compl. ¶¶ 18-21 (text of Carmel Code § 6-8[11] and details of Ordinance)), because they provide "program[s] . . . to the general public" and "educational" programs.[12] Carmel Code § 6-8; Appellants' App. Vol. 2, pp. 63-68 (Compl. ¶¶ 59-65, 69, 74, 81-83). 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." Carmel Code § 6-8(d)(1)-(2). And they are not "religious institutions," though the Carmel Ordinance does *not* actually exclude "religious institutions" in the plain language of the relevant exclusion:

> (d) *Exclusions*: This section 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;

[10] Carmel and Bloomington expressly equate exclusion of same-sex-married couples with sexual-orientation discrimination. Appellants' App. Vol. 6, pp. 112-13, 129.

[11] *Available at* https://codelibrary.amlegal.com/codes/carmel/latest/carmel_in/0-0-0-3541#JD_6-8.

[12] The discrimination ban on "obtain[ing] an education" is absolute (aside from inapplicable exclusions), without regard to whether the education is "provided to the general public." § 6-8(a). Carmel below attempted to gloss over the plain grammatical structure of the Ordinance, but examination of the text reveals that "education" need not be public to be covered. Any attempt to restrict "education" to a particular education would create fatal underinclusiveness.

§ 6-8(d)(1) (emphasis added). Anyway IFI and IFA challenge “religious worship” and “religious institutions” as unconstitutionally vague, which they have standing and ripeness to do because by the plain terms of the Ordinance their intended but chilled activities are covered by the Ordinance unless they fit within these “religious” exceptions. Notably, though Indiana argues that each Advocate is within the RFRA Provider-Exceptions, § 7.5(1), as “a church or other nonprofit religious organization or society,” AFA Br. Part I, and Indianapolis argues that similar pro-life-advocacy expressive-association is “religious” and “affiliated” so as to be within a religious-affiliation exception, AFA Br. Part II, Carmel does not deem IFI and IFA sufficiently religious to be within the Carmel Ordinance’s exception for “religious” groups.

IFI and IFA are subject to the **Bloomington Ordinance** and **Columbus Ordinance** for the same reasons that AFA says it is subject to them, and the relevant portions of the AFA Brief Facts(E) discussing the applicability of these ordinances is adopted here by reference.

Because these three ordinances by their plain terms govern IFI’s and IFA’s intended activities and because these Advocates’ intention to offer public programs and education in these three cities is credible, their verified assertion that they are chilled from offering their public programs and education in Carmel, Bloomington, and Columbus is credible and sufficiently concrete. *See, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 460, 463 (2007) (“*WRTL-II*”) (WRTL did not have to *prove* that it was chilled from running ads, only credibly verify it). *See also* Part I.A.4 (lowered concreteness standards for First Amendment chill).

Summary of Argument

To avoid duplication, the AFA Brief's Summary of Argument is adopted here by reference.

Argument

To avoid duplication, the first three paragraphs of the AFA Brief's Argument are adopted here by reference.

I.
Advocates have standing and ripeness to challenge (i) "nonprofit religious organization or society" as unconstitutionally vague and (ii) being stripped of RFRA protection by the Amendment.

To avoid duplication, the AFA Brief's Part I Issue, Standard, and Introduction are adopted here by reference. As established next, (**A**) controlling standards provide standing and ripeness[13] to RFRA "persons" who are stripped of protection by the Amendment; (**B**) Advocates are such "persons"; and (**C**) alternatively, Advocates may bring their challenges under public-standing doctrine.

A. Controlling standing-and-ripeness standards permit these challenges if Advocates are either RFRA "persons" stripped of protection by the Amendment or may be due to the vagueness of "nonprofit religious organization or society."

To avoid duplication, Part I.A of the AFA Brief is adopted here by reference. And following is added an extended treatment of the controlling, lowered standing-and-ripeness[14] mandates of

[13] As in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), "standing and ripeness issues in this case 'boil down to the same question,'" so we likewise in some cases here "use the terms 'standing'" to indicate both, *id.* at 157 n.5 (citations omitted).

[14] This First-Amendment-standards discussion applies to Parts I.A and II.A of both briefs as applicable (note that the equal-protection claim discussed in Parts I depends on the harm of being stripped of RFRA protection and doesn't depend on lowered First Amendment standards).

the First Amendment's Free Speech Clause, U.S. Const. amend. I, as applied in state courts.

1. Indiana and federal standing-and-ripeness requirements are similar, but Indiana's are more permissive, including allowing public-interest standing.

Preliminarily, note that Indiana and federal standing requirements have similar basic requirements. Indiana is not bound by the case-and-controversy restriction of Article III, § 2, of the U.S. Constitution, as noted in *Pence v. State*, 652 N.E. 2d 486, 488 (Ind. 1995), though Indiana's constitutional separation-of-powers requirement offers something of a parallel, *id.* Indiana standing requires a "personal stake" and a "direct injury" (including an impending one) that is the "result of complained of conduct." *Midwest Psychological Center v. Indiana Dep't of Admin.*, 959 N.E.2d 896, 902 (Ind. Ct. App. 2011) (citations omitted). Federal standing similarly requires that (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," such that "the injury [is] fairly . . . trace[able] to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).[15] Vitally, *under* this similar federal test, the U.S. Supreme Court has held that the

[15] *Lujan* is the classic, oft-quoted, modern statement of Article III standing requirements. Regarding its "imminent" requirement, the 5-4 decision in *Clapper v. Amnesty International U.S.A.*, 568 U.S. 398 (2013), noted that "imminence is concededly a somewhat elastic concept" and focused on a "certainly impending" requirement, *id.* at 409, but it expressly conceded that case law also "found standing based on a 'substantial risk' that the harm will occur" and declined to distinguish those terms of art, *id.* at 414 n.5. That the terms both remain good law was confirmed a year later in the *unanimous* opinion in *Driehaus*, 573 U.S. 149, which held that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is

First Amendment requires special protection. *See* Part I.A.2-7.

Because Indiana's requirements are *similar* to federal requirements, federal standing and ripeness doctrines inform Indiana's doctrines. For example, ripeness in Indiana examines "fitness" and "hardship" factors. *See, e.g.*, *Hardy v. Hardy*, 963 N.E.2d 470, 474 n.3 (Ind. 2012). This is, of course, derived from an identical statement regarding ripeness in federal-court cases: "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas and Elec. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 201 (1983) (citation omitted) ("*PG&E*"). That Indiana adopts the federal ripeness standard is explicit in *Rene ex rel. Rene v. Reed*, 726 N.E.2d 808 (Ind. Ct. App. 2000), which states the fitness-hardship test by directly *quoting* the U.S. Supreme Court's *PG&E* statement of the ripeness test just quoted above, *id.* at 822. Vitally, *under* that ripeness standard, the U.S. Supreme Court has held that the First Amendment requires special protection. *See* Part I.A.2-7.

To the extent that Indiana's standing requirements *differ* from Article III requirements, they do so because Indiana's standing doctrine is *more permissive*. For example, though the Indiana Supreme Court acknowledged that a case was moot, it used the case to reaffirm that Indiana allows standing without unique personal injury under the public-standing doctrine. *See Cittadine v. Ind. DOT*, 790 N.E.2d 978, 980-982 (Ind. 2003). Neither public-standing doctrine nor deciding moot cases is permitted by Article III (except under the capable-of-repetition-yet-evading-review

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a '"substantial risk" that the harm will occur,'" *id.* at 158, eliminating speculation that the Court had altered the standard on which the case law here is based.

doctrine), so Indiana's rules are clearly more permissive. While the Indiana Supreme Court said that "federal justiciability limits have no *direct* applicability," *Pence*, 652 N.E.2d at 488 (emphasis added) (citing *Matter of Lawrance*, 579 N.E.2d 32 (Ind. 1991)), the *point* of the discussion in *Pence* was that Indiana is not limited by the federal "case or controversy" requirement and so provides *easier* standing because "we do not permit overly formalistic interpretations of our separation of powers clause to impede substantial justice." 625 N.E.2d at 488. *See also id.* at 488-87 ("Historically, this Court has been more sympathetic to [citizen- and taxpayer-based] claims than our counterparts in the federal system."). The point of the cited discussion in *Lawrance* was that Indiana provides *less-strict* mootness standards because it is not bound by Article III concerns. 579 N.E.2d at 37. In fact, because "[t]he Indiana Constitution has no comparable limitation on the 'judicial power of the State' conferred on the courts by article 7, section 1, of the Indiana Constitution," the Indiana Supreme "Court can, and does, issue decisions which are, for all practical purposes, 'advisory' opinions" in cases with "an issue of 'great public interest.'" *Mosley v. State*, 908 N.E.2d 599, 693 (Ind. 2009) (citations omitted). So for example, plaintiffs with standing for a free-speech claim under federal law due to chilled speech clearly have standing under Indiana's more permissive standing requirements.

Because the challenges in Parts I and II both include First Amendment free-speech and free-expressive-association claims, the First Amendment's lowered standing-and-ripeness mandates readily resolve standing and ripeness in Advocates' favor. But Indiana case law is underdeveloped in recognizing these mandates, perhaps explaining the trial-court's decision below. Governmental entities actually attacked and rejected the idea that the First Amendment controls Indiana

standing-and-ripeness where speech is involved. *See* Part II.A.1. So this appeal provides a vital opportunity for this Court to clarify to trial courts that the First Amendment controls and applies here just like it does in federal and other state courts. As established next, the First Amendment is the supreme law of the land, the breathing room it mandates imposes lowered standing-and-ripeness standards, as recognized by other states, and that breathing room mandates greater precision in regulating speech, which necessarily lowers the standards for finding unconstitutional vagueness where provisions regulate speech.

2. The First Amendment is the supreme law of the land, so its standing-and-ripeness mandates control.

The Supremacy Clause makes federal constitutional and statutory provisions "the supreme law of the land." U.S. Const. art. VI, cl. 2. So the First Amendment is supreme over any state constitutional or statutory provision. Thus, if the First Amendment requires that speech be given breathing space, as established next, that First Amendment requirement follows the First Amendment wherever it is applied, whether in federal or state court. So if the First Amendment's protections are asserted in Indiana courts, the First Amendment's breathing-space requirements must be applied as part of its protection, and state courts may not provide less protection to First Amendment rights by more restrictive standing and ripeness requirements than federal law provides.

An example illustrates that the First Amendment must be applied uniformly in all jurisdictions. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court held that corporations may not be barred from spending money for independent speech expressly advocating the elec-

tion or defeat of a federal candidate because *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), had established that *independent* speech poses no quid-pro-quo-corruption risk and absent such risk the government has no cognizable interest to justify restricting speech, 558 U.S. at 357. That established what the First Amendment requires. Nonetheless, Montana and its Supreme Court decided that the First Amendment did not require it there, but the U.S. Supreme Court reaffirmed that the First Amendment applies the same everywhere by summarily reversing the contrary holding. *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012) ("The question . . . is whether . . . *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U. S. Const., Art. VI, cl. 2."). The transferable concept is that what the First Amendment requires in one jurisdiction applies in all jurisdictions.

3. The First Amendment mandates lowered standing-and-ripeness requirements because speech requires breathing space.

Courts have long recognized that the First-Amendment-protected speech needs "breathing space" to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963). So a "party has standing to challenge, pre-enforcement, . . . the constitutionality of a statute if First Amendment rights are *arguably* chilled, so as long as there is a *credible* threat of prosecution." *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (emphasis altered). Such a credible threat of prosecution exists where an applicable (or arguably applicable, given vagueness) provision on its face regulates a plaintiff's speech. *See* Part I.A.4. "For many decades, the courts have shown special solicitude to pre-enforcement challenges brought under the First Amendment, relaxing standing requirements and fashioning doctrines, such as overbreadth and vagueness, meant to avoid the

chilling effects that come from unnecessarily expansive proscriptions on speech." *N.Y. Republican State Comm. v. Securities and Exch. Comm'n*, 799 F.3d 1126, 1135-1136 (D.C. Cir. 2015) (collecting cases). "In the First Amendment context, the standing requirements are somewhat relaxed," *McConnell v. FEC*, 251 F. Supp. 2d 176, 258 (D.D.C. 2003), *aff'd* 540 U.S. 93 (2003), so "'claim[ing] . . . specific present objective harm or a threat of specific future harm'" provides standing and ripeness. *Id.* (quoting *Bigelow v. Virginia.*, 421 U.S. 809, 816-817 (1975)). This breathing-space mandate is required by "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It "guarantee[s] the right to express any thought, free from government censorship." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

So in First Amendment cases, preenforcement challenges may be made "to laws that could affect [Plaintiffs'] ability to engage in protected expression," "special flexibility" and "breathing room" apply to ripeness and standing, and "self-censorship" (i.e., chill) is a harm "today":

> The Supreme Court in [*Virginia v.*] *American Booksellers Ass'n*[, 484 U.S. 383, 393 (1988),] and this Court in *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323, 327 ([7th Cir.] 1985), . . . allowed publishers to make pre-enforcement constitutional challenges to laws that could affect their ability to engage in protected expression. . . . [S]pecial flexibility, or "breathing room," . . . attaches to standing doctrine in the First Amendment context . . . . See *Broadrick v. Oklahoma,* 413 U.S. 601, 610-12 [(1973)] . . . . To the extent the provisions require . . . self-censorship, they are required to exercise self-censorship today.

Sequoia Books, Inc. v. Ingemunson, 901 F.2d 630, 634 (7th Cir. 1990).[16]

[16] *Broadrick* allows *facial* invalidation of substantially overbroad provisions, 413 U.S. at 615, a much easier standard under which to obtain facial invalidation than the facial challenge standard applicable to other cases in *United States v. Salerno*, 481 U.S. 739 (1987).

These doctrines must necessarily be applied in Indiana courts because the First Amendment *itself* requires such breathing room everywhere and because the Supremacy Clause thus compels it. And citing federal standing-and-ripeness cases is proper because federal courts regularly deal with federal constitutional rights and so establish what federal rights require, and they are useful because they provide guidance in situations where there may be no state cases.

4. The First Amendment mandates that the *existence* of an applicable provision burdening speech is a cognizable harm sufficient for standing and ripeness, as is *chill*, and a credible verification of intent and chill is sufficiently concrete.

The First Amendment's required breathing space includes relaxed standing-and-ripeness standards so that the mere *existence* of an applicable, nonmoribund provision impinging on First Amendment liberties is sufficient to work a constitutionally recognizable injury against a plaintiff, as is credible *chill*. *See*, *e.g.*, *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000) ("*VRLC*") (recognizing that a plaintiff need only allege "'an actual and well-founded fear that the law will be enforced against'") (quoting *American Booksellers Ass'n,* 484 U.S. at 393); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("*NRLC-I*") ("A non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary") (quoting *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)), *cert. denied*; *NRLC-I*, 528 U.S. 1153 (2000); *New Hampshire Right to Life PAC*, 99 F.3d at 13-14 (explaining that two types of injuries may exist in preenforcement challenges: (1) the injury that attends the threat of enforcement and (2) the chill associated with statutes infringing on First Amendment values); *ACLU v. The Florida Bar*,

999 F.2d 1486, 1492-93 (11th Cir. 1993) (acknowledging justiciability for a challenge against a newly enacted law because plaintiffs were chilled by the existence of it); *International Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 818-20 (5th Cir. 1979) (explaining that the "Supreme Court has been most willing to allow anticipatory claims by plaintiffs who allege that they wish to violate the challenged statute because of their active membership in some profession or organization that has goals apart from the extirpation of unconstitutional measures"). *See also Wilson v. Stocker* 819 F.2d 943, 947 (10th Cir. 1987) ("threat of injury flow[s] directly from the statute" *despite no threat of enforcement*); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (preenforcement challenge permitted because "the threat is latent in the *existence* of the statute" (emphasis added) "if it arguably covers [conduct]"); *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (same); *Deida v. Milwaukee*, 176 F. Supp. 2d 859, 863 (E.D. Wisc. 2001) (*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), provides "a more relaxed injury and ripeness standard in the First Amendment context where a law's mere existence can chill speech before the law is actually enforced").

And "where, as here, First Amendment rights are implicated and *arguably* chilled by a 'credible threat of prosecution'" courts' "reluctan[ce] to require parties to subject themselves to enforcement proceedings" is "at its peak." *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (quoting *Chamber of Commerce*, 69 F.3d at 603 (emphasis added)).

Thus, whether or not Defendant-Appellee Cities have enforced their ordinances against the Advocates in the past or threatened enforcement is irrelevant because the *existence* of a statute that *arguably covers* Advocates' conduct suffices for standing and ripeness. The challenges to

the ordinances are ripe, though this is a preenforcement challenge, because the challenged provisions are nonmoribund and there is thus an inherently credible threat of prosecution for noncompliance. *See, e.g.*, *Doe v. Bolton,* 410 U.S. 179, 188 (1973). A nonmoribund 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,* 99 F.3d at 15. A presumption of a credible threat for a preenforcement challenge is particularly appropriate when, as here, the presence of a statute tends to chill the exercise of First Amendment rights. *See Wilson,* 819 F.2d at 946; *NRLC-I*, 168 F.3d at 710. Moreover, self-censorship "[i]s a harm that can be realized even without actual prosecution." *American Bookseller's Ass'n*, 484 U.S. at 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 . . . ." *Babbitt*, 442 U.S. at 298.

And *Babbitt* makes clear that where a provision is challenged as "unconstitutionally vague in that it does not give notice of what conduct" it covers, and challengers "desire to engage in . . . [speech] prohibited by the Act," standing exists to challenge the vague provision because "[i]f the provision were truly vague, [challengers] should not be expected to pursue their collective activities at their peril." *Id.* at 303.

That the foregoing holdings are correct is clear from the fact that we don't put our constitutional rights at the mercy of enforcers' whims or goodwill. "Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873n.8 (8th Cir.2012) (en banc) (quoting *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th

Cir. 2008) ("*NCRL-II*")). So no assurance from governmental entities that they will not enforce, or prosecute violations of, the challenged law deprives Advocates of standing, *see Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir.2000); *VRLC*, 221 F.3d 376 at 383-84; *NCRL-I*, 168 F.3d at 711, or renders claims unripe, *see National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691 (2d Cir.2013). Holding otherwise would place Advocates' "First Amendment rights 'at the sufferance of'" the governmental entities. *VRLC*, 221 F.3d at 383 (quoting *NCRL-I*, 168 F.3d at 711). Even if the governmental entities adopted a *policy* not to enforce the challenged law or prosecute anyone, Advocates would still have standing because such a policy, unlike a statute or regulation, does "not carry the binding force of law. Th[ose] who adopted the policy might be replaced with [others] who disagree with it, or some of th[ose who approved it] might change their minds." *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001) ("*VSHL*") (citing *Chamber of Commerce*, 69 F.3d at 603). Government's promise to use unconstitutional law responsibly does not justify upholding it. *United States v. Stevens*, 559 U.S. 460, 480 (2010) (citing *Whitman v. American Trucking Ass'ns, Inc.*, 531 U. S. 457, 473 (2001)).

Finally, under the lowered First Amendment standing-and-ripeness mandates, the requirements for *concreteness* are modest (and easily met by Advocates in this case). This is already evident from quotes used above, e.g., "[f]or 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 . . . ." *Babbitt*, 442 U.S. at 298, and "[a] non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and

a case or controversy thus exists in the absence of compelling evidence to the contrary," *NRLC-I*, 168 F.3d at 710 (citation omitted). So to challenge a provision based on its *existence*, a plaintiff need only show that he belongs to the class of those facially covered by a provision, and for *chill*, he need only show that he intends to engage in a course of conduct arguably constitutionally protected.

An example is *WRTL-II*, 551 U.S. 449, where WRTL did not have to *prove* that it was chilled from running ads, only credibly verify it.[17] There, the Supreme Court noted that "WRTL planned on running [issue-advocacy ads] throughout August 2004 and financing the ads with funds from its general treasury" but did not because "as of August 15, 30 days prior to the Wisconsin primary, the ads would be illegal 'electioneering communication[s]' under BCRA § 203." *Id.* at 460. How did the Court know what WRTL's plans were? Because WRTL *verified* its plans. And the Court held that the case was not moot, under the capable-of-repetition-yet-evading-review mootness exception, because WRTL verified its intent to do "materially similar" ads in the future. *Id.* at 463. Again, WRTL did not have to *prove* its intent (how could it prove intent anyway?), only credibly verify it, and that verification was credible because it was the sort of issue advocacy that this issue-advocacy group did (as is the case here for Advocates). The FEC argued that the mootness exception couldn't apply because the precise situation to which the ads were directed was unlikely to recur, which the Court rejected: "The FEC asks for too much" because "[h]istory repeats itself, but not at the level of specificity demanded by the FEC." *Id.* And such concreteness as to intended future advocacy is not required because "groups like WRTL cannot

[17] Present counsel Bopp and Coleson were counsel for WRTL. *Id.* at 454.

predict what issues will be matters of public concern during a future blackout period. In these cases, WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters during the BCRA blackout period." *Id.* at 462. So too here, the making of concrete plans for public programs and education awaits the day when Advocates receive the declaratory and injunctive relief they here seek; it is enough that they are groups with a history of advocacy.

Courts have recognized the concreteness-and-chill problem, resolving it with a test that readily establishes that Advocates here have sufficient concreteness for their chill harms. The test was formulated in *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), where a wildlife-advocacy group was found to have standing under First Amendment chill doctrine to challenge a state constitutional provision imposing a supermajority mandate on initiatives involving wildlife management. *Walker* noted the "delicate" nature of the "[l]ine drawing" in this situation because, "[b]y definition, the injury is inchoate . . . ." *Id.* at 1088. The government insisted that plaintiffs must have "specific plans to take actions subject to the statute" or "'it is too speculative and conjectural to evaluate the fitness of the claims for judicial resolution.'" *Id.* (citation omitted). The Court rejected that notion, noting that "[i]t makes no sense to require plaintiffs simultaneously to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'" *Id.* at 1089. So it established a test not requiring such specific plans:

> We hold that plaintiffs in a suit for prospective relief based on a "chilling effect" on speech can satisfy the requirement that their claim of injury be "concrete and particularized" by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no

intention to do so because of a credible threat that the statute will be enforced.

Id. The Tenth Circuit held that "evidence of past activities" could be used to establish the credibility of the intent and chill. *Id.* "If the plaintiffs satisfy these three criteria," the court held, "it is not necessary to show that they have specific plans or intentions to engage in the type of speech affected by the challenged government action." *Id.* (citing *Babbitt*, 442 U.S. at 303 ("It is clear that appellees desire to engage at least in consumer publicity campaigns prohibited by the Act; accordingly, we think their challenge to the precision of the criminal penalty provision, itself, was properly entertained by the District Court . . . .")). Other courts have adopted this logical, speech-protective, chilling-effect test that doesn't require specific plans. *See Green Party of Conn. v. Garfield*, 648 F. Supp. 298, 367-68 (D. Conn. 2009) (adopting and employing Tenth Circuit's test), *aff'd in relevant part, rev'd in part*, 616 F.3d 213, 242-43 (2nd Cir. 2010); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1199-1200 (D. Utah 2017) (following Tenth Circuit).

Applying the foregoing standards to Advocates, it suffices for concreteness that they have a history of advocating for their pro-traditional-family issue by public programs and education and want to continue doing so. Until they are free of the chill imposed by the applicable ordinances they cannot know that they can safely offer their programs and education, and only then will they be able to make more specific plans as to venue, topic, method, etc. To ask them to do so now in the name of concreteness violates the First Amendment's protection too.

5. The First Amendment's mandate of lowered standing-and-ripeness requirements is recognized by other states.

Many states recognize that the First Amendment's breathing-room requirement brings low-

ered standing-and-ripeness mandates with the First Amendment into state courts, including the First Amendment's substantial-overbreadth doctrine (allowing facial invalidation). The following examples show that state courts routinely recognize that the First Amendment's mandates apply where the First Amendment is applied in state courts. If a case cited next did not *apply* the special rules, the facts in the case did not allow for the application of the special rules, e.g., because the activity at issue lacked First Amendment protection.

a. Arizona. *State v. Kessler*, 13 P.3d 1200 (Ariz. Ct. App. 2000), recognized that in First Amendment cases the substantial-overbreadth doctrine applies, allowing protection of third parties, *id.* at 1204. "This exception exists in order to ensure that protected speech and expression are not chilled." *Id*.

b. Colorado. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348 (Colo. 1985), held that "[i]n First Amendment cases, rules of standing are broadened to permit a party to assert the facial overbreadth of statutes or ordinances which may chill the constitutionally protected expression of third parties . . . ," *id.* at 356. And *Marco Lounge, Inc. v. City of Fed. Heights*, 625 P.2d 982 (Colo. 1981), recognized the same, *id.* at 985.

c. Illinois. *People v. Williams,* 920 N.E.2d 446 (Ill. 2009), recognized that "in First Amendment cases" the substantial overbreadth doctrine is recognized to prevent "activity . . . be[ing] deterred or chilled, thus depriving society of an uninhibited marketplace of ideas," *id.* at 460.

d. Maryland. *Galloway v. State*, 781 A.2d 851 (Md. 2001), recognized that "[i]f the challenged statute . . . encroaches upon . . . First Amendment guarantees of free speech and assembly, then the statute should be scrutinized for vagueness on its face . . . . [P]ermitting a defendant to

challenge a statute on its face for vagueness becomes a 'rule of standing which allows a defendant to challenge the validity of a statute even though the statute as applied to the defendant is constitutional,'" *id.*. at 861(citations omitted).

e. Massachusetts. *Commonwealth v. Abramms*, 849 N.E.2d 867 (Mass. App. 2006), recognized an "'exception [to the traditional rule of standing] . . . based on an overriding interest in preventing any 'chill' on . . . First Amendment rights,'" *id.* at 872 (citation omitted).

f. Minnesota. *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998), recognized that "the overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment area, a challenge to a statute both on its face and as applied to the defendant," *id.* at 419.

g. Ohio. *Lorain v. Davidson,* 584 N.E.2d 744 (Ohio Ct. App. 1989), *dismissed*, 555 N.E.2d 316 (Ohio 1990), recognized that the substantial-overbreadth doctrine applies in First Amendment cases, *id.* 746.

h. Utah. *Provo City Corp. v. Thompson*, 86 P.3d 735 (Utah 2004), recognized that the substantial-overbreadth doctrine applies in First Amendment cases, *id.* at 738.

i. Virginia. *Coleman v. City of Richmond,* 364 S.E.2d 239, 242 (Va. Ct. App.1988), recognized that the substantial-overbreadth doctrine applies in First Amendment cases and that "[t]he United States Supreme Court has recently allowed a facial attack on the ground of vagueness, as well, when the statute at issue touched First Amendment concerns," *id.* at 242. And *Jaynes v. Com.*, 666 S.E.2d 303, 305 (Va. 2008), recognized that "the First Amendment overbreadth doctrine is a constitutional exception to state and federal rules of standing that would otherwise limit a party to an as-applied challenge to a statute. *Id.* at 310-311. Thus, '[a] state court is not free to

avoid a proper facial attack on federal constitutional grounds.'" *Id.* at 311 (citing *New York v. Ferber,* 458 U.S. 747, 767 (1982)).

j. Washington. In a case where the ACLU intervened in a suit brought by the state prosecuting an organization for violating Washington's False Statement Statute, *State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the court recognized that "[t]he ACLU has standing to assert its claim on its own behalf. A statute that chills a plaintiff's speech [under the First Amendment] grants standing to that plaintiff and presents a case ripe for adjudication." *Id.* at 694, n.3. And *City of Tacoma v. Luvene*, 827 P.2d 1374 (Wash. 1992), recognized that the substantial-overbreadth doctrine applies in First Amendment cases, *id.* at 1382.

After a hearing on Carmel's dismissal motion, early in this case, Advocates submitted these authorities as supplemental authorities for the proposition that state courts recognize that the First Amendment's lowered standing-and-ripeness mandates follow it into state courts. The Carmel Defendants' Response to Plaintiffs' Notice of Supplemental Authority made three arguments.

First, Carmel said ""Plaintiffs cited no Indiana authority for the proposition that an Indiana state court must apply these federal standards . . . ." *Id.* at ¶ 2. But the argument is that these are *First Amendment* standards, not mere *federal* standards. And Carmel cites no case holding that Indiana courts *reject* applying First Amendment standing-and-ripeness mandates in First Amendment cases, so the dearth of case law is due to lack of opportunity, which this case presents.

Second, Carmel said the cases "focus primarily on the federal concept of third party standing," while Advocates assert "chill," so their "out-of-state cases are inapposite." *Id.* at ¶ 5. The cases *also* recognize special protection against *chilled* speech and *vague* provisions, both at issue

here. But even if the cases only recognized substantial-overbreadth and third-party-standing protection, they did so because the *First Amendment* requires that protection. That proves Advocates' point that First Amendment protections travel with the First Amendment wherever its protections are asserted.

Third, Carmel said Advocates recite no concrete facts that would establish standing and ripeness even if First Amendment chill were to apply. *Id.* at ¶¶ 6-7. But Advocates *have* verified that they credibly intend activities governed by the applicable provision, which gives them standing and ripeness based on the mere *existence* of applicable provisions, and they credibly assert that their speech is *chilled* by those provisions. And they have made vagueness claims, which vagueness also imposes chill and which gives standing and ripeness to challenge whether or not a provision covers Advocates' speech and expressive-association. (And on the merits, not at issue here, the First Amendment mandates higher precision than does the Due Process Clause, precisely to avoid chill, as discussed next.) As to concreteness, Advocate's verified facts about their intended activities and chill fit well within the standards for First Amendment standing-and-ripeness standards discussed above. *See* Part I.A.4. *See also WRTL-II*, 551 U.S. at 460, 463 (WRTL did not have to *prove* that it was chilled from running ads, only credibly verify it).

6. The First Amendment's heightened clarity requirement lowers the standing-and-ripeness requirement for vagueness challenges.

The required "breathing room" requires "precision" and "narrow specificity" in regulations affecting First Amendment rights. *Buckley*, 424 U.S. at 41 & n.48 (1976) (citation omitted). Thus, it is insufficient to argue ordinary due-process requirements of notice and removing the

potential for arbitrary enforcement, though due-process standards must also certainly be met. But where, as here, vague provisions determine whether an Advocate is within a provision's coverage or is within some exception, the ordinary common-folks-understand-it argument doesn't suffice. Rather, where a provision regulates speech and expressive-association, standing and ripeness must be afforded to allow resolution of the vagueness challenge by the high standards of precision and narrow specificity mandated by the First Amendment's breathing-room rule. For example, in *Buckley* the government could not regulate an "expenditure . . . relative to a clearly identified candidate," *id.* at 39, even if "read to mean 'advocating the election or defeat of' a candidate," *id.* at 42, because this speech regulation remained too vague and overbroad until "construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44. That is the level of "'[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (quoting *NAACP*, 371 U.S. at 438). Though the RFRA Amendment and Ordinances similarly touch on precious freedoms, Indiana and the Cities have not even attempted such precision of regulation, and the speech-chilling freedoms are thus subject to vagueness challenges as to the scope of their coverage.

7. Applying the proper standards shows that Advocates have standing for their vagueness and protection-stripping claims unless they fit a "provider" exception.

Applying the foregoing proper standards readily reveals that Advocates have standing for the claims dealt with here in Part I. Three points summarize this.

First, given that the construction of "nonprofit religious organization or society" in the

Provider-Exceptions, § 7.5(1), governs whether Advocates are stripped of RFRA protection by the Provider-Exclusion, § 0.7, and given the differing interpretations of the phrase by Advocates and governmental entities, Advocates have standing to challenge that phrase for vagueness under the First Amendment's heightened-precision mandate and get a declaratory judgment that it is either void for vagueness or (to avoid that constitutional issue) must be given the saving construction that Advocates claim is the proper construction.

Second, given that, under the proper (or a saving) construction of that phrase that Advocates establish, they were in fact stripped of RFRA protection by the Amendment, *see* Part I.B, Advocates have standing to challenge that 2015 stripping, which is a long-ripe harm itself.

Third, under the proper standing and vagueness standards, Advocates also have standing to challenge the ordinances at issue here, and the lack of a RFRA "defense" is a separate harm that gives Advocates standing to challenge the Amendment's stripping of protection for them.

Moreover, for Advocates' RFRA "claim" against the ordinances as applied to Advocates' Exclusion Policy, RFRA itself provides statutory standing for that where religious free-exercise is "is substantially burdened or is likely to be substantially burdened." § 9. And since the challenged ordinance provisions, by their plain terms and as properly construed (given vagueness) govern and restrict Advocates' activities, including intended future but chilled activity, the required burden exists.

B. Advocates are RFRA "persons" stripped of protection by the Amendment because they are "providers" with a "sexual orientation" Exclusion Policy.

Though Advocates were protected by RFRA as *Hobby-Lobby*-type entities, and though they

provide services and have a policy of excluding same-sex-married couples, *see* Facts(C)-(D) (facts re IFI and IFA), Indiana says Advocates aren't Amendment "providers" on two grounds: (**1**) their programs aren't really public and (**2**) Advocates are exempt from the "provider" definition because they fit the exception for a "nonprofit religious organization or society." These are addressed in turn.

1. Advocates' programs are public under the required scope of "public," though the Amendment does not require that all services be offered to the public to be stripped of RFRA protection.

One way governmental entities try to avoid the applicability of the Amendment and ordinances to Advocates is to argue that Advocates programs are not really public. But (**a**) the Amendment and many ordinance provisions don't require that services be offered to the public to be covered, (**b**) governmental entities' too-narrow scope of "public" is erroneous and would vitiate any asserted antidiscrimination interest, and (**c**) "Public" may not be deemed nonpublic where individuals are excluded from an otherwise public program *on banned bases*.

a. The Amendment covers services that are not offered to the public.

To avoid duplication, Part I.B.1.a of the AFA Brief is adopted here by reference.

b. "Public" may not be limited to at-will, walk-in public accommodations or an antidiscrimination provision is fatally underinclusive as to its interest.

To avoid duplication, Part I.B.1.b of the AFA Brief is adopted here by reference.

c. "Public" may not be deemed nonpublic when individuals are excluded from an otherwise public programs on banned bases.

To avoid duplication, Part I.B.1.c of the AFA Brief is adopted here by reference.

d. Government may not tell religiously motivated speakers and expressive-associations what policy they do and may have.

As noted in Part I.B.1.d of the AFA Brief, governmental entities actually argued that Advocates lack the Exclusion Policy they verify they have and try to tell Advocates what their policy should be. To avoid duplication, that Part is adopted here by reference, but recall that Advocates established that (i) telling such groups what their beliefs are or ought to be is not permitted to government, (ii) even if a group had not had a policy previously, it is entitled to seek protection for one going forward so that what it did in the past is not controlling, and (iii) in discovery, governmental-entity counsel *avoided* asking about Advocates' *actual* Exclusion Policy, instead asking about grounds on which Advocates did *not* say they would exclude persons and then arguing that because they didn't exclude persons on those non-asserted ground Advocates were not chilled. In short, they set up strawmen, attacked those, and then declared victory without addressing the actual Exclusion Policy—which they concede would be banned sexual-orientation discrimination under the plain language of challenged provisions.

Now, it is possible that this latter argument persuaded the trial court because the only questions it asked of Advocates' counsel at the summary-judgment hearing were about this argument. Mr. Bopp had just stated Advocates' policy of excluding same-sex-married couples and the Court asked: "How does this square with the depositions?" Tr. Vol. 2, p. 110:25; *see also id.* at 111:2-3 and 111:25– 112:1 (follow-up questions on same topic). Mr. Bopp explained that the governmental entities followed non-asserted bases for exclusion and ignored the actual Exclusion Policy except for one question that was not pursued:

> [T]he problem in the depositions, Your Honor, was that the . . . Defendants decided that that was not the policy of the Plaintiffs that [Defendants] want to litigate. What the policy [Defendants] want to litigate is that the Plaintiffs' policies are that they exclude people based on their religious beliefs or solely because of sexual orientation. And so that's what they asked. And what they found out was, no, that's not the policy of the Plaintiffs and, no, they did not exclude people based on their religious beliefs or solely because of their sexual orientation.
>
> We've looked at the depositions. We can only find one question that actually involved the Plaintiffs' policy . . . . And it's as follows:
>
> The question: "In paragraph 83 of the Complaint it refers to IFI not allowing same sex married couples that do not uphold the biblical teachings on marriage and sexuality into their programs."
>
> Answer: "Uh-huh."
>
> Next question: "Do couples historically participate in the Hoosier Leadership Series together?"
>
> In other words, they had no interest in pursuing what is actually their policy. Their policy is to exclude not people based solely on sexual orientation, but to exclude people and employees known to be in a same sex marriage, engaged in same-sex sexual activity, and who advocate for such.

Id. at 111:4-24. But if that was the basis of the trial courts' holding of no standing and ripeness for *all* claims it is clearly erroneous for reasons just established, e.g., it is factually incorrect that Advocates' lack the Exclusion Policy they verify that they have, even if they lacked it in the past (they did not) they can assert it prospectively, and past history in any event is not determinative as to same-sex-married couples because same-sex marriage was only recently recognized in Indiana and nationally. *See* AFA Brief Facts(A) (adopted here by reference). *Obergefell* found a constitutional right to same-sex marriage in 2015, 135 S. Ct. 2584, wedding-service providers began denying services for same-sex-weddings in the same timeframe, AFA Br. Facts (A), and this lawsuit was filed in 2015, so assertions of fact about practices regarding same-sex-married couples before that timeframe would be meaningless to the present situation anyway.

2. Advocates are not within the exemption for a "nonprofit religious organization or society" within the meaning required by RFRA.

To avoid duplication, Part I.B.2 of the AFA Brief is adopted here by reference. Also, the specific facts about IFI and IFA establishing that they are not within the exception for a "non-profit religious organization and society" are incorporated here by reference. *See* Facts(C)-(D).

C. Alternatively, Advocates have standing under public-standing doctrine.

To avoid duplication, Part I.C of the AFA Brief is adopted here by reference.

II.
Advocates have standing and ripeness to challenge the ordinances under RFRA and constitutional protections, facially (given vague provisions) and as applied to Advocates' Exclusion Policy.

Issue: Whether IFI and IFA have standing and ripeness—including under the First Amendment's lowered standard and ripeness mandates—to bring RFRA and constitutional claims against the Carmel, Bloomington, and Columbus antidiscrimination ordinances facially (for vagueness) and as applied to their Exclusion Policy.

Standard: The standard of review for dismissing a case on standing is de novo, *Reed*, 810 N.E. 2d at 1127, as is review of summary judgment orders, *Pflugh*, 108 N.E.3d at 908.

Introduction: As established next, (**A**) controlling standards provide standing and ripeness based on the existence of an applicable provision burdening speech and where speech is credibly chilled; (**B**) IFI and IFA have standing and ripeness to challenge the Carmel Ordinance; and (**C**) IFI and IFA have standing and ripeness to challenge the Bloomington and Columbus Ordinances.

A. Controlling standing-and-ripeness standards authorize Advocates to challenges provisions that by their terms burden and chill their speech and expressive-association.

The controlling standing-and-ripeness standards for these challenges involves both Indiana's standards and the lowered standing-and-ripeness mandates of the First Amendment. To avoid duplication, IFI and IFA here adopt by reference the extended standing-and-ripeness discussion above in Part I.A. Under these standards, Advocates have standing and ripeness to bring preenforcement challenge to provisions that by their terms burden and chill Advocates' speech and expressive-association. Advocates need not await enforcement or threats thereof; the *existence* of an applicable, nonmoribund provision suffices, as does credible chill.

In addition, RFRA authorizes preenforcement challenges as a "claim" (though Advocates were stripped of RFRA protection as a "defense" by the Amendment) where "exercise of religion has been substantially burdened, or is likely to substantially burden." *Compare* § 9 ("may assert . . . as a claim or defense") *with* § 0.7 (RFRA "does not . . . establish a defense"). So RFRA does not require persons to await enforcement (where a RFRA "defense" may not be permitted), but allows persons to bring preenforcement "claims." Ordinances that by their terms burden and chill religious free-exercise are substantial burdens, and because such provisions are nonmoribund, they pose a credible risk of enforcement which is a substantial burden.

B. IFI and IFA have standing and ripeness to challenge the Carmel Ordinance.

IFI and IFA have standing and ripeness to challenge the Carmel Ordinance because, by its plain terms, the Ordinance applies to Advocates' Exclusion Policy. *See* Facts(E). The analytical issues are the same as for AFA and Indianapolis, so Part II.B of the AFA Brief is adopted here by

reference. In short, by the plain terms of the Ordinance (i) programs offered to the public and education (without being necessarily offered to the general public} are governed, (ii) excluding same-sex-married couples is sexual-orientation discrimination, and (iii) the Ordinance is non-moribund. So because IFI and IFA fit no exception to the Ordinance, the Ordinance by its plain terms *applies* to them, providing standing and ripeness by the existence of the provision. And because the Ordinance applies and IFI and IFA credibly verify that they intend covered activity but are *chilled* by the Ordinance, IFI and IFA have standing and ripeness on that separate basis.

C. Advocates, including IFI and IFA, have standing and ripeness to challenge the Bloomington and Columbus Ordinances.

The analytical issues regarding Bloomington and Columbus are the same as for Carmel: (i) the ordinances, by their plain terms, govern what Advocates (here, IFI and IFA) credibly verify their intent to do, *see* Facts(E), and (ii) Advocates (here, IFI and IFA) credibly verify that their speech and expressive-association is chilled by the existence of these ordinances, *id.* The *existence* of the applicable ordinances and the credible *chill* provide standing and ripeness.

III.
Advocates' request for judicial notice should have been granted and discussions of such evidence should not have been struck.

Issue. Whether the trial Court erred by (A) denying Advocates' request to judicially notice (i) a periodical article that Advocates said stated their Christian view of marriage, (ii) news articles showing the motives for enacting the Amendment and Carmel Ordinance, and (iii) a letter from sixteen bipartisan law professors to legislators in support of RFRA and (B) striking portions of Plaintiffs' Designation of Evidence and summary-judgment memorandum discussing such

evidence.

Standard. The standard of review is abuse of discretion, as set out in *Weinberger v. Boyer*, 956 N.E.2d 1095, 1104 (Ind. Ct. App. 2011):

> The standard of review for admissibility of evidence is abuse of discretion. *Blocher v. DeBartolo Properties Management, Inc.*, 760 N.E. 2 229, 233 (Ind. Ct. App. 2001), *trans. denied*. The trial court abuses its discretion only when its action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.* Even when the trial court erred in its ruling on the admissibility of evidence, this court will reverse only if the error is inconsistent with substantial justice. *Id.*

Applying the wrong legal standard is "clearly erroneous" as a matter of law and thus an abuse of discretion. *See, e.g.*, *Gared Holdings, LLC v. Best Bolt Prods.*, 991 N.E.2d 1005, 1011-12 (Ind. Ct. App. 2013).

Introduction. As established next, the trial court abused its discretion by applying the wrong legal standards in denying the judicial-notice requests and striking provisions of Advocates' Designation of Evidence and summary-judgment memorandum.

Evidence rule and constitutional mandates. A court "must take judicial notice if a party requests it" and it fits the "generally known" or "readily determined" criteria. Ind. Evid. R. 201(a) and (c)(2). The items at issue fit those criteria. The governmental entities argued hearsay, but to the extent the *existence* of an item and its *topic* are at issue (as here), hearsay objections fail. The governmental entities also argued that Indiana is not a legislative-history state, but the sixteen-professor letter discussed below is not offered as legislative history.[18] But *overriding all*,

[18] Legislative *history*, of course, differs from a legislative *fact* of which courts may take notice whether or not a fact is accepted as an adjudicative fact. *See, e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 520 (2d ed. 1995) ("legislative facts" are (inter alia) "facts that 'help the tribunal to exercise its judgment or discretion in determining what course of action to

the Free Exercise Clause requires that all evidence of governmental non-neutrality toward religious free-exercise be considered, *see, e.g.*, *Church of the Lukumi Babalu Aye v. Hialeah* 508 U.S. 520, 540 (1993) (plurality) ("Relevant evidence includes, among other things, the historical background of the decision 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.") And specifically, evidence that reveals what "was the object of the [provisions at issue]" is essential to determining a provision's neutrality as to free-exercise. *Id.* at 534 (Court op.). So all evidence showing governmental non-neutrality and a provision's object, should be considered and must not be struck.

A recent example of this *Hialeah* mandate in a relevant case is *Buck v. Gordon*, 2019 U.S. Dist. LEXIS 165196 (W.D. Mich. Sept. 26, 2019). In *Buck*, St. Vincent Catholic Charities sought a preliminary injunction because the Michigan Department of Health and Human Services was terminating contracts with it due to a policy of declining home studies for same-sex-married couples, which termination would curtail St. Vincent's foster-care and adoption work. As relevant here, *Buck* recognized the above quote from *Hialeah* as controlling, *id.* at *31, and expressly considered quotations attributed to the HHS head in news articles in determining non-neutrality in assessing likely merits success, *id.* at *20-21 & n.9, including by using such evidence to determine the purpose of the new provision, *id.* at *33. So here, articles and argument going to evidence of hostility toward free-exercise and the purpose of a new provision removes the very evidence that is required to prove such things, which *Hialeah* and the Free Exercise Clause forbid.

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take'" (citation omitted) and "the kind of facts that are used in a *Brandeis brief*").

Items at issue. Plaintiffs' Request for Judicial Notice and Plaintiffs' Designation of Evidence are included in the Appendix. Appellants' App. Vol. 4, pp. 162, 172. As noted in the Order from which this appeal was taken, Appellants' App. Vol. 2, p. 108, the trial court took judicial notice of constitutional, statutory, and ordinance provisions, but "[a]s to Items 7-26, the Court finds that such Motion should be and is hereby DENIED." Order at 2-3. "As to Defendants' Joint Motion to Strike Portions of Plaintiffs' Designated Evidence and Memorandum in Support of their Motion for Summary Judgment, the Court finds that such Motion should be and is hereby GRANTED." *Id.* at 3. So at issue are a theological statement, article, news articles, a letter from sixteen bipartisan law professors to Indiana legislators, and struck provisions of Advocates' Designation and summary-judgment memorandum, as discussed below.

Item 7: Theological Statement. Item 7 is a theological statement of the Christian view of marriage titled *The Two Shall Become One Flesh: Reclaiming Marriage* ("*Reclaiming Marriage*"), authored by Evangelicals and Catholic Together in the March 2015 edition of First Things, that Advocates cited and excerpted as "[a]n insightful statement on the Christian view of marriage" to which Advocates subscribe. Appellants' App. Vol. 2, p. 79 (Compl. ¶ 129 n.24). In addition to the excerpt in the Complaint, which was not struck, Advocates asked the trial court to judicially notice the statement at https://www.firstthings.com/article/2015/03/the-two-shall-become-one-flesh. Appellants' App. Vol. 4, p. 164. This statement has nothing to do with hearsay, represents the authors' own view and a view that Advocates endorse, and the excerpts are cited as a concise statement of the Christian view 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.'" Compl. ¶ 129 n.24 (citation omitted; emphasis in original).

"Printed material purporting to be a newspaper or periodical" is "self-authenticating," "requir[ing] no extrinsic evidence of authenticity . . . to be admitted." Evid. R. 902(6). First Things is a periodical, *see* https://www.firstthings.com/, so *Reclaiming Marriage* is self-authenticating—removing authentication arguments. Plaintiffs' Designation includes "items in the Request for Judicial Notice," where the statement is number seven. Appellants' App. Vol. 4, p. 173.

At page 81 of their summary-judgment memorandum ("Mem."), Appellants' App. Vol. 2, p. 94, Advocates noted the generally known fact that Christian denominations have different views on same-sex marriage, providing links to an Episcopal Church statement on one side and Southern Baptist Convention and United Methodist statements on the other. Through those links any reader can confirm that these groups are on opposite sides of the issue. The governmental entities did not move to strike those links, which is proper because they provide legislative facts that this Court may consider. As a further illustration of this generally known difference in views, Advocates linked to *Reclaiming Marriage* regarding why they believe marriage is a *religious*, not just *civil*, act. At the link provided, just like the prior undisputed links, the trial court could determine for itself what the statement says. Advocates provided some accurate quotes, accurately described the rest, and provided commentary based on their own evangelical views because this is the view with which Advocates agree. Again, the purpose was to show the existence of different views among Christian denominations, a legislative fact the court may consider, and to articulate Advocates' own view, neither within the hearsay definition. But Advocates also asked that the

statement be judicially noticed as an adjudicative fact as a concise statement of the Evangelical view with which Advocates identify.

The governmental entities objected to judicial notice of *Reclaiming Marriage* based on hearsay and moved to strike it and references to it. Whether a statement is hearsay “depends on the *purpose* for which it is offered.” *Indianapolis Newspapers v. Fields*, 259 N.E.2d 651, 267 (Ind. 1970) (emphasis in original). *See generally id.* at 266-71 (establishing hearsay doctrine’s parameters in Indiana). Here, judicial notice should be granted and neither *Reclaiming Marriage*, quotation therefrom, reference thereto, nor arguments based thereon should be struck for six reasons. First, this theological statement is not hearsay *as evidence of the fact of the statement’s publication*, and to that extent it should be judicially noticed so a court may consider the link (which is not hearsay because it asserts nothing but the author’s views) and the theological statement to which the link leads, just as it considers the prior links for the proposition that Christian denominations differ on issues of human sexuality and same-sex marriage. Second, the statement was offered in support of the proposition that Christian *denominations have different positions*, on which ground it also should be judicially noticed because that does not turn on whether any particular “statement” by any “declarant” that is “offered . . . to prove the truth of the matter asserted,” taking it outside the hearsay definition. Evid. R. 801. Third, the statement was offered *as a concise statement of Advocates’ own theological view*, which is outside the hearsay definition. Fourth, the statement is different in kind from the “newspaper” article case citations on which the governmental entities relied because First Things is not a newspaper and *Reclaiming Marriage* is a statement of the authors’ *own* beliefs, not an ordinary article *about* some subject. A court may,

and should, take judicial notice of the commonly known fact that an online search of "statements on human sexuality" yields *many* statements by Christian groups on the subject, such as the Evangelical *Nashville Statement*, https://cbmw.org/nashvillestatement/, which is also a legislative fact that a court may consider without judicial notice. Fifth, the fact that the authors of *Reclaiming Marriage* chose to publish their own statement of beliefs in a periodical does not make it hearsay because the statement is still the authors' own words. Sixth, even if the statement were inadmissible as an adjudicative fact, it should not be stricken from Plaintiffs' summary-judgment memorandum since it also serves a legislative-fact function, just like the prior two links on this subject to which Governmental entities did not object.

Items 8-22 and 25: News Articles. Items 8-22 and 25 are included in the Appendix. Appellants' App. Vol. 5, pp. 61-123. They are news articles (i) establishing the *object* of public concern that lead to the RFRA Amendment and (ii) providing permissible evidence (under *Hialeah*) of *non-neutrality* to religious free-exercise. Newspaper articles are self-authenticating, Evid. R. 902(6), so authentication arguments are irrelevant.

Pages 21-22 of Advocates' summary-judgment memorandum is in the Appendix. Appellants' App. Vol. 4, pp. 34-35. There, Advocates noted a fact that is generally known in Indiana (and nationally),[19] i.e., that what Advocates called the "news and social media turmoil" public debate over Indiana's recently enacted RFRA was about possible RFRA application to "discriminat[ion] against LGBT individuals, especially in the context of services related to same-

[19] Advocates requested that the articles and the fact for which they are provided be judicially noticed as "generally known" and "readily determined." Evid. R. 201(a)(1)(A).

sex weddings." *Id.* at 34. To illustrate, Advocates provided links to some news articles so the reader could confirm that the recited topic was the *topic* in the news. Advocates provided parenthetical comments about the article's topics. The *citations* to the articles and the *links* thereto fall outside the hearsay definition because they assert nothing, so may not be struck on that ground, and they and the articles to which they link are *legislative* facts that a court may consider—as are the short descriptions of the topics of the articles. And under the hearsay rule, the trial court may take judicial notice of the fact that these articles were *published* and the fact of their *topics*, which was the purpose for which they were offered. So no article cited for this purpose should be struck, and judicial notice should be granted as requested.

Pages 22-24 of Advocates' summary-judgment memorandum is in the Appendix. Appellants' App. Vol. 4, pp. 35-37. There, Advocates discussed evidence of forbidden non-neutrality toward religious free-exercise. *See id.* at 125-130 (establishing Free Exercise Clause mandates). Advocates provided evidence of such hostility and non-neutrality from hearings on the Carmel Ordinance. *Id.* at 36-37. Advocates also asserted that "th[e] RFRA media turmoil reflected hostility to such religious free-exercise" *Id.* at 35, i.e., that in the media such hostility and non-neutrality was *reported*. To illustrate that assertion, Advocates cited articles *reporting* statements reflecting similar hostility and non-neutrality. *Id.* 35-36. The governmental entities argued that (1) judicial notice of these news articles should be denied because they are hearsay and (2) that "[t]hese news articles, and any reference thereto, should be stricken." Of course, judicial notice and striking references in a legal memorandum are separate issues. The *citation* of the articles and the provided *links* are not within the hearsay rule because cites and links assert nothing in

themselves and are legislative facts that a court may consider in analyzing this case, so those should not be struck. And the *articles* themselves are clearly not hearsay as to the fact of their *publication* in the relevant time-frame as part of the "media turmoil" discussed and the fact that they *report* the quotations recited, so they may be judicially noticed to that extent, which Advocates asked the trial court to do. Regardless of whether the truth of the statements themselves is admissible for their truth, the fact that there were multiple *reports* of hostile and non-neutral statements is relevant to whether there was a climate of hostility to religious beliefs and religious free-exercise and reports of such in the news when the RFRA Amendment was being debated and enacted. Moreover, the reported statements of public officials and legislators is admissible as circumstantial evidence of their state of mind (and necessarily also that of some of the public) toward religious service providers who might deny services in the same-sex-marriage and LGBT-related context, so the reported statements are beyond the hearsay rule and may be admitted on that ground. *Indianapolis Newspapers*, 259 N.E.2d at 269-70 ("utterances which circumstantially indicate a specif state of mind" not hearsay). The reported statements are also admissible evidence as to the "the *fact* of the utterance," which is outside the hearsay rule. *Id.* at 268 (emphasis in original). In any event, the citations, links, and articles are legislative facts that the trial court may consider in its analysis, even if the articles are not judicially recognized as adjudicative facts for all purposes, so that references should not be struck from Plaintiffs' Summary Judgment Memorandum.

Before leaving the discussion of the "media turmoil" that led to the so-called RFRA Fix, it is useful to note that *something* led to the Fix because it happened. Indiana passed a RFRA similar

to that enacted by the federal government and many states, then it altered it in a unique way, all as set out in Plaintiffs’ Summary Judgment Memorandum. *See, e.g.*, *id.* at 5-6, 24, 29-32. Some of the public and the legislators necessarily had the perception that Indiana’s RFRA needed to be *fixed* for *some* reason. The nature of the Fix itself informs that to some degree—indicating that there was a concern over “providers” of services withholding those on certain bases. But beyond that, the public debate evidenced in the first set of articles at issue above provides evidence of the specific *nature* of the services and providers about which there was concern. The second set of articles provides reports the sort of *arguments in the public domain* concerning religious beliefs and their bearing on those specific services and providers. The public (necessarily including legislators and public officials) read such articles and were influenced by them, so the articles are admissible as circumstantial evidence of what caused the effect on the public that led to the Fix, which purpose is outside the hearsay rule. *Id.* (“*not* offered to prove the truth of the facts asserted” (emphasis in original)). And as set out in Plaintiffs’ Summary Judgment Memorandum, “‘circumstantial evidence’” is relevant to whether government has departed from religious neutrality. *Id.* at 112 (citation omitted; listing Supreme Court approved factors, including “‘direct and circumstantial evidence’” of (inter alia) “‘historical background,’” “‘events leading to the enactment,’” and “‘legislative history, including contemporaneous statements made by members of the decisionmaking body’” (citation omitted)). All of these articles are beyond hearsay and admissible as evidence from which *inferences* may be drawn as to the focus of, and reason for, the Fix. *Cf. Kucki v. State*, 483 N.E.2d 788, 790-91 (Ind. Ct. App. 1985) (error to exclude article as hearsay offered for the existence of the article and a named person, from which crucial inference

could be drawn).[20] And finally, as noted, a federal court has recognized that the *Hialeah* requirement that all evidence be considered includes quotes from authorities that might otherwise be excluded as hearsay. *See supra* at 47.

Item 26: Letter from Law School Professors. At page 24, footnote 22, of their Summary Judgment Memorandum, Advocates cited and discussed the "Laycock Letter." *See* Appellants' App. Vol. 4, p. 37. Advocates also asked the trial court to take judicial of the Letter as an adjudicative fact. Governmental entities moved to strike the Letter because it is (1) unverified, (2) statements therein are hearsay, and (3) the legal analysis therein "is not a fact that can be judicially noticed."

Regarding verification, Professor Laycock provided a verification, *see* Appellants' App. Vol. 6, pp. 96-106, that was delayed in the mail and so arrived too late to include with Advocates' initial summary-judgment filings, but it was attached to Plaintiffs' Opposition to Defendants' Objections to Judicial Notice and Motion to Strike as Exhibit 1 under the authority of Indiana Trial Rule 56(E) ("The court may permit affidavits to be supplemented . . ." and affidavits and other evidence may be submitted in opposition to cross-motions for summary judgment.). But as discussed below, the legal analysis in the Laycock Letter may be considered by the trial court as a legislative *fact*—not as legislative *history* (for which it was never employed)—regardless of any authentication or judicial notice. Given the verification, the need to judicially notice the Letter

[20] Advocates withdrew their request for judicial notice of items 23 and 24 and agreed that they may stricken from their evidence designation. They are not referenced in Plaintiffs' Summary Judgment Memorandum.

should be eliminated anyway.

Regarding whether the Letter must be rejected from evidence as hearsay, the only possible "facts" in footnote 22 that might be deemed hearsay are the statement that (1) the issue regarding RFRA is not same-sex marriage but conscience protection and (2) RFRA is no license to discriminate. (*Id.*) But of course those are legal argument and conclusion, not statements of adjudicative fact, so they are outside the hearsay rule. And neither the existence of Laycock Letter nor its link, https://www.indianahouserepublicans.com/clientuploads/PDF/RFRA/RFRA.pdf, are hearsay, so there is no hearsay.

Regarding legal analysis, the governmental entities below correctly note that legal analysis "is not a fact that can be judicially noticed." But it is a legislative fact that the trial court may consider, whether or not it is an adjudicative fact. So nothing justifies striking Advocates' reference to, and discussion of, the Letter, its contents, and its legal analysis in Plaintiffs' Summary Judgment Memorandum and the trial court may consider it to the degree it finds it persuasive.

Moreover, that these scholars opine that original RFRA did not discriminate is evidence that the Amendment is evidence of non-neutrality toward religious free-exercise. Thus, this evidence must be admitted under *Hialeah*. *See supra* at 47.

Conclusion

This Court should hold that (i) Advocates have standing and ripeness for all their claims and (ii) the trial court abused its discretion by (a) refusing requested judicial notice of articles and the 16-law-professor letter and (b) striking portions of Advocate's Designation of Evidence and summary-judgment memorandum discussing such evidence; reverse the trial court's holding to

the contrary; and remand this case for consideration on the merits of all claims.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 29, 2020, the foregoing document was filed and served electronically using the Court's IEFS upon the following:

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