STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO.: 49D01-2209-PL-031056
ANONYMOUS PLAINTIFF 1, *et al*. ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA, *et a*l.,	)	
	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY CASE AS CLASS ACTION

This matter comes before the Court on Plaintiffs', Anonymous Plaintiff 1, *et al,* ., Motion to Certify Case as Class Action ("Motion to Certify"), filed on September 12, 2022. Defendants, the Individual Members of the Medical Licensing Board of Indiana, *et al*., filed an Opposition to Plaintiffs' Motion to Certify Case as a Class Action ("Opposition") on July February 20, 2023. Plaintiffs filed a Reply Memorandum in Support of their Motion for Class Certification on March 7. 2023. The Parties presented oral argument at a hearing held before the Court on April 4, 2023. By agreement, the Court took the motion under advisement and would have 60 days from the date of the hearing to issue a ruling.

The Court, being duly advised, finds now as follows:

I. BACKGROUND

1. Senate Enrolled Act No. 1(ss) ("S.E.A. 1") criminalizes the performance of abortions in most cases except where a pregnancy seriously endangers the mother's

physical health or life, the pregnancy is the result of rape or incest, or the fetus has a lethal anomaly. Ind. Code § 16-34-2-1.

2. The individual plaintiffs in this case are four women from various areas of Indiana who all are facing real-life situations where they might need to obtain an abortion as directed by and consistent with their religious beliefs. See Declarations of Anonymous Plaintiff 1, Anonymous Plaintiff 2, Anonymous Plaintiff 4, Anonymous Plaintiff 5.[1] The plaintiff organization, Hoosier Jews for Choice, is a newly formed group that "exists to take action within the Jewish community and beyond to advance reproductive justice, support abortion access, and promote bodily autonomy . . . across the state of Indiana." See Declaration of Hoosier Jews for Choice in Support of Motion for Preliminary Injunction.

3. The Individual Members of the Medical Licensing Board ("the Medical Board") are empowered to revoke and otherwise discipline medical practitioners in Indiana. See Ind. Code §§ 25-0.5-3.7, 25-0.5-8-11, 25-0.5-10-17, 25-0.5-11-5, 25-22-5-. 25-33.5-8-6. They are sued in their official capacities.

4. The defendant County Prosecutors are obligated to enforce Indiana law in their respective counties. Ind. Code § 33-39-1-5. They are sued in their official capacities.

5. Senate Enrolled Act No. 1(ss) ("S.E.A. 1") would prevent the individual Plaintiffs from being able to seek abortions.

[1] Plaintiffs originally were five individuals and an organization. Anonymous Plaintiff 3—a 24-year-old unmarried Muslim woman without children—dismissed her claims through a joint stipulation filed on February 13, 2023 after receiving a job offer that required relocation out of Indiana, rendering her claims moot. (*See* Stipulation of Dismissal without Prejudice as to Anonymous Plaintiff 3, ¶¶ 1-2).

6. The Plaintiffs filed suit challenging the application of S.E.A. 1 pursuant to Indiana's version of the Religious Freedom Restoration Act ("RFRA"). Ind. Code § 34-13-9-8.

7. Under RFRA, "a person" can seek declaratory or injunctive relief where a "governmental entity . . . substantially burden[s] [the] person's exercise of religion, even if the burden results from a rule of general applicability." Ind. Code §§ 34-13-9-8(a), 34-13-9-10. However, the government nevertheless "may substantially burden a person's exercise of religion" where "application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Id. § 34-13-9-8(b) (emphasis added).

8. This Court recognized in granting a preliminary injunction, the individual Plaintiffs have sincere religious beliefs that direct them to terminate pregnancies in situations where the abortions are not allowed by the challenged statute. (*See* Order Granting Plaintiffs' Motion for Preliminary Injunction ¶¶ 41, 49, 70).

9. The Court's order has been appealed and is currently set for oral argument in September 2023 under Case Number 22A-PL-02938.

10. While the initiation of an appeal usually divests the trial court of jurisdiction over the matter, appellate courts have held that "a trial court may retain jurisdiction to … preside over matters which are independent of and do not interfere with the subject matter of the appeal." *Clark v. State*, 727 N.E.2d 18, 21 (Ind. Ct. App. 2000). Class certification is not at issue on appeal, so the Court is proceeding with this motion.

11. Plaintiffs have filed declarations from Rabbi Dennis Sasso, Rabbi Sandy Sasso, and Rabbi Krichiver, Jewish religious leaders;[2] Rima Shahid, a follower of Islam; Reverend Julia Whitworth, a priest in the Episcopal Church; Reverend Catherine Griffin, a leader in the Unitarian Universalist Church; and J.D. Grove, a practicing Pagan.

12. Defendants have filed declarations from Rabbi Benjamin Sendrow, Rabbi Yisrael Gettinger, and Rabbi Yaakov Shulman, who are all Jewish religious leaders; Gabriel Said Reynolds, PhD, a Professor of Islamic Studies and Theology at the University of Notre Dame; and Reverend Stewart Clem, a priest in the Episcopal Church and Assistant Professor of Moral Theology at Aquinas Institute of Theology.

I. STANDARDS ON CLASS CERTIFICATION

Since this case has been filed in Indiana state court and the motion is requesting a procedural certification of the proposed class, this Motion to Certify will be assessed pursuant to Ind. Trial Rule 23.

T.R. 23 states in applicable part:

(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

[2] The Court understands that there are several different movements within Judaism such as Reform, Conservative, Reconstructionist, Orthodox, and Renewal among others. For the purposes of this order, the Court takes notice that adherents who affiliate with these different movements within Judaism may hold differing views on access to abortion as indicated by the statements and deposition testimony of the identified declarants and that more granular applications of the precepts of these movements is not necessary for the narrow purposes of this class certification order.

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action….

Id.

In order to certify a class, the plaintiff must meet its burden of proof. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). Under the analogous federal rules, a trial court "may certify a class of plaintiffs if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy of representation—and any one of the conditions of Rule 23(b)." *Id.*

The plaintiff also must show that the class is "indeed identifiable as a class." *Lindh v. Dir., Fed. Bureau of Prisons*, No. 2:14-cv-151-JMS-WGH, 2015 U.S. Dist. LEXIS 4063, at *2 (S.D. Ind. Jan. 14, 2015).

II. DISCUSSION

Plaintiffs have asked the Court to grant its initial request to certify this case as a class action. Plaintiffs have asked the Court to grant certification of the following proposed class:

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

In its Memorandum in Support, Plaintiffs argued that the present case meets all four criteria for class certification under Ind. Trial Rule 23.

In their Opposition, Defendants disputed Plaintiffs' contentions that this case satisfies the T.R. 23 factors and also raised new challenges to class certification. Defendants maintain that the proposed class is not sufficiently definite to permit certification. Additionally, Defendants argue that, should the class be certified as presently briefed, a single injunctive order would be unable to provide relief for the class.

In their Reply, Plaintiffs reiterate their earlier claims that the case satisfies the T.R. 23 factors and address the arguments raised by Defendants with regard to the definiteness of the class and the ability for a single injunctive order to provide sufficient relief.

Having reviewed the briefing, the Court finds that the present dispute comes down to three primary issues:

- Whether the proposed class is indefinite and unascertainable;
- Whether Plaintiffs have met the criteria under T.R. 23; and
- Whether a single injunction would be able to provide relief for the class as proposed.

The Court will assess each of these issues in turn.

A. Whether the proposed class is indefinite or unascertainable by any objective criteria

Before addressing the T.R. 23(A) factors, Defendants first challenge the identified class as insufficiently specific for certification at all.

"In addition to the express requirements for class certification, there is an implicit 'definiteness' requirement." *Wal-Mart Stores, Inc. v. Rhodus*, 808 N.E.2d 1198, 1201 (Ind. Ct. App. 2004). To make such a determination, the proposed class has to be definable by some kind of objective criteria defining the members of the class rather than simply the subjective beliefs of the individuals *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657, 660 (7th Cir. 2015). For instance, a class definition that can identify a particular group of individuals who have been harmed in a particular manner would satisfy objective assessments of definiteness. *See, e.g., id.* at 660-61. Proposed classes that depend solely on a member's state of mind to determine whether they belong in it, however, likely do not satisfy this objectivity requirement. *Id.* at 660. In addition, "if a class definition includes persons without interests or standing in the lawsuit, the definition is inadequate. *Wal-Mart Stores, Inc. v. Rhodus*, 808 N.E.2d 1198, 1203-04 (Ind. Ct. App. 2004).

Defendants first argue that that Plaintiffs' proposed class fails the definiteness requirement because it depends on putative class members' individual circumstances, states of mind, and subjective beliefs at any given moment. Defendants argue that there is not an objective way to determine who would be motivated by religious reasons to obtain an abortion as required by the present definition of the proposed class. Defendants direct the Court to the case *Lindh v. Dir., Fed. Bureau of Prisons*, where the Southern District of Indiana denied class certification on a RLUIPA claim seeing to overturn a policy that would not permit Muslim inmates to wear their pants above their ankles in accordance with their religious beliefs. 2:14-cv-151-JMS-WGH, 2015 U.S. Dist. LEXIS 4063, at *2 (S.D. Ind. Jan. 14, 2015). The plaintiffs had proposed two potential classes: all 28,000 Muslim inmates potentially impacted by the current rule or those specific inmates that had sought a similar exception under religious grounds but were denied. In denying certification for either proposed class, the *Lindh* Court reasoned that the classes as defined were not objectively definite because 1) there was no apparent consensus among incarcerated practicing Muslims regarding the religious necessity of wearing pants above the ankle and 2) because there was no evidence in the record of other inmates declaring that their religious observances had been similarly impacted as the plaintiff by the rule. The trial court held, therefore, that the proposed classes could not objectively be determined because the pants length issue depended on the inmate's subjective, personal beliefs about their religious practices rather than any objective criteria which could identify them as class members. Defendants argue similar considerations promote denial of class certification here. Defendants point to there being no consensus among the religions to which the current Plaintiffs belong

over whether and what circumstances the Plaintiffs would be directed to obtain an abortion as part of their religious practices. In support, Defendants rely on the declarations of their experts identifying that Plaintiffs purported religious views are not universal among all practicing Jews, Muslims, Episcopalians, or Pagans. Defendants analogize this case to the *West v. Carr*, case where the trial court found that plaintiffs comprised of members of eight different Umbrella Religious Groups ("URGs") seeking class certification to prosecute claims related to alleged burdens on their abilities to congregate for religious ceremonies because their affiliations and requested reliefs were too disparate to comprise a singular class. 337 F.R.D. 181, 187-88 (W.D. Wis. 2020). Because of the variance in beliefs across the religions identified, the subjective rationale for the Plaintiffs seeking abortions in this case, and the lack of ability to identify the potential class of putative plaintiffs through objective criteria, Defendants conclude that Plaintiffs' proposed class similarly lacks the necessary definiteness for certification as was the case in *West*.

In addition to lack of objective criteria to define members of the proposed classes, Defendants argue that certification should be denied as an improper "fail-safe" class. "[C]lasses that are defined in terms of success on the merits—so called 'fail-safe classes'—. . . are not properly defined." *Mullins*, 795 F.3d at 660. Defendants argue that since an element of the proposed class is that one has had their purported religious exercise burdened, the proposed class as defined necessarily relies on finding that a potential class member's exercise of their religious beliefs be necessarily inhibited in violation of RFRA, making the proposed class a "fail-safe" one.

In response, Plaintiffs dismiss Defendants' arguments identifying differences of opinion within religious sects as stating premises that Plaintiffs already agree and fail to defeat the proposed class certification. Plaintiffs contend that the current proposed class is sufficiently definite to be certified. Plaintiffs state that claims involving religious practices necessarily implicate one's subjective personal beliefs, but courts still routinely permit class action cases to be brought by plaintiffs with differing religious beliefs. *See, e.g., Colonel Fin. Mgmt. Officer v. Austin*, __ F. Supp. 3d __, 2022 WL 3643512, at *9 (M.D. Fla. Aug. 18, 2022), appeal pending, No. 22-13522 (11th Cir.); U*.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 776-77 (N.D. Tex. 2022), appeal pending, No. 22-10534 (5th Cir.); *Dowdy-El v. Caruso*, 2012 WL 6642763, at *1 (E.D. Mich. Dec. 20, 2012); *Willis v. Commissioner*, 753 F. Supp. 2d 768, 769 n.1 (S.D. Ind. 2010) (class of inmates who identified themselves "as requiring a kosher diet in order to properly exercise their religious beliefs").

Moving to the more specific aspects of this case, Plaintiffs argue that courts have recently certified classes of persons consisting of various religious backgrounds seeking to challenge alleged state burdens on religious practice similar to the present case. For example, in *Doster v. Kendall*, the Sixth Circuit upheld certification of a class of servicemembers challenging the requirement to be administered a COVID-19 vaccine on sincerely held religious grounds. 54 F.4th 398, 438-41(6th Cir. 2022), *see also Austin,* 2022 WL 3643512, at *11. In response to Defendants' arguments that the religious beliefs at issue are inherently subjective, the Plaintiffs contend that the personal adherence to a religious practice does not render the class unobjectively definite. Plaintiffs cite *DeOtte v. Azar*, where the trial court held certification of a class of

persons seeking to challenge the requirement to provide contraception under the Affordable Care Act on religious grounds. 332 F.R.D. 188, 197 (N.D. Tex. 2019). The trial court noted that while the particular beliefs may be personal and subjective, “the contours of those beliefs are objective” as they inform both the beliefs and the actions of the class members seeking to protect their purportedly sincere religious convictions. *Id.* Taking and even stronger position on proper deference to one’s stated religious beliefs, the *DeOtte* court stated that it “need not—indeed, may not—"delve into each unidentified individual's or employer's state of mind." *Id.* “So long as those employers and individuals who opt into the proposed classes contend that the contraceptive mandate is forbidden by their sincerely held religious beliefs, the Court must accept those contentions. *Id.* (citations omitted).

Finally, Plaintiffs argue that the proposed class is not a “fail-safe” class because there remains an unanswered question of whether S.E.A. 1’s denial of abortion services to those seeking them as part of their sincere religious beliefs “substantially burdens” the Plaintiffs’ religious practices as proscribed by RFRA.

Upon review, the Court finds that the Plaintiffs prosed class meets the minimum requirements for definiteness for the purposes of class certification analysis.

Apparent from the strong arguments from both parties and compelling case law presented in support of both positions, class claims concerning infringement of religious practice do not fit neatly into bright-line categories. While one’s personal beliefs and value system can be intensely personal and subjective based on experience, practicing one’s faith presents, as the *DeOtte* Court identified, a set of actions that observers can associate with a particular denomination. Even within denominations, there are

legitimate disagreements among observant followers on how members of a particular religion should approach issues in our world in accordance with articles of faith. The Court's role then is to determine that the alleged religious infringement is objective and observable rather than rely solely on the subjective assessment of the class members.

The Court finds necessary objective measures do exist to deem the class sufficiently definite. First, one implicit criterion to be part of the proposed class is the ability to become pregnant, which is an objective assessment that depends on possession of the necessary reproductive organs and be of childbearing age. Neither age nor possession of reproductive orders are are dependent on one's subjective state of mind at any point in time.

A second criterion is membership in a religion that would direct the putative class member to abort a pregnancy under certain circumstances. Here, the subjective/objective assessment becomes far less clear because of internal conflicts within the religions presented and the necessarily personal decision to follow a particular religion. The competing declarations provided by the Plaintiffs and Defendants, as well as the subsequent deposition designations, show that there are certainly conflicts withing religious traditions on when a practitioner may be compelled to seek an abortion on religious grounds. The Court finds at this stage of proceedings, however, that the declarations from Plaintiffs' witnesses and the admission of doctrinal conflict from both sets of witnesses provide sufficient evidentiary support that the religions to which Plaintiffs and putative class members belong would guide its practitioners to seek abortions under particular circumstances based on testimony from

leaders of these faiths. Taken together, the Court finds there to be some objective criteria to denote putative class members for the purposes of definiteness analysis.

The Court reiterates that it does not consider this evidence to be the consensus view of particular religions or as dispositive of the issue of whether denial of abortion access constitutes a substantial burden on religious practice under RFRA. The Court finds that the designations thus far merely provide sufficient evidence that one could determine putative members of the class proposed by Plaintiffs through objective criteria. Whether limiting abortion services is a substantial burden of the practice of these religions remains a question that goes to the ultimate determination in this matter.

As suggested in the prior paragraph, the Court further finds that Plaintiffs' proposed class does not constitutes an inappropriate "fail-safe" class. The question of whether limitation to abortion services constitutes a substantial burden on religious practice proscribed by RFRA remains an open question that is not impacted by certification of the class as proposed by Plaintiffs.

Having addressed the Definiteness element, the Court will proceed to the remining factors under T.R. 23(A).

B. Whether Plaintiffs proposed class satisfy the Four Factors under T.R. 23(A).

The Court will next address whether Plaintiffs have met their burden on the four factors identified under T.R. 23(A)-- numerosity, commonality, typicality, and adequacy of representation

i. Numerosity

The first factor to address is numerosity, or whether "the class is so numerous that joinder of all members is impracticable." T.R. 23(A)(1).

The plaintiff's burden is to "show enough evidence of the class's size to enable the court to make commonsense assumptions regarding the number of putative class members." 3 *Newberg and Rubenstein on Class Actions* § 3:13 (6th ed. 2022) (footnotes omitted). "[T]he fact that the number of class members cannot be determined with precision does not defeat certification." *7-Eleven, Inc. v. Bowens*, 857 N.E.2d 382, 392 (Ind. Ct. App. 2006) (citation omitted). While a plaintiff may rely on a good faith estimate of putative class membership where exact figures are difficult to ascertain. *Jones v. Blinziner*, 536 F. Supp. 1181, 1189 (N.D. Ind. 1982), the moving party cannot rely solely on conclusory allegations that joinder is impractical or that the size of the proposed class is sufficiently numerous to meet its burden. *McCart v. Chief Exec. Officer in Charge*, 652 N.E.2d 80, 83 (Ind. Ct. App. 1995); *see also Mielo v. Steak 'n Shake Operations, Inc*., 897 F.3d 467, 484–87 (3d Cir. 2018).

"Numerosity is not a high hurdle." *Elizarri ex rel. Perez v. Sheriff of Cook Cnty*., 2022 WL 767487, at *11 (N.D. Ill. Mar. 14, 2022). When seeking injunctive or declaratory relief, "the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of [the] proposed [ ]class" to show that joinder is impracticable. *Sueoka v. United States*, 101 Fed. App'x 649, 653 (9th Cir. 2004). The numerosity requirement is generally deemed to be met if a class consists of forty or more persons. *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 616 (Ind. Ct. App. 1998) (citation omitted).

Plaintiffs argue that they have satisfied the numerosity requirement for class certification through a combination of the number of religious practitioners potentially impacted by S.E.A. 1 failing to provide them a religious exemption. Plaintiffs analogize the present case to *California for Disability Rights, Inc. v. California Dept of Transp.*, where the court held that twenty-two signed affidavits of putative class members as well as the likelihood that the large number of persons with disabilities affected by the California statute were sufficient to establish numerosity for class certification purposes. 249 F.R.D. 334, 343, 347 (N.D. Cal. 2008).

Plaintiffs note that there are at least four current individual Plaintiffs impacted. Following the passage of S.E.A. 1, Hoosier Jews for Choice was formed and claims that approximately twelve of its forty-five members able to bear children have been similarly impacted by the passage of the statute. Ex. 9 to Defs. PI Opp.; Ex. 10 to Defs. PI Opp. 53:5-22. With respect to potential Jewish class members, Plaintiffs note there are 12,673 Jewish women in Indiana, 4,929 of whom are of childbearing age that can be impacted by the statute.[3] Applying the same ratio of members of Jewish Hoosiers for Choice who have claimed to be negatively impacted by S.E.A. 1 (12/45 = ~26.6%) to the 4,929 eligible persons, Plaintiffs contend that more than 1,300 Jewish persons may be negatively impacted by this statute.

Plaintiffs further identify that, in addition to these potential putative Jewish class members, S.E.A. 1 impacts persons who belong to other religions. For example,

[3] World Population Review, Jewish Population by State 2023, https://worldpopulationreview.com/state-rankings/
jewish-population-by-state (last visited Feb. 26, 2023). United States Census, QuickFacts Indiana, https://www.census.gov/quickfacts/IN (last visited Feb, 27, 2023). A court can take judicial notice of this type of general fact. Ind. Evidence Rule 201(a)(1);

applying the same arithmetic and ratios as those used when extrapolating potential Jewish class members, Plaintiffs point out that there are potentially 104 Unitarian Universalists in Indiana who would be impacted by the implementation of S.E.A. 1.(Ex. 8 to Pls. Submissions at 2 ¶ 8); (Ex. 6 to Defs. Class Opp. at 6:14-17). Plaintiffs further argue that Muslim, Episcopal, and Pagan Hoosiers would be similarly impacted as well.

In addition to statistical probability of the likely number of putative class members that would satisfy the numerosity agreement, Plaintiffs note that cases such as this where injunctive relief is sought permit the court to consider likely future members to be added to the putative class when assessing numerosity, 3 *Newberg and Rubenstein on Class Actions* § 3:15 (6th ed. 2022) (footnote omitted). Further, Plaintiffs argue that in cases such as this one where individuals are reluctant to step forward with their claims in fear of retaliation, the Court can weigh privacy concerns as an explanation why more individuals may be unwilling to step forward at this stage of the case and assume the number of putative class members to be even larger than what is indicated. *Zelaya v. Hammer*, 342 F.R.D. 426, 433 (E.D. Tenn. 2022) (citations omitted).

In response, Defendants argue that Plaintiffs have failed to make any showing that the putative class is self-evidently large enough to meet the numerosity requirement under T.R.23(A). Defendants have taken issue with the Plaintiffs methodology for estimating the number of people who would be seeking to join the class. First, Defendants argue that Plaintiffs have not provided numbers of persons who would be compelled to seek abortions as part of their religious beliefs; Plaintiffs have used total numbers of Hoosiers practicing certain religions and calculated a figure based on certain factors. Defendants note, however, that not all Jews, Muslims, and Unitarian

Universalists hold the same religious views on abortion, making any assessment on number based on these broad categories suspect. Defendants argue that Plaintiffs have not tried to show that their proposed members of the putative class have beliefs that align with the current plaintiffs or how many practitioners of these faiths sought abortions priors to the passage of S.E.A. 1 who would now be impacted. Even with the figures derived by Plaintiffs, Defendants argue that the Plaintiffs failed to control for periods of time or if the population sampled by Plaintiffs may be disproportionately more likely to obtain an abortion than the general population. Defendants further note that Plaintiffs have provided even less clear support for the consistency of beliefs among the potential Episcopalian and Pagan representatives of the putative class to make any significant assumptions on the numbers of this population that would be affected by S.E.A. 1. See pp.12–14, supra; Defs.' Ex. 5, Whitworth Dep. 42:7 ("you can find differing opinions [about abortion] for sure" in the Episcopal Church); Defs.' Ex. 7, Grove Dep. 18:9–10 (agreeing pro-life pagans exist). Finally, Defendants argue that the anecdotal evidence provided by their religious experts suggests that the number of people who are considering becoming pregnant or who are pregnant and are concerned that they will not be able to obtain an abortion is minimal.

In addition, Defendants argue that Plaintiffs have not shown joinder would be impracticable. First, Defendants argue that the likely minimal number of eventual named Plaintiffs would be reasonable to join. Second, the timing concern raised by Plaintiffs is not applicable because even if the Plaintiffs were or became pregnant, the Court has the ability to expedite proceedings, such as through temporary restraining orders or minors seeking judicial approval for abortions. see Ind. Code § 16-34-2-4(c)–(h)

(judicial-bypass procedure for seeking no-notice abortion for pregnant unemancipated minors). Further, if the timing is appropriate for the current Plaintiffs, then it would be for other class members as well. Defendants argue that other Plaintiffs could proceed anonymously as well if there are any privacy concerns which would arise without class certification, and that the alleged revolving nature of Plaintiffs' class membership due to changes in pregnancy likelihood or status does not favor finding that numerosity has been met.

Upon, review, the Court finds that Plaintiffs have met their numerosity burden under T.R. 23(A). The case law suggests that numerosity is not a substantial burden to overcome at this stage of proceedings.

Plaintiffs have relied on an estimate of the potential size of the class to show joinder is impracticable. While the exact methodology to calculate the potential size of the class as currently defined may not survive scrutiny in a peer-reviewed academic journal, the Court finds its rough approximation is persuasive enough for the Court to find that the number of class members would likely exceed the minimal threshold figure of forty and could possibly number into the thousands. The Court finds the estimate to be in good faith and able to satisfy numerosity standards under T.R. 23(A). The Court also finds that Plaintiffs' assumption of more uniform religious beliefs among individuals affiliated with a particular religious to be acceptable for the purposes of coming to an estimate and to counteract potential undercounting of putative class members. The highly sensitive nature of this case coupled with the substantial interest the public has taken in its proceedings supports Plaintiffs' arguments that several putative class members may be reluctant to come forward until the class has been certified, so the

figure could even exceed the largest estimates presently briefed. Or it could not. In either case, given the preliminary nature of this action and the potential impact of S.E.A. on thousands of Hoosiers, the Court finds that the present circumstances indicate that adding additional parties through joinder would be highly impracticable and that the potential numbers of the putative class who may be impacted by S.E.A. 1 satisfy the numerosity element for certification under T.R. 23.

ii. Commonality

Next, the Court must address the commonality prong of T.R. 23(A). Commonality as a "requirement is satisfied if the individual plaintiff's claims are derived from a common nucleus of operative fact, which is described as a 'common course of conduct.'" *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1271 (Ind. Ct. App. 2015). [F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359, 131 S. Ct. 2541, 2556 (2011).

Plaintiffs argue that all Plaintiffs are impacted by the same issue: Does S.E.A. 1 substantially burden their rights to practice their religion as afforded under RFRA? Plaintiffs argue that regardless of their specific denomination, Plaintiffs are all similarly impacted by the lack of a religious exemption to permit them to seek abortions in accordance with their religious beliefs. In support, Plaintiffs analogize this case to the *DeOtte* case, where the court held that a common question of a religious challenge to the contraception mandate united the plaintiffs in that case. 332 F.R.D. at 198.

In response, Defendants argue that Plaintiffs have failed to meet the commonality requirement necessary for class certification. Defendants argue that to satisfy commonality, it is not enough to allege that all class members "suffered a

violation of the same provision of law." *Wal- Mart*, 564 U.S. at 350 (2011); *see also Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497 (7th Cir. 2012). Defendants contend that a plaintiff must instead "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 350 (citation omitted). Defendants maintain that determining the scope of the burden on a person's sincere religious convictions must be assessed on a case-by-case basis. *United States v. Quaintance, 315 Fed. App'x 711, 713 (10th Cir. 2009) (quoting United States v. Affleck, 765 F.2d 944, 952 (10th Cir.1985)); see Barr v. City of Sinton,* 295 S.W. 3d 287, 302 (Tex. 2009) (Texas' RFRA "requires a case-by-case, fact-specific inquiry"), thus eliminating commonality in the proposed class because the extent of each burden would depend on each particular member's religious beliefs rather than a shared question of law.

Upon review, the Court finds that Plaintiffs have satisfied the commonality requirement. The current Plaintiffs' claims share the alleged harm of S.E.A. 1's failure to provide a religious exemption to seek an abortion, substantially burdening the Plaintiffs' religious practices as protected by RFRA. The proposed class carries on this common harm by permitting only those whose religious exercise would be inhibited by S.E.A. 1 to join. Recent examples of courts certifying classes made of persons of various faith backgrounds seeking to challenge statutes on religious expression grounds indicates to the Court that the same can occur here. *See Doster*, 54 F.4th 398, 438-41(6th Cir. 2022), *see also Austin,* 2022 WL 3643512 . While the question of whether Plaintiffs are actually substantially burdened for the purposes of RFRA will have to be determined throughout this litigation, the Court is satisfied that the Plaintiffs' unified calls

for a repeal of alleged restrictions on their religious practices imposed by S.E.A. 1 satisfy the commonality criteria .

iii. Typicality

The third prong under T.R. 23(A) is typicality. To satisfy typicality, the representative plaintiff's claim is neither in conflict nor antagonistic to the class as a whole." *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1272 (Ind. Ct. App. 2015). "A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and [plaintiff's] claims are based on the same legal theory." *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008) (citation omitted).

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

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

Plaintiffs argue that that their claims are typical of the putative class. Regardless of whether the plaintiffs are pregnant, may become pregnant, or have adjusted their behavior to avoid becoming pregnant, they all share the claim that S.E.A. 1 burdens their religious practices. The members of the proposed class would, therefore, all share the essential characteristics as the other members of the putative class, satisfying the typicality requirement.

In response, Defendants reiterate that the typicality requirement is not met for reasons similar to why commonality was not met. Specifically, Defendants contend that each Plaintiff's religious beliefs are personalized to them and cannot be held out as

typical of the class. Further, the putative members of the class also have different damage claims. For example, while certain members have claimed to have altered their behavior due to S.E.A. 1, not all have. The particular relief sought by each Plaintiff in this case, therefore, cannot be considered typical for all class members.

Similar to commonality element, the Court finds that Plaintiffs have met their burden to satisfy the typicality requirements under T.R. 23(A). The Plaintiffs' claims all stem from an alleged infringement by S.E.A. 1 of their religious practices as protected under RFRA. The Court is not persuaded that the differences in religious denomination nor the Defendants' distinction between putative class members who may become pregnant verses those who are altering their current behavior to avoid pregnancy sufficient to render Plaintiffs' claims atypical of the claims of the stated putative class since ultimately all members of the putative class would be claiming their religious practices have been allegedly substantially burdened by the passage of S.E.A. 1.

iv. Adequate Representatives of the Proposed Class

Finally, the Court must assess whether Plaintiffs are adequate representatives of the proposed class.

> Indiana's Trial Rule 23(A)(4) adequacy requirement has three components:
>
> 1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class;
> 2) the named representative must have a sufficient interest in the outcome to ensure vigorous adequacy; and
> 3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously.

LHO, 40 N.E.3d at 1273. "An indispensable requirement for class certification is that one or more named plaintiffs who agree to serve as class representative actually belong to the proposed class defined in the complaint as to each claim and possess the same

interest and suffer the same injury as the class members." 1 *McLaughlin on Class Actions* § 4:28 (19th ed.).

Plaintiffs argue that they have met each of the three factors to determine adequate representation. First, the Plaintiffs do not have conflicting claims because they are all seeking to prevent burdens on their religious practices from S.E.A. 1. Second, all of the named Plaintiffs, both individuals and the organization, have interests in achieving a positive outcome in this case and will ensure vigorous advocacy. Finally, Plaintiffs contend that their counsel is highly competent and be able to carry to the proposed litigation vigorously.

Defendants argue that Plaintiffs are not adequate representatives of the class for the same reasons that Plaintiffs could not meet their commonality and typicality burdens. Namely, each Plaintiff has unique religious beliefs, and satisfaction of one's burden may not provide the same relief to Co-Plaintiffs. Defendants also argue that the Plaintiffs have not shown that they actual belong to the proposed class and have suffered any injury that would let them become part of the class

Upon review, the Court finds Plaintiffs to be adequate representatives of the putative class. The Court finds that the current Plaintiffs all share similar interests in the outcome of this litigation and do not have conflicting claims. The Court also finds that Plaintiffs have shown the necessary interest in the outcome of this lawsuit to ensure it is litigated intently. Finally, the Court finds Plaintiffs' counsel to posses the necessary experience in these types of claims to handle this case competently.

In summary, the Court finds that Plaintiffs' proposed class satisfies all four elements of class certification.

C. Whether the proposed class could obtain relief under a single injunction

Finally, Defendants have challenged the certification of Plaintiffs' proposed class on grounds that it would not satisfy the single-injunction requirement under T.R. 23(B)(2).

T.R. 23(B) states, "Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition… (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole…."

Defendants argue that Plaintiffs cannot satisfy this aspect of T.R. 23(B)(2) because no single injunction could apply to the unique and particular beliefs of the likely putative class members and a general injunction forbidding enforcement of S.E.A. 1 is too abstract to satisfy due process. Defendants argue that a general injunction could not apply to all class members because the class members come from different religious denominations each with their own unique set of circumstances where seeking an abortion must be permitted. Furthermore, Defendants argue that even among the individual members of the putative class there are multiple reasons why one would seek an abortion that raise highly -context specific questions over whether enforcement of S.E.A. 1 would be a substantial burden on the individual's religious practice in that instance. Defendants analogize to the case, *Perdue v. Murphy*, where the court held that a proposed class of persons needing reasonable accommodations to be permitted to continue applying for certain benefits through government programs would require a remedy too individualized and divergent to warrant class certification under Rule 23(B)(2)." 915 N.E.2d 498, 509 (Ind. Ct. App. 2009). Defendants argue that an

alternative blanket injunction against applications of S.E.A. 1 under the proposed class could result in S.E.A. 1 not being enforced even in cases where there is no valid religious practice being protected under RFRA, which would "offend[] the principle that relief should be no greater than necessary to protect the rights of the prevailing litigants." *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022).

Defendants additionally argue that the requested injunctive relief by the class is too indefinite to be permitted under the Indiana Trial Rules. Under Ind. Trial Rule 65(D), "[e]very" injunction must "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." *Id.* "Plaintiffs seek an injunction prohibiting the "defendants from taking any action that would prevent or otherwise interfere with the ability of . . . class members . . . from obtaining abortions as directed by their sincere religious beliefs." Compl. 26. Defendants argue, however that the requested relief does not specify to the Defendant to act in accordance with any specific religious denomination's precepts or any specific class member's sincere religious beliefs, making the requested injunctive relief too vague under T.R. 65(D) and does not "describe in reasonable detail . . . the act or acts sought to be restrained." T.R. 65(D).

Finally, Defendants argue that certifying the class as presently proposed could prejudice persons who are not presently aware or involved in this matter that may have sincere religious views on abortion access that could be invalidated through an adverse ruling against Plaintiffs in this matter. Defendants propose that a fact finder may find the present plaintiffs claims do not constitute a substantial religious burden. Since the proposed putative class concerns general religious objection to the application of S.E.A. 1 here, the adverse ruling could prejudice a subsequent plaintiff who may have a more

compelling claim to prosecute a RFRA claim to keep S.E.A. 1 from preventing that individual from accessing abortion services. Defendants conclude, therefore that the class as presently proposed should not be certified.

In response, Plaintiffs argue that the requirements of T.R. 23(B)(2) are satisfied. Plaintiffs restate that the United States Supreme Court has interpreted the analogous federal rule 23(b)(2) as "applying only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.: *Wal-Mart*, 564 U.S. at 360 (internal quotation and citation omitted). Plaintiffs further note that at least one Federal Circuit Court has held, "Rule 23(b)(2) does not require that every jot and tittle of injunctive relief be spelled out at the class certification stage; it requires only reasonable detail as to the acts required." *Yates v. Collier*, 868 F. 3d 354, 368 (5th Cir. 2017) (quotation and citation omitted). In light of this guidance, Plaintiffs challenge Defendants' argument that an injunction could not apply the necessary relief to the members of the putative class because the putative members need only generally benefit from an injunction and that the specifics of the injunctive relief need not be determined at the class certification stage. Here, Plaintiffs argue that an injunction preventing the enforcement of S.E.A. 1 against the Plaintiffs would provide such a general benefit even without more specific assessment of each particular religious objection. To the extent that Defendants are concerned that a broad injunction against enforcing S.E.A. 1 would permit abortions under circumstances where there was no valid religious objection, the Court could issue an injunction that only permitted class members to seek abortions as compelled by their

religious beliefs. Plaintiffs further argue that while the facts of the *Perdue* case are distinguishable from the present case because the persons seeking class certification did need highly particularized remedies to qualify for specific benefit programs, that language actually supports Plaintiffs' position. The *Perdue* Court noted that a common disability could constitute a classwide "qualification" that would not lead to the number of specialized assessments of remedies which would prevent class certification under T.R. 23(B)(2). Here, Plaintiffs argue that the proposed class members would share as unifying classwide characteristic, namely persons whose religious practice would be burdened by S.E.A. 1. Plaintiffs reiterate that courts have often certified classes consisting of multiple different adherents of varying religious traditions because they share the commonality of having their religious practices burdened by government action in contravention of RFRA/RLUIPA. *See, e.g.*, *Ackerman v. Washington*, 436 F. Supp. 3d 1002 (E.D. Mich. 2020), aff'd, 16 F.4th 170 (6th Cir. 2021). *DeOtte,* 332 F.R.D. at 200. Further, the Plaintiffs argue that any certification concerns regarding religious beliefs could be remedied by requiring some kind of certification of religious exemption under S.E.A. 1 like the bill currently permits for abortions following cases of rape, incest, or threat to the life of the mother. *See* Ind. Code §§ 16-3-2-1(a)(2)(D); 16-34-2-1(a)(3)(E); see also, *Willis v. Commissioner*, 753 F. Supp. 2d 768 (S.D. Ind. 2010) (entering an injunction that required a corrections commissioner to "provide certified kosher meals to all inmates who, for sincerely held religious reasons, request them in writing"); Doster, 54 F.4th at, 407 ((outlining the Air Force's 11-step religious-exemption process to determine whether a belief is sincerely held). Finally, with respect to the concern that an adverse judgment against Plaintiffs could prevent other persons from

raising claims to enjoin enforcement of S.E.A. 1 for reasons of religious exercise, Plaintiffs point out that a positive judgment could result in protecting that person's claims. Because a final judgment in this case may potentially benefit class members who otherwise cannot opt out, Plaintiffs conclude that the prejudice argument should fail.

Upon review, the Court finds that Plaintiffs' prosed class satisfies T.R. 23(B)(2). The Court agrees with Plaintiffs that a single injunction would provide the putative class members with the same general benefit, namely the preservation of the right to challenge enforcement of S.E.A 1 on protected religious exercise under RFRA. Just as the present preliminary injunction is benefiting class members according to plaintiffs, the Court finds that any future injunctive relief would similarly meet the requirements under T.R. 23(B)(2). To the extent that any future injunctive relief would need to be more narrowly fashioned to satisfy T.R. 65(D) and ensure that the remedy is only applicable to the claims as demanded by the putative class members, the Court has the capability to fashion such remedy as needed. The contours of such a remedy do not need to be addressed at the class certification stage and may be addressed following further litigation on the merits of this case. The Court also agrees with Plaintiffs that persons unable to opt out of the class stand just as likely to benefit from a judgment in Plaintiffs' favor as they are to suffer due to an adverse judgment against Plaintiffs and finds that such a concern should not defeat class certification.

ORDER

In sum, the Court hereby GRANTS Plaintiffs' Motion to Certify Case as a Class Action.

SO ORDERED, ADJUDGED AND DECREED this 6th day of June, 2023.

Heather A. Welch

Honorable Heather Welch,
Judge, Marion Superior Court 1

Distribution: All counsel of record