No. 4-24-1282

IN THE ILLINOIS APPELLATE COURT
FOURTH DISTRICT

ILLINOIS BAPTIST STATE ASSOCIATION,
an Illinois not-for-profit corporation,

Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF INSURANCE,

Defendant-Appellee.

Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Case No. 2020-MR-325, Hon. Chistopher Perrin, Presiding Judge

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BRIEF OF PLAINTIFF-APPELLANT

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Oral Argument Requested

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff Illinois Baptist State Association ("IBSA") is a small Baptist organization and employer located in Springfield, Illinois. IBSA challenges the Reproductive Health Act of 2019, 775 ILCS 55/1-1, *et seq*. ("RHA"), which requires employer health plans regulated by the State to cover abortion (215 ILCS 5/356z.4a). Plaintiff seeks relief pursuant to the Religious Freedom Restoration Act, 775 ILCS 35/1, *et seq*., because the RHA coerces IBSA to provide abortion insurance coverage to which it objects on the grounds of its sincerely held religious beliefs. The relief would do nothing more than allow IBSA and its insurer to provide health coverage to IBSA employees that excludes abortion.

The circuit court denied Plaintiff's motion for summary judgment and granted the Department of Insurance's motion for summary judgment. The Circuit Court found that Plaintiff should obtain insurance from an out-of-state, unregulated-in-Illinois insurer called GuideStone, based in Texas, because it offers plans that exclude abortion. The circuit court made this finding regardless of whether GuideStone otherwise provides an acceptable plan (when they last offered a plan, it excluded the main hospital IBSA employees use) and despite the fact that relying on a single insurer (GuideStone) going forward negates any bargaining power or insurance market for IBSA. Plaintiff appeals the summary judgment rulings.

ISSUE PRESENTED FOR APPEAL

Whether the Reproductive Health Act, 775 ILCS 55/1-1, *et seq*., including 215 ILCS 5/356z.4a, is unlawful, invalid, unenforceable, null and void and otherwise of no force and effect to the extent it coerces Plaintiff to provide abortion insurance coverage to

which Plaintiff objects on the grounds of its sincerely held religious beliefs.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment under Supreme Court Rule 301. The Circuit Court of the Seventh Judicial Circuit, Sangamon County, entered judgment for Defendant on September 4, 2024. (A1). Plaintiff filed this appeal on September 30, 2024. (A5).

STATUTE INVOLVED

(215 ILCS 5/356z.4a)

Sec. 356z.4a. Coverage for abortion.

(a) Except as otherwise provided in this Section, no individual or group policy of accident and health insurance that provides pregnancy-related benefits may be issued, amended, delivered, or renewed in this State after the effective date of this amendatory Act of the 101st General Assembly unless the policy provides a covered person with coverage for abortion care. Regardless of whether the policy otherwise provides prescription drug benefits, abortion care coverage must include medications that are obtained through a prescription and used to terminate a pregnancy, regardless of whether there is proof of a pregnancy.

(b) Coverage for abortion care may not impose any deductible, coinsurance, waiting period, or other cost-sharing limitation that is greater than that required for other pregnancy-related benefits covered by the policy.

(c) Except as otherwise authorized under this Section, a policy shall not impose any restrictions or delays on the coverage required under this Section.

(d) This Section does not, pursuant to 42 U.S.C. 18054(a)(6), apply to a multistate plan that does not provide coverage for abortion.

(e) If the Department concludes that enforcement of this Section may adversely affect the allocation of federal funds to this State, the Department may grant an exemption to the requirements, but only to the minimum extent necessary to ensure the continued receipt of federal funds.

(Source: P.A. 101-13, eff. 6-12-19; 102-1117, eff. 1-13-23.)

STATEMENT OF FACTS

Plaintiff and its Position on Abortion

Plaintiff Illinois Baptist State Association (IBSA) is an Illinois not-for-profit corporation with its principal office located in Springfield, Sangamon County, Illinois. (C494 at ¶1; C502; C660). IBSA provides health insurance coverage through a third-

party insurer to more than 20 employees, along with retirees. (C495 at ¶5; C503; C661). IBSA believes there is a moral and spiritual obligation to care for employees to the best of its ability and insurance is one of the ways that it does that. (C497 at ¶20; C519; C666). The health insurance IBSA provides its employees includes pregnancy-related benefits. (C495 at ¶6; C503; C661).

IBSA, founded in 1907, is a partnership of almost 1,000 churches, church plants, and mission congregations working together to advance the Gospel in Illinois and around the world. (C494 at ¶2; C502; C660). Through its ministries and missions, IBSA seeks to develop healthy, effective Baptist churches, sacrificially working together to advance the Gospel, make disciples of Jesus, and establish new churches throughout Illinois and the world. (C494 at ¶3; C502; C661). IBSA and its member churches are affiliated with the Southern Baptist Convention. (C494 at ¶4; C502; C661). Because "the Bible affirms that the unborn child is a person, bearing the image of God, from the moment of conception (Psalm 139:13–16; Luke 1:44)," Southern Baptists have "historically upheld the sanctity of life in the womb and repeatedly reaffirmed opposition to legalized abortion."[1] *Id*. IBSA's beliefs are described in the Baptist Faith and Message 2000 statement of faith, which states that "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death," and "[c]hildren, from the moment of conception, are a blessing and heritage from the Lord." (C497 at ¶21; C667). IBSA's position on abortion has never changed. (C497 at ¶22; C514; C667).

[1] "On Celebrating The Advancement Of Pro-Life Legislation In State Legislatures," Southern Baptist Convention, https://www.sbc.net/resource-library/resolutions/on-celebrating-the-advancement-of-pro-life-legislation-in-state-legislatures/

It is IBSA's sincerely held religious belief that abortion involves the destruction of human life and is gravely wrong and sinful. (C495 at ¶7; C503; C661-62). IBSA believes that it cannot facilitate access to, subsidize, or otherwise materially cooperate with the provision of abortion without violating its conscience and most sacred and solemn obligations to God, betraying its professed religious faith, and disserving the best interests of fellow human beings. (C495 at ¶8; C503; C662). As such, IBSA believes that paying for, participating in and/or providing a group health insurance plan that provides abortion coverage is sinful and immoral, because IBSA would be complicit in abortion, in violation of its sincerely held religious beliefs. (C495 at ¶10; C503; C662). IBSA believes that its health insurance should comply with the Baptist Faith and Message 2000. (C497 at ¶23; C519; C667).

The Reproductive Health Act of 2019 and its Abortion Coverage Mandate

On June 12, 2019, Governor J. B. Pritzker signed the Reproductive Health Act into law as part of his vow to make Illinois the "most progressive" state in the nation when it comes to reproductive health care rights.[2]

As to abortion coverage, the RHA (at 215 ILCS 5/356z.4a) states:

> Coverage for abortion.
>
> (a) **Except as otherwise provided in this Section, no individual or group policy of accident and health insurance that provides pregnancy-related benefits may be issued, amended, delivered, or renewed in this State after the effective date of this amendatory Act of the 101st General Assembly unless the policy provides a covered person with coverage for abortion care.**

[2] Tina Sfondeles, Chicago Sun-Times, "Pritzker signs abortion measure he says makes Illinois most 'progressive' on issue," https://chicago.suntimes.com/politics/2019/6/12/18661670/pritzker-abortion-bill-illinois-sign-reproductive-health-act.

(b) Coverage for abortion care may not impose any deductible, coinsurance, waiting period, or other cost-sharing limitation that is greater than that required for other pregnancy-related benefits covered by the policy.

(c) Except as otherwise authorized under this Section, a policy shall not impose any restrictions or delays on the coverage required under this Section.

(d) This Section does not, pursuant to 42 U.S.C. 18054(a)(6), apply to a multistate plan that does not provide coverage for abortion.

(e) If the Department concludes that enforcement of this Section may adversely affect the allocation of federal funds to this State, the Department may grant an exemption to the requirements, but only to the minimum extent necessary to ensure the continued receipt of federal funds.

(Emphasis added.)[3]

The Reproductive Health Act's Legislative History

Sponsors Kelly Cassidy (house of representatives) and Melinda Bush (senate) both spoke in favor of the RHA during floor debates in late May of 2019. (C497 at ¶24; C537-40; C667). Notably, they both answered the same question relevant to this case:

Rep. Robyn Gabel: "Does the Reproductive Health Act require all health insurance policies, even those purchased by churches, other religious entities, and persons and employers with moral or religious objections to abortions, to cover abortion services?"

Cassidy: "No. Our state's existing Health Care Right of Conscience Act already provides protections for those with moral or religious objections, including permitting insurance companies and other health care payers to opt out of coverage for any health care service to which they have a documented conscience-based objection. This is the same way that contraceptive coverage requirements are handled for entities with conscience-based objections. Regardless, the Bill was amended with language to clarify this point. I understand that some Members have received calls and letters from various institutions or companies claiming that their insurance providers are not asking whether the employer has a conscience objection to providing coverage for services such as abortion. The Health Care Right of

[3] On November 20, 2024, pro-life organizations, a church, and other Christian employers filed a federal complaint seeking an injunction against enforcement of the abortion coverage mandate at issue in this case. *Students for Life of America v. Gillespie*, 1:24-cv-11928 (N.D. Ill.). That case is in its early stages and involves a religious freedom claim (under the U.S. Constitution's Free Exercise Clause instead of Illinois' RFRA statute), an expressive association claim, and statutory claims.

> Conscience Act provides that any health care payer, including an employer paying for health care, has a right to opt out of the coverage mandate. A 'health care payer' is defined as a health maintenance organization, insurance company, management services organization, or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product. The language covers any company purchasing insurance, not just those who are self-insured. **For purposes of legislative intent, the language of Senate Bill 25, as amended by House Amendment 1, makes it abundantly clear that the intent of the language in this Bill is to require an insurance company to offer a health care product but not to interfere with the right of the entity purchasing the health care policy to refuse to provide coverage for abortion care."**

(C497 at ¶25; C537-40; C668) (also citing Bush's almost identical answer) (emphasis added). The Illinois General Assembly thus anticipated the Plaintiff's claims and assured the public that these rights would be protected.

Count II of Plaintiff's complaint was made under the Health Care Right of Conscience Act, which does not expressly protect employers but instead expressly protects doctors, nurses and insurance companies, among some others. (C202-04); 745 ILCS 70/1. Defendant successfully moved to dismiss that claim, convincing the circuit court that employers who provided health plans were not "health care payers." (C208; C287). Regardless of the Health Care Right of Conscience Act, Illinois' RFRA statute undoubtedly protects employers like IBSA, 775 ILCS 35/5, and Plaintiff chose to present its best claim in this Court.

IBSA's insurer inserted abortion coverage into IBSA's health plan once the RHA took effect.

IBSA's health plan is subject to Illinois' Reproductive Health Act and its abortion coverage mandate, meaning the plan (to the extent the State can regulate it) is required to provide employee health insurance coverage that includes abortion coverage. 215 ILCS 5/356z.4a. IBSA currently complies with this law against its will by providing insurance coverage to employees that includes abortion coverage. (C495 at ¶11; C503; C663).

Before the Reproductive Health Act, IBSA provided employees with health insurance coverage for reproductive health services but never provided abortion coverage. (C496 at ¶12; C504; C663). IBSA provided insurance through a company called GuideStone before 2019, and then Blue Cross Blue Shield of Illinois in 2019; those policies did not include abortion coverage. (C498 at ¶26; C668-69). In 2020, because of the Reproductive Health Act, IBSA's insurer added abortion coverage to the plan and IBSA started looking at other options. *Id*. IBSA now provides coverage through Health Alliance, and it includes abortion coverage. (C498 at ¶27; C526-28; C669).

When IBSA became aware of the abortion coverage mandate, it looked for exemptions, options, and alternatives to insurance, but because the law applies to all insurance providers in Illinois, they could not find a solution without abortion. (C498 at ¶28). IBSA reached out to its insurance broker and asked him if IBSA could have an exemption, and the broker, after "doing a lot of research," said "no." (C499 at ¶35; C669). At IBSA's request, the broker asked several of the carriers, including Blue Cross Blue Shield, if IBSA could have an exemption from the abortion mandate, and they all said "no." *Id*. At this point, IBSA believed that the only possible health plans included abortion coverage. (C498 at ¶29; C524; C669). Every year since the RHA was enacted IBSA has asked its broker if there is a way to get an exemption from the abortion mandate and the answer is always "no." (C499; C671-72).

IBSA desires to continue offering group health plans, including pregnancy-related benefits, to its employees, but wishes to exclude coverage for products and services that violate its religious beliefs, such as those required by the Reproductive Health Act—namely, abortion. (C496 at ¶13; C504; C663-64).

IBSA has always had a "fully insured" health plan, which is a plan that does not require any medical underwriting. (C499 at ¶31; C670). Not every type of health insurance is subject to the Reproductive Health Act, simply because the State cannot regulate certain types of health plans. Defendant provides an explanation on a "frequently asked questions" section of its website:

> **Is my insurance required to cover my abortion?**
>
> That depends on your type of insurance. The Reproductive Health Act requires state-regulated private health insurance plans that offer pregnancy-related benefits to cover abortion. This includes plans that you or your family purchase directly from a carrier such as plans purchased on the ACA (Affordable Care Act) Health Insurance Marketplace, and coverage that you have through an employer that is "fully insured". However, this requirement does not apply to Medicare or other federally managed plans, and it does not apply to private employers that provide "self-funded" group health plans, which are preempted from state regulation.[4]

IBSA has looked into "self-funded" or "self-insured" plans and every discussion has led IBSA to believe it would be cost prohibitive and too high-risk for an organization its size. (C499 at ¶32; C547-48; C670). It is concerned about catastrophic events. *Id*. IBSA's broker also stated in his deposition that self-insured plans are for groups of 250 or more, much larger than IBSA. (C497 at ¶17; E420-22; C665-66).

As more fully described *infra*, Courts have described the notable characteristics of a self-insured/funded plan. "Under a self-funded plan, an employer provides health benefits to its employees out of its own funds, in contrast to a fully-insured plan in which an employer pays fixed premiums to an insurance carrier, which in turn pays the health benefits of the employees." *Express Oil Change, LLC v. Anb Ins. Servs.,* 933 F. Supp. 2d 1313, 1319 (N.D. Ala. 2013); *Little Sisters of the Poor Home for the Aged v. Burwell,*

[4] https://idoi.illinois.gov/consumers/reproductive-health-care-services.html

794 F.3d 1151, 1158 (10th Cir. 2015) (a self-insured group health plan is a "benefit plan in which the employer assumes the risk of providing health insurance."). There are pros and cons to a self-insured plan—the primary disadvantage being possible financial devastation to a small employer.

IBSA has explored other plans that are possibly not subject to the Reproductive Health Act. (C496 at ¶14; C664). For instance, IBSA has looked at "level-funded" plans, which may not be subject to the Reproductive Health Act and require additional risk on the part of the employer. (C496 at ¶18; C666). IBSA has never qualified for such plans because of the health of its staff, and, in any case, thought the risk and exposure were too great. (C498 at ¶30; C670). IBSA has considered an "associational health insurance plan" but does not believe IBSA qualifies. (C499 at ¶33; C549-50; C670). IBSA has considered an out-of-state plan (also possibly not subject to the Reproductive Health Act) through an organization named GuideStone, but there were significant coverage issues, including the failure to cover a local hospital in Springfield. (C499 at ¶ 34; C574; C670-71). Plaintiff's insurance broker testified that he would not be able to sell an insurance product from another state. (C679 at ¶36; E418; C666).

IBSA regularly reevaluates its insurance plan and tries to find abortion-free plans. (C497 at ¶19; C504; C666).

The Circuit Court's Decision

Following discovery, which included depositions of IBSA leadership, the parties filed cross-motions for summary judgment. (C483-91). Defendant's primary argument was that IBSA should use a health plan provided by out-of-state insurer GuideStone:

> [A]lternative options exist that do not cover abortion care, including self-funded insurance or out-of-state insurance products (like those offered by Texas-based

> GuideStone). Interested Illinois buyers can purchase these options—including Plaintiff, who is not restricted from buying the out-of-state insurance product offered by GuideStone.

(C653) (internal citations omitted).

The circuit court agreed, stating that "[t]he Illinois Baptist State Association could have selected a plan from GuideStone, which is comparable in terms of quality and cost to their current Health Alliance plan but does not include abortion coverage." (A2 at ¶8).

But IBSA's own past experience with GuideStone demonstrates the problems with resolving the matter for this reason and with out-of-state-insurers in general: (a) in 2018, GuideStone's plan cost hundreds of thousands of dollars more than an Illinois-based plan, (b) in 2019 and 2020, GuideStone would not even provide a quote to IBSA because of the health risk of IBSA's employees; and (c) most recently, GuideStone's plan did not include the Springfield Clinic, where most of Plaintiff's employees get their healthcare.[5] (C679 at ¶¶37-39; C523; C525; C714; E460-62).

ARGUMENT

Standard of Review

Where a case is decided through summary judgment, the appellate court's standard of review is de novo. *Vill. of New Athens v. Smith*, 2021 IL App (5th) 200257, ¶

[5] Defendant cited news articles stating the Blue Cross of Illinois has recently made the Springfield Clinic an in-network provider. (C639). So, the Department says, GuideStone's plans will include the Springfield Clinic now as an in-network provider because GuideStone uses the BCBS network. Even if true, there is no guarantee that it will stay that way, nor is there any indication of what effect that change has on GuideStone's pricing. And even according to the articles cited by the Department, there are exceptions to Springfield Clinic being in-network (for instance, "Blue Choice" and HMO plans still have the clinic as out-of-network—https://www.springfieldclinic.com/insurance#blue-cross-blue-shield-developments). The tenuous nature of this situation demonstrates the importance of IBSA having options, instead of *one vendor* to look to for insurance.

15, 188 N.E.3d 1 (citing *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43, 376 Ill. Dec. 182, 998 N.E.2d 892). *De novo* consideration means the appellate court performs the same analysis that a trial judge would perform. *Jones v. Live Nation Entm't, Inc*., 2016 IL App (1st) 152923, ¶ 28, 63 N.E.3d 959, 968-69.

Introduction

It cannot be disputed that the Illinois Baptist State Association ("IBSA")—an Illinois employer—sincerely believes that it must not abet abortion. It also cannot be disputed that the State of Illinois's Reproductive Health Act of 2019 ("Reproductive Health Act") is the but-for cause of IBSA providing insurance coverage for abortion to its employees for the first time. Defendant has argued that the Reproductive Health Act only forces *insurance companies* to cover abortion, not *employers who use those insurance companies*, but courts recognize that any distinction between a direct and indirect operation of the law upon affected plaintiffs is unimportant. The relevant question is whether Plaintiff's injury "fairly can be traced to the challenged action of the defendant." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). That Plaintiff now provides a health plan that pays for abortion is, undoubtedly, the result of the Reproductive Health Act.

IBSA's religious freedom rights are protected by the Illinois Religious Freedom Restoration Act ("Illinois RFRA"), which the Reproductive Health Act's abortion coverage mandate flouts. The Illinois RFRA protects IBSA's sincerely held and undisputed religious beliefs, which bar them from funding and providing employee health care coverage for abortion.

Various federal courts, including the United States Supreme Court, have held that employers cannot be forced by the federal government to provide contraceptive and abortifacient coverage to employees in violation of their religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). The State of Illinois faces an even steeper challenge than the federal government. *Hobby Lobby* and the many similar federal cases discussed herein addressed a federal mandate for *contraceptive* health care coverage, while Illinois has mandated coverage not just for contraceptives *but also abortions*.

Defendant's primary defense, and the reason the circuit court ruled against Plaintiff, is that IBSA is not working hard enough to exploit loopholes in the RHA. Yes, the law says clearly that "no individual or group policy of accident and health insurance that provides pregnancy-related benefits may be issued, amended, delivered, or renewed in this State . . . unless the policy provides a covered person with coverage for abortion care." 215 ILCS 5/356z.4a. But, the Defendant says, perhaps IBSA could put all its assets at risk and use a "self-funded" plan, which evades the mandate. Or perhaps IBSA could find an unregulated out-of-state plan like that of GuideStone in Dallas. This wild goose chase, which IBSA has participated in, cannot be the answer.

Before the Reproductive Health Act, IBSA never provided abortion coverage to its employees. The Reproductive Health Act has now coerced IBSA, in violation of its sincerely held religious beliefs, to provide such coverage. These basic facts should have entitled IBSA to summary judgment.

Before this case, the state acknowledged the problem. Legislative sponsors of the Reproductive Health Act, regarding the abortion coverage mandate, stated as follows in

response to a question about whether the RHA "requires all health insurance policies, even those purchased by churches, other religious entities, and persons and employers with moral or religious objections to abortions, to cover abortion services":

> No. . . . For purposes of legislative intent, the language of Senate Bill 25, as amended by House Amendment 1, makes it abundantly clear that the intent of the language in this Bill is to require an insurance company to offer a health care product **but not to interfere with the right of the entity purchasing the health care policy to refuse to provide coverage for abortion care**.

(C497 at ¶25; C537-40; C668) (quoted more fully *supra* at pp. 5-6) (emphasis added). What happened to the right of religious employers "to refuse to provide coverage for abortion care"? The State should be held to its word.

Although all states regulate health plans, most (39 of them) leave abortion out of their insurance requirements for employers. But even among those states that require abortion coverage, eight of the 11 have religious employer exceptions. Illinois stands on an island with Vermont and Washington as states who flout basic religious freedom rights, and the Washington mandate has been successfully challenged in cases similar to this one (discussed *infra*). This shows that states, in general, acknowledge the intrusion on religious beliefs that abortion coverage mandates like that of the RHA creates. It also shows that even the most liberal states can accommodate religious beliefs and still accomplish their objectives. And it shows that Defendant, in its enforcement of RHA, is plainly hostile to religion.

Thomas Jefferson declared that "[n]o provision in our Constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprizes of the civil authority." Letter from Thomas Jefferson to Richard Douglas,

National Archives, Founders Online (Feb. 4, 1809).[6] Rights of conscience are at the very center of this case, and this Court's intervention is dearly needed.

I. The RHA's abortion coverage mandate violates IBSA's rights under the Illinois RFRA by coercing IBSA to provide abortion coverage to its employees.

A. IBSA has demonstrated a substantial burden on its religious beliefs under the Illinois RFRA.

The Illinois RFRA, 775 ILCS 35/10, states that the government cannot substantially burden the exercise of religion without compelling justification. Specifically, the government may not substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest. 775 ILCS 35/15. The Illinois RFRA applies to all State and local laws, ordinances, policies, procedures, practices, and governmental actions and their implementation, whether statutory or otherwise. 775 ILCS 35/25.

The coverage mandate in 215 ILCS 5/356z.4a substantially burdens the plaintiff's free exercise of religion. The statute prevents Plaintiff from obtaining or purchasing health insurance for itself or its employees unless it pays for abortions (including other people's) and becomes complicit in the provision of elective abortions and abortion-inducing drugs. That imposes a "substantial burden" of Plaintiff's exercise of its religious faith. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014); *Little Sisters of*

[6] https://founders.archives.gov/documents/Jefferson/99-01-02-9714.

the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 681 (2020) (courts "must accept the sincerely held complicity-based objections of religious entities.").

1. State abortion coverage mandates are rare, but almost all the states that pass them acknowledge a religious burden by exempting religious entities.

Illinois is one of eleven states with an abortion coverage mandate. *See* https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/ (last visited January 1, 2025). Those states are Illinois, California (Knox-Keane Health Care Service Plan Act of 1975, Cal. Health & safety code § 1340, *et seq*.), Colorado (Colo. Rev. Stat. § 10-16-104), Maine (Me. Rev. Stat. tit. 24-A, § 4320-M), Maryland (MD Insurance Code § 15-857 (2023), Massachusetts (Mass. General Laws c.175 § 47F), New Jersey (N.J. Admin. Code § 11:24-5A.1), New York (N.Y. Ins Law § 3217 (2015); 11 N.Y.C.R.R. § 52.16(o)(1) (only "medically necessary" abortions must be covered by private insurance)), Oregon (Or. Rev. Stat. § 743A.067 (2019), Vermont (8 Vt. Stat. Ann. § 4099e), and Washington (Wash. Rev. Code § 48.43.073 (2018)).

Among these few states, Illinois, Vermont and Washington stand out for lacking religious accommodations.[7] Maine for, instance, states as follows:

> A religious employer may request and a carrier shall grant an exclusion under the policy or contract for the coverage required by this section if the required coverage conflicts with the religious employer's bona fide religious beliefs and practices.

Me. Rev. Stat. tit. 24-A, § 4320-M. Oregon states as follows:

> An insurer may offer to a religious employer a health benefit plan that does not include coverage for contraceptives or abortion procedures that are contrary to the

[7] The Washington abortion coverage mandate is being challenged as described in *Cedar Park Assembly of God of Kirkland, Washington v. Myron Kreidler, et al.,* #23-35585 (9th Cir.). However, Washington does not have a RFRA statute like Illinois.

> religious employer's religious tenets only if the insurer notifies in writing all employees who may be enrolled in the health benefit plan of the contraceptives and procedures the employer refuses to cover for religious reasons.

Or. Rev. Stat. § 743A.067(9) (2019); *see also Foothill Church v. Watanabe,* 623 F. Supp. 3d 1079, 1085 (E.D. Cal. 2022) (finding that California's Knox Keene Act includes several categorical and individualized exemptions including those for "religious employers."); 11 N.Y.C.R.R. § 52.16(o)(2) (religious employer exception); Colo. Rev. Stat. § 10-16-104(26)(d) (same); MD Insurance Code § 15-857 (2023) (same); Mass. General Laws c.175 § 47F (same); N.J. Admin. Code § 11:24-5A.3 (same).

The rarity of these abortion coverage mandates demonstrates the extreme nature of the RHA. The lack of a religious accommodation makes Illinois' imposition even more extreme. The religious accommodations from other states also demonstrate a blatant truth: legislators even in liberal states recognize the burden that employers like IBSA face, and they recognize the constitutional limitations on their actions.

Curiously, in summary judgment briefing, Defendant argued that "the record is undisputed that IBSA has not asked the *Department* for an exemption." (C655) (emphasis in original). As stated above, there is no mechanism for an employer to request an exemption from the coverage mandate. Nonetheless, in response to this argument in litigation, IBSA stated in writing that it was asking for an exemption. (C707; C733 at pp. 10-11). Defendant made no response.

2. Supreme Court precedent, along with many other court decisions, makes clear that government-coerced, religiously objectionable insurance coverage creates a substantial burden on religion.

Various federal courts, including the United States Supreme Court, have held that employers' religious beliefs are substantially burdened when forced by the government to

provide contraceptive coverage to employees in violation of their religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014); *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) ("there can be little doubt that the contraception mandate imposes a substantial burden on the plaintiffs' religious exercise . . . [T]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services.") (emphasis in original); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 671 (2020) ("in the absence of any accommodation, the contraceptive-coverage requirement imposes a substantial burden").

The State of Illinois faces an even steeper challenge than the federal government. *Hobby Lobby* addressed a federal mandate for *contraceptive* health care coverage, while Illinois has mandated coverage for not just contraceptives *but also abortions*.

An abortion coverage mandate in another state, California, has been successfully challenged by religious claimants who are similarly situated to IBSA. In *Foothill Church v. Watanabe,* 623 F. Supp. 3d 1079 (E.D. Cal. 2022), a federal district court in California granted summary judgment in favor of religious claimants who objected to orders from the State of California to include abortion coverage in their health plans. *Id*. at 1082-83. Following that decision, a permanent injunction was issued in favor of the claimants, stating that "the Churches have established irreparable injury by showing the State violated their rights guaranteed by the Free Exercise Clause by refusing to consider their exemption request." *Foothill Church v. Watanabe*, 654 F. Supp. 3d 1054, 1058 (E.D. Cal. 2023). This victory was on the basis of the Free Exercise Clause, a more challenging claim than under the Illinois RFRA since the Free Exercise Clause allows even

burdensome statutes to survive if they are neutral and generally applicable. *See Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Under the Illinois RFRA, IBSA's religious exercise is more protected than that of the successful plaintiffs in *Foothill Church*.

Similarly, in *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020), the Court of Appeals for the Ninth Circuit recognized that a religious employer suffered injury-in-fact as a result of California's abortion coverage requirement and that the violation of the employer's free exercise rights was fairly traceable to the abortion coverage requirement, despite the requirement operating on insurers (as in the case at bar). *Id*. at 747-751. On remand, the district court entered summary judgment and a permanent injunction in favor of the plaintiff on its Free Exercise claim. *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 3:16-cv-00501 (S.D. Ca. May 11, 2023); *see also Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, 683 F. Supp. 3d 1172, 1182 (W.D. Wash. 2023) ("None of the State's arguments seem to fully address the crux of Cedar Park's facilitation complaint: that its employees would not have access to covered abortion services absent [the challenged law]. This fact is undisputed and undoubtedly true. . . Even if the 'facilitation' is somewhat minimal, [the challenged law] requires Cedar Park to facilitate access to covered abortion services contrary to Cedar Park's religious beliefs.").

The Supreme Court and courts across the nation are essentially uniform in their findings that forced or coerced insurance coverage of religiously objectionable products and services to employees constitutes a substantial burden on religion. The Reproductive Health Act flouts these findings.

3. Legislative sponsors of the Reproductive Health Act expressly and publicly recognized the law's burden on religion.

Although no religious accommodation to the Reproductive Health Act made it into the law, the legislators sponsoring the Reproductive Health Act made it clear that they intended one. Sponsors Kelly Cassidy (house of representatives) and Melinda Bush (senate) both spoke in favor of the Reproductive Health Act during floor debates in late May of 2019. (C497 at ¶24; C537-40; C667). Representative Cassidy testified:

> For purposes of legislative intent, the language of Senate Bill 25, as amended by House Amendment 1, makes it abundantly clear that the intent of the language in this Bill is to require an insurance company to offer a health care product but not to interfere with the right of the entity purchasing the health care policy to refuse to provide coverage for abortion care.

(C497 at ¶25; C537-40; C668) (quoted more fully *supra* at pp. 5-6) (also citing Bush's nearly identical statements). The Illinois General Assembly thus anticipated claims of those in the position of IBSA, *recognized the burden that was being imposed*, and assured the public that religious objection rights would be protected.

"[S]tatements made by legislators who are in a position to clarify legislative meaning carry weight and are helpful to the courts in determining legislative intent." *Dep't of Cent. Mgmt. Servs. v. Illinois State Lab. Rels. Bd.*, 249 Ill. App. 3d 740, 746 (1993); *People v. Billingsley*, 67 Ill. App. 2d 292, 297 (1966) (committee comments are an appropriate and valuable source for determining legislative intent).

The Department of Insurance's abandonment of the legislature's intent is unacceptable from a legal perspective and a general governance standard. The State should be held to its word.

4. IBSA is clearly and traceably injured by the Reproductive Health Act, even if it operates nominally on insurers.

In the past, Defendant has argued that the Reproductive Health Act does not constitute a substantial burden on Plaintiff's religious beliefs under the Illinois RFRA because the Act does not apply to IBSA, but to insurance companies:

> Here, the RHA Provision does not require plaintiffs to abandon religious convictions or comply with a governmental regulation. In fact, the RHA Provision does not make plaintiffs do ***anything***. It simply does not apply to them. As explained in detail above, the RHA Provision regulates insurance companies and managed care entities, not employers, like plaintiffs, who merely make premium payments toward insurance coverage for their employees.

(C97) (emphasis in original). This is a standing argument, and the responding party bears the burden to plead and prove lack of standing. *In re Estate of Schlenker,* 209 Ill. 2d 456, 461 (2004).

This argument ignores a reality that many courts have acknowledged. That reality is this: Plaintiff previously had an employee health plan that did not cover abortion; Illinois passed the Reproductive Health Act; and now Plaintiff, against its religiously-motivated wishes and convictions, has a health plan that covers abortion. *See Trump v. Hawaii*, 585 U.S. 667, 697 (2018) (the question is whether the plaintiff "is directly affected by the laws and practices against which [its] complaints are directed.").

Even if Defendant's factual premise were correct, it would miss the point, for the relevant question is whether Plaintiff's injury "fairly can be traced to the challenged action of the defendant." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). That Plaintiff's health plan now covers abortion is, undoubtedly, the result of the Reproductive Health Act. This is a direct injury to Plaintiff, clearly caused by and traceable to the actions of Defendants. *See Nat'l Wrestling Coaches Ass'n v. Dept. of*

Educ., 366 F.3d 930, 936 (D.C. Cir. 2004) (finding plaintiffs "have standing to challenge government action on the basis of injuries caused by regulated third parties where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress"); *Petitioners Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970) (finding standing where alleged injury caused by national banks was directly traceable to the action of the defendant federal official, as plaintiff complained of injurious competition that would have been illegal without that action).

The Eighth Circuit's decision in *Wieland v. United States Department of Health & Human Services*, 793 F.3d 949 (8th Cir. 2015), addressed an analogous situation. In *Wieland*, a member of the Missouri legislature and his spouse challenged provisions of the Affordable Care Act and implementing regulations that required certain insurers to cover contraceptives. *Id*. at 952-53. The plaintiffs claimed that these laws caused their state-provided group health care plan to include contraceptive coverage, and that this coverage—which they had previously been able to opt out of—violated their religious beliefs. *Id*. at 952-54. In *Wieland*, the defendants made the same standing argument that Defendant previously made in this case: "According to HHS, the Wielands lacked standing because they were challenging provisions of the ACA that did not apply to them." *Id*. at 953. The Eighth Circuit disposed of this argument:

> The Mandate challenged in the Wielands' complaint requires group health plans and health insurance issuers to include coverage for contraceptives in all healthcare plans, and it is the Mandate that caused the State and MCHCP to eliminate contraceptive-free healthcare plans, to place the Wielands in a healthcare plan that included this coverage, and **thus to cause injury to the Wielands**.

Id. at 955 (emphasis added). "The undeniable effect of the Mandate upon the Wielands is that their healthcare plan must now include coverage for contraceptives." *Id*. at 956; *see also Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, 860 Fed. Appx. 542, 543 (9th Cir. 2021) (plaintiff had standing to challenge statute mandating abortion coverage because, "due to the enactment of [the statute], its health insurer (Kaiser Permanente) stopped offering a plan with abortion coverage restrictions and [plaintiff] could not procure comparable replacement coverage").

Defendant may claim that it is not challenging Plaintiff's standing, but these injury-in-fact standing analyses and substantial burden analyses are intertwined. The federal district court in *Wieland v. United States HHS* analyzed the traceability argument in its substantial burden analysis:

> Defendants argue that the Mandate does not substantially burden Plaintiffs' exercise of religion because it does not apply to Plaintiffs at all, in that it does not require them to provide coverage, unlike group health plans and health-insurance issuers.
> ...
> At least one other district court has addressed a similar challenge to the Mandate by employee plaintiffs, and held that the plaintiffs had demonstrated a substantial burden on their exercise of religion. In *March for Life v. Burwell*, No. 14-cv-1149 (RJL), 128 F. Supp. 3d 116, 2015 U.S. Dist. LEXIS 115483, 2015 WL 5139099, at *7-11 (D.D.C. Aug. 31, 2015), appeal docketed, No. 15-5301 (D.C. Cir. Oct. 30, 2015), the District Court concluded that **"[e]ven though employee plaintiffs are not the direct objects of the Mandate, they are very much burdened by it,**" and that the defendants' arguments that the plaintiffs' participation in a plan covering contraceptives was "'not a burden' at all" was, in essence, "a thinly veiled attack on [the plaintiffs'] beliefs." 2015 U.S. Dist. LEXIS 115483, [WL] at *7. The Court found that the plaintiffs were "caught between the proverbial rock and hard place: they can either buy into and participate in a health insurance plan that includes the coverage they find objectionable and thereby violate their religious beliefs, or they can forgo health insurance altogether and thereby subject themselves to penalties for violating the ACA's individual mandate, codified at 26 U.S.C. § 5000A." 2015 U.S. Dist. LEXIS 115483, [WL] at *8.
> ...
> [T]his Court finds the reasoning in *March for Life* highly persuasive. Similar to the plaintiffs in *March for Life*, Plaintiffs here claim that they cannot maintain health insurance consistent with their religious beliefs. Plaintiffs allege that they cannot

> obtain any insurance plan that does not provide coverage for contraceptives, and that forgoing health insurance altogether violates their religious duty to provide for the health and well-being of their children. Based upon these allegations, the Court concludes that a reasonable inference can be drawn that the Mandate coerces Plaintiffs into violating their sincerely-held religious beliefs.

No. 4:13-cv-01577-JCH, 2016 WL 98170, at *7-11 (E.D. Mo. Jan. 8, 2016) (emphasis added).

The *Wieland* case is not alone. A District Court for the District of Columbia addressed the Government's argument that the contraceptive mandate does not apply directly to individuals but instead to employers and their health plans:

> Defendants argue that the Mandate acts on employers and health plans, not individual employees, and therefore does not substantially burden employee plaintiffs' exercise of religion. . . . I disagree.
> . . .
>
> [H]ealth insurance does not exist independently of the people who purchase it. . . . **Even though employee plaintiffs are not the direct objects of the Mandate, they are very much burdened by it.**

March for Life v. Burwell, 128 F. Supp. 3d 116, 129 (D.D.C. 2015) (emphasis added); *see, e.g., Hobby Lobby*, 573 U.S. at 723 (rejecting argument that regulatory command was too "attenuated" to constitute substantial burden).

The previously discussed *Skyline* case is also relevant. In 2014, the California Department of Managed Health Care and its Director (collectively, the "DMHC") issued letters to seven health insurers directing them that, effective immediately, their insurance plans had to include coverage for legal abortion. *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, No. 18-55451, 2020 U.S. App. LEXIS 22740, at *1 (9th Cir. July 21, 2020). Skyline Wesleyan Church filed suit alleging, among other things, that its right to the free exercise of religion required the DMHC to approve a health insurance plan that comported with Skyline's religious beliefs about abortion. *Id*. at *1-2.

The Ninth Circuit panel held that Skyline suffered an injury-in-fact, noting that before the letters were sent, Skyline had insurance that excluded abortion coverage consistent with Skyline's religious beliefs. *Id*. at *2. After the letters were sent, Skyline did not have that coverage, and it presented evidence that its new coverage violated its religious beliefs. *Id*. The panel further held that there was a direct chain of causation from the DMHC's directive requiring seven insurers to change their coverage, to Skyline's insurer doing so, to Skyline's losing access to the type of coverage it wanted. *Id*. at *2-3.

The analyses in *Wieland, March for Life* and *Skyline* are directly on point. Whether the abortion coverage mandate of the Reproductive Health Act operates directly on employers or indirectly on them through insurers, the key is the impact on Plaintiff (which now has a plan that includes abortion coverage), which is clearly traceable to the Reproductive Health Act. That impact is an obvious burden on Plaintiff's religious beliefs—beliefs the government does not dispute—that paying for, participating in and/or providing a group health insurance plan that complies with the Reproductive Health Act are morally wrong because it makes Plaintiff complicit in abortion in violation of its sincerely held religious beliefs.

As the cases above clearly demonstrate, examining only the direct relationship (or lack thereof) between Plaintiff and Defendant is insufficient. The "enforcement" of Defendant's regulations is against Plaintiff's insurers, and that is what damages Plaintiff. Even if the Plaintiff is "not the direct object[] of the [regulations], [it is] very much burdened by it." *March for Life v. Burwell*, 128 F. Supp. 3d at 129.

5. The drastic and costly option of switching to a self-insured plan or other type of plan does not negate the burden on IBSA.

Defendant has argued and will continue to argue that IBSA is not burdened because it could switch to an insurance option that is exempt from Defendant's regulations, including becoming self-insured or purchasing an out-of-state plan. This argument is flawed because it establishes only that Defendant's regulations leave Plaintiff a choice between one burden (providing abortion coverage) and another (costly, risky and administratively burdensome changes to the health plan). Either way, IBSA is burdened.

The most straightforward "option" presented by Defendant is that IBSA become self-insured. Courts have described the notable characteristics of a self-insured plan. "Under a self-funded plan, an employer provides health benefits to its employees out of its own funds, in contrast to a fully-insured plan in which an employer pays fixed premiums to an insurance carrier, which in turn pays the health benefits of the employees." *Express Oil Change, LLC v. Anb Ins. Servs.,* 933 F. Supp. 2d 1313, 1319 (N.D. Ala. 2013); *Little Sisters of the Poor Home for the Aged v. Burwell,* 794 F.3d 1151, 1158 (10th Cir. 2015) (a self-insured group health plan is a "benefit plan in which the employer assumes the risk of providing health insurance."). There are pros and cons to a self-insured plan—the primary disadvantage being possible financial devastation to a small employer:

> Self-funding has a number of benefits, among them increased flexibility in designing a health care plan and a potential reduction in cost. **That potential reduction in cost, however, is counterbalanced by an increase in risk resulting from unpredictable or catastrophic claims, which may be devastating to a smaller employer that may not have the financial resources to meet those obligations.**

Express Oil Change, 933 F. Supp. 2d at 1319 (emphasis added).

Even the Defendant Department of Insurance notes that self-insured entities are generally used by bigger entities: "Many large employers, unions, government agencies including local municipalities, and school districts are self-insured." Illinois Department of Insurance, "Illinois Insurance Facts: Self-Insured Health Plans."[8] According to the Self-Insurance Institute of America, Inc., a self-insured plan is not the best plan for every employer because "[s]ince a self-insured employer assumes the risk for paying the health care claim costs for its employees, it must have the financial resources (cash flow) to meet this obligation, which can be unpredictable. Therefore, small employers and other employers with poor cash flow may find that self-insurance is not a viable option." SIAA, Self-Insured Group Health Plans FAQ.[9]

An employer with a self-insured plan, in order to be able to handle catastrophic claims, must either build up sufficient coverage reserves or purchase additional insurance in the case of large claims. *Id*. "It is implicit in the term, 'self-insurer,' that such person maintains a fund, or a reserve, to cover possible losses, from which it pays out valid claims, and that the self-insurer have a procedure for considering such claims and for managing that reserve." *Alderson v. Insurance Co. of North America*, 223 Cal. App. 3d 397, 407 (Cal. App. 4th 1990).

The switch to a self-insured plan is thus not accomplished through a simple change in paperwork. A third-party administrator must be engaged, small employers like IBSA need to beware that a catastrophic claim could bankrupt them, and those who do have self-insured plans must first build up a cash reserve to cover claims. The costs and

[8] https://www.yumpu.com/en/document/read/33896133/illinois-department-of-insurance-self-insured-health-plans (last visited January 7, 2025).

[9] https://www.siia.org/i4a/pages/Index.cfm?pageID=4546 (last visited January 7, 2025).

trepidation associated with making such a change do nothing to assuage the "pressure on [Plaintiff] to modify [its] behavior and to violate [its] beliefs" by capitulating to the effect of the Reproductive Health Act and covering abortion. *See Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981).

The move to a self-insured plan presents another problem—stewardship. The Bible instructs IBSA to be "good stewards of the manifold grace of God." King James Version, 1 Peter 4:10; *see also* Matthew 25:14-29; Proverbs 22:26-27. In the case of IBSA, moving to a self-insured plan would put its donors' gifts, among other things, at risk, to avoid a burden imposed by the State of Illinois.

Defendant will also suggest that Plaintiff is not burdened by the RHA because it could seek an out-of-state plan that does not include abortion coverage. This option is merely an alternative burden: instead of participating in a robust market of insurers as a purchaser of a typical health plan, IBSA can "opt" to search far and wide for a plan that eschews abortion and is otherwise feasible, with no guarantee that any such options will exist.

Defendant makes light of this burden by citing one single insurer in the entire nation—that being GuideStone, located in Dallas, Texas—that *may eventually* have a suitable plan for IBSA. (C649) ("Plaintiff is not in between a 'rock and a hard place,' as there is a proverbial door number three open to them: insurance through GuideStone."). But IBSA's own past experience with GuideStone demonstrates the problems with this suggestion, and with the "option" of out-of-state-insurers in general: (a) in 2018, GuideStone's plan cost hundreds of thousands of dollars more than an Illinois-based plan, (b) in 2019 and 2020, GuideStone would not even provide a quote to IBSA because of

the health risk of IBSA's employees; and (c) most recently, GuideStone's plan did not include the Springfield Clinic, where most of Plaintiff's employees get their healthcare. (C679 at ¶¶37-39; C523; C525; C714; E460-62). The mere existence of one or even an entire market of out-of-state insurance does not make such insurance a non-burdensome alternative to submitting to providing abortion coverage in an Illinois plan.

GuideStone may—next year, or in 2030, or in 2050—offer a plan to IBSA that compares in price to Illinois insurers and actually covers hospitals in Springfield, but recent history is not favorable for this scenario. Even if it did, the existence of a single insurer that provides insurance without abortion coverage could not eliminate the burden on IBSA imposed by the RHA. The RHA forces IBSA out of a functioning insurance market. A functioning insurance market requires options, like other organizations have; it is not replaceable by an obligation to use one Texas-based insurer from here on out. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., 801 F.3d 927, 937 (8th Cir. 2015) ("governmental action substantially burdens the exercise of religion when it coerces private individuals into violating their religious beliefs or penalizes them for those beliefs by denying them the rights, benefits, and privileges enjoyed by other citizens") (internal quotation and citation omitted).

California made a similar argument in *Skyline*, claiming there was no traceability from the plaintiff's injury to the law at hand because the church's decision not to purchase other insurance options like self-insurance "was grounded in economics and was in no way forced on it by DMHC." Answering Brief of the Appellee at 44-46, *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, No. 18-55451 (9th Cir. Dec. 14, 2018), 2018 WL 6791786 (cleaned up). But the Ninth Circuit rebuffed the state,

holding: "It can hardly be said that Skyline caused its own injury when it has shown that, if it were to pursue any of the alternatives floated by the DMHC, it would remain worse off than it had been before the" state's abortion mandate. *Skyline*, 968 F.3d at 748.

The Ninth Circuit held the same in the *Cedar Park* case. *Cedar Park*, 860 Fed. Appx. at 543. And that result is consistent with *Hobby Lobby*, which held that "a law that operates so as to make the practice of . . . religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion." 573 U.S. at 710 (cleaned up). The district court in *Cedar Park* agreed with the plaintiff that "self-funded and level-funded[10] plans are not comparable to fully insured plans like it had." *Cedar Park*, 683 F. Supp. 3d at 1177.

Defendant's position on this subject is odd: *sure*, the Reproductive Health Act says clearly that "no individual or group policy of accident and health insurance that provides pregnancy-related benefits may be issued, amended, delivered, or renewed in this State . . . unless the policy provides a covered person with coverage for abortion care." 215 ILCS 5/356z.4a. But, the Defendant says, there are ways around our law! Essentially, according to Defendant, IBSA is not burdened with providing abortions, it is instead burdened with finding and exhausting loopholes in their law. Fortunately, courts have recognized that that is still a burden on religious employers.

The evidence shows that IBSA indeed has gone to great lengths to find an insurance plan that would help it avoid the abortion coverage mandate at issue in this

[10] One type of self-funded plan is a "level-funded" plan, which Defendant is likely to mention (and IBSA has looked into but not qualified for—(C496 at ¶18; C498 at ¶30; C666; C670)). This type of plan "again require[s] the employer to take on more risk" than a fully insured plan. *Cedar Park*, 683 F. Supp. at 1177.

case. (C496-97 at ¶14, ¶¶16-19; C504; C664; C666). After the abortion coverage mandate passed, IBSA inquired about out-of-state plans, and IBSA was told that that would have required returning to a much more costly plan. (C496 at ¶16; C504). IBSA also researched self-insured plans with a third-party administrator, and the cost estimates involved with those were almost twice as expensive as IBSA's current plan. (C496 at ¶17). There is therefore no way for IBSA to comply with the RHA and its religious beliefs without incurring significant burden.

Religious freedom laws do not require religious claimants to dodge religious freedom harms; they oblige government to avoid or remedy harms to religious freedom.

B. IBSA easily meets redressability requirements.

Defendant, in the past, has also made a one-sentence redressability argument, stating that even if Plaintiff got its injunction, "[t]here is no guarantee that a Department-regulated entity would offer the type of insurance purportedly sought by plaintiffs: insurance with pregnancy-related benefits that excludes coverage for abortion." (C89). As an initial matter, no such guarantee is required under, at least, typical federal standing cases:

> "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision." *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir.1998). The plaintiffs' burden is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Plaintiffs need only show that there would be a "change in a legal status," and that a "practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered."

Renee v. Duncan, 686 F.3d 1002, 1013 (9th Cir. 2012).

IBSA passing a federal standing bar should be sufficient in this case. "Federal standing principles are similar to those in Illinois, and the case law is instructive." *Maglio*

v. Advocate Health & Hosps. Corp., 2015 IL App (2d) 140782, ¶ 25, 40 N.E.3d 746, 753. In fact, in *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 491 (1988), the Illinois Supreme Court recognized that state courts are *more liberal* in recognizing the standing of parties than the federal courts.

Courts did not see redressability as a problem in the *Hobby Lobby* line of cases, where for-profit employers successfully sought reprieve from the Affordable Care Act's contraceptive mandate. Those employers, even with an injunction against the mandate, would still need their insurance companies or third-party administrators to provide contraceptive-free plans.

Wieland and *Skyline* both also disposed of the redressability argument in analogous cases. In *Wieland*, like the case at bar, the plaintiffs sought an injunction against an insurance mandate on behalf of themselves and those who insure them. 793 F.3d at 953; Amended Complaint, at Prayer for Relief (C204). The Eighth Circuit found that even though a court order enjoining the federal government from enforcing the challenged laws would not require the plaintiffs' state-provided health care plan to offer a contraceptive-free option, the fact that the plan had done so before the enactment of the challenged provisions was "persuasive evidence that [the plan] would do so again if the [plaintiffs were to] obtain their requested relief." *Id*. at 957; *see also Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, 860 Fed. Appx. 542, 543 (9th Cir. 2021) ("The injury is also redressable. . . . [T]he fact that Cedar Park had access to an acceptable plan is strong evidence that Cedar Park could obtain a similar plan from Kaiser Permanente or another health insurer if the state is enjoined from enforcing [the abortion coverage mandate]."). This is exactly the situation at bar, where Plaintiff had

satisfactory insurance plans before the Reproductive Health Act passed and has had unsatisfactory insurance since.

In *Skyline*, the Ninth Circuit followed similar logic:

> The fact that insurers had previously offered plans that were acceptable to Skyline is strong evidence that, if a court were to order that the Coverage Requirement could not be applied to prevent approval of a health plan for Skyline that comports with Skyline's religious beliefs, at least one of the many insurers who do business in California would agree to offer the type of plan Skyline seeks. We acknowledge that it is possible no insurer would do this. But we need not be certain how insurers would respond.

Skyline Wesleyan Church v. California Dep't of Managed Health Care, 959 F.3d 341, 352 (9th Cir. 2020), amended and superseded on reh'g, 968 F.3d 738 (9th Cir. 2020); *see also Howe v. Burwell,* 2:15-CV-6, 2015 WL 4479757, at *14 (D. Vt. July 21, 2015) ("Plaintiff argues that the Federal Defendants may alleviate a burden on Plaintiff's religious beliefs by refraining from enforcement actions against a third party insurer who agrees not to adhere to the segregation requirement for health insurance offered to Plaintiff. Although this relief requires the cooperation of a third party, Plaintiff need not establish that an accommodation will fully redress his harm in order to be entitled to it.").

C. The Reproductive Health Act's abortion coverage mandate, as applied to IBSA, cannot withstand strict scrutiny.

Once a plaintiff establishes that its exercise of religion has been substantially burdened, the burden of proof shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner. *People v. Latin Kings St. Gang*, 2019 IL App (2d) 180610-U, ¶ 94. This test, known as strict scrutiny, is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). For the State to meet its burden, it must show that the abortion coverage mandate serves interests "of the highest order," *Church of the Lukumi*

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993), and is "narrowly tailored" to serve those paramount interests, *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). "[I]t is the rare case in which . . . a law survives strict scrutiny," *Burson v. Freeman*, 504 U.S. 191, 211 (1992). This is not such a rare case.

1. Defendant can show no compelling interest.

To establish a compelling interest, a government "must do more than simply posit the existence of the disease sought to be cured;" it "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C*., 512 U.S. 622, 664 (1994) (internal quotations and citations omitted). The State, that is, must "present more than anecdote and supposition," and must show an "actual problem" to be solved. *Playboy Entm't Grp., Inc*., 529 U.S. at 822. "Mere speculation of harm does not constitute a compelling state interest," *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y*., 447 U.S. 530, 543 (1980), and "[c]onclusory statements [by] proponents of" a law also will not do, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 129-30 (1989).

As the Supreme Court reiterated in *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 532 (2021), strict scrutiny requires courts to "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." 141 S. Ct. at 1881 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). "The question, then, is not whether the [defendant] has a compelling interest in enforcing its [challenged] policies generally, but whether it has such an interest in denying an exception to [plaintiff]." *Id.*

In this case, the answer to this question is clearly "no." As discussed *supra*, Illinois is only one of 11 states with an abortion coverage mandate. So, 39 other states show no compelling interest in forcing abortion coverage on employers. Even among the 11 states that do have abortion coverage mandates, eight have built-in religious exemptions. *See supra* at pp. 15-16. These exemptions demonstrate that even some of the most abortion-friendly states are resigned to religious organizations being exempt from their abortion-coverage mandates. They also demonstrate that such exemptions are workable and realistic.

There is simply no interest at all in the State of Illinois forcing a small Baptist organization to pay for its employees' and their dependents' abortions. The interest is not compelling; it is non-sensical.

Further, once the State has articulated its interest in denying an exception to a religious claimant, the State must also show that enforcing the law at issue will materially advance that interest. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 228-29 (1989) (law could not withstand strict scrutiny because it was unclear to what extent it would advance purported interest). It is not enough, therefore, for the State to show that its law will close a small gap in abortion coverage. To the contrary, the Supreme Court has explained that "[f]illing the remaining modest gap" does *not* rise to "a compelling state interest," *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 803 (2011), because "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced," *id.* at 803 n.9. Accordingly, the State must put forth actual *evidence* of how the law will advance the interest. *Id.* (explaining that under strict scrutiny, the State cannot rely on a "predictive judgment" about the law's potential

effects). And because the State "bears the risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice" to satisfy its burden. *Id.* at 799-800.

Here, however, the State has never provided any evidence that the Abortion Mandate will materially advance its asserted interests, and there is good reason to doubt that such evidence exists. Plaintiff has well-known beliefs about abortion, and their employees are more likely than the employees of other organizations to share those beliefs. Plaintiff's employees, since they are employed, are also not in the class of people (homeless, teenage or indigent, for example) that may typically be viewed as avoiding abortion because of cost. The State has thus not demonstrated that enforcing the abortion mandate against the Plaintiff would *materially* advance its interests (or indeed, advance them at all).

Finally, Defendant's central position in this case undermines any compelling government interest. Defendant does not appear to care if IBSA provides abortion coverage; according to Defendant, IBSA *should* seek a self-insured plan, or an out-of-state plan, and should even ask *Defendant* for an exemption, as discussed *supra* at 16.

2. The abortion mandate is not narrowly tailored.

To be narrowly tailored, the RHA's abortion mandate must "target[ ] and eliminate[ ] no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal citations omitted). It is *the State* that bears the burden of demonstrating that there are no less restrictive alternatives that would further its alleged interests. *Playboy Entm't Grp., Inc*., 529 U.S. at 813. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* Under the narrow tailoring prong of strict scrutiny, a law cannot survive

if the State's purported interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Holt v. Hobbs*, 574 U.S. 352, 368 (2015).

Again, a less restrictive means is obviously available to Illinois: write an abortion mandate that exempts religious organizations. Other states have done it; the legislators sponsoring the Reproductive Health Act said they would do it; Illinois can do it. *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 624 F. Supp. 3d 761, 795 (W.D. Ky. 2022) (noting that the state had not "shown that it considered different methods that other jurisdictions have found effective.").

Illinois could also take on the cost of abortions itself, instead of forcing employers (at least, religious ones), to take on these costs. Illinois already does so in the context of Medicaid.[11] *See Hobby Lobby*, 573 U.S. at 728 ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections.").

The State could "give tax incentives to [abortion] suppliers to provide these . . . services at no cost to consumers" or "give tax incentives to consumers" so they would not have to bear the cost of abortion. *Korte v. Sebelius,* 735 F.3d 654, 686 (7th Cir. 2013). The simplest version of this approach would be to grant refundable tax credits for the cost of abortion services purchased by people enrolled in religious objectors' health plans. Or, alternatively, the State could grant credits to a network of large insurance companies to

[11] https://www2.illinois.gov/IISNews/24885-Pritzker_Administration_Affirms_State_Coverage_of_Abortions_in_Comprehensive_Healthcare_for_Pregnant_Women.pdf

incentivize them to provide an independent program with easy online enrollment for people enrolled in religious health plans.

Indeed, rather than seriously considering any of these less restrictive means, the State has insisted that it and two other states with abortion coverage mandates and without religious exemptions are achieving their interests in the only possible way. Such an approach cannot be considered "narrowly tailored" under any of the U.S. Supreme Court's precedents, and must be rejected in light of the clearly available alternatives.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the circuit court's decision and remand the case with instructions to (1) enter summary judgment in IBSA's favor, (2) enter a declaratory judgment stating that the Reproductive Health Act is in violation of IBSA's Illinois RFRA rights, and (3) enter a permanent injunction barring the enforcement of the abortion insurance requirement of the Reproductive Health Act against Plaintiff and its insurers or third-party administrators.

Respectfully submitted,

January 8, 2025

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 37 pages.

Executed this 8th day of January 2025.

/s/ J. Matthew Belz
J. Matthew Belz