RELIGION CLAUSE CHALLENGES TO EARLY ABORTION BANS

CAROLINE MALA CORBIN*

ABSTRACT

The substantive due process right to abortion is gone. But other parts of the Constitution may also protect women's right to control their bodies and live as equals in the United States. This Essay addresses what role the two religion clauses may play in advancing reproductive autonomy. Because religion and reproduction are intertwined, the religion clauses may provide some measure of constitutional protection.

The Establishment Clause bars the government from imposing religion onto those who do not share it. It also forbids the government from taking sides in theological disputes. Early abortion bans not only favor one religious belief on the contested question of when life begins, but codify that belief into law. Imposing onto all Americans the religious perspective that life begins at conception should violate the Establishment Clause.

The Free Exercise Clause prevents the government from burdening people's exercise of religion. Its protections extend to requiring religious liberty exemptions from laws that prevent religious observance. In fact, the Supreme Court has greatly expanded the availability of religious exemptions. Consequently, women whose religion counsels abortions in situations forbidden by abortion bans should be entitled to an exemption.

* Professor of Law, University of Miami School of Law; B.A., Harvard University; J.D. Columbia Law School.

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INTRODUCTION

In an instant, the Supreme Court overruled *Roe v. Wade* and its progeny, including *Planned Parenthood v. Casey*.[1] In *Dobbs v. Jackson Women's Health Organization*,[2] the Court held that the due process clause only protects fundamental rights that are deeply rooted in our nation's history and tradition, and that the right to abortion is not one of them.

Although substantive due process no longer protects reproductive autonomy, other clauses might. This Essay examines the role the First Amendment religion clauses may play in protecting the right to decide when and whether to bear children. The U.S. Constitution (and most state constitutions) contains two religion clauses, the Establishment Clause and the Free Exercise Clause.[3] The two clauses work together to promote religious liberty and equality: The Establishment Clause by barring the government from enacting religious dogma into law, and the Free Exercise Clause by preventing the government from burdening people's exercise of religion.

Because religion and abortion regulations are inextricably intertwined, the religion clauses may protect access to abortion. The Establishment Clause is meant to ensure that the government remains secular and neutral vis-à-vis religion. Thus, laws should be designed to advance secular rather than religious goals and should not favor one religion over others.

Early abortion bans, such as those in eighteen states that ban abortion either from the moment of conception or soon thereafter,[4] contravene establishment values. According to these states, saving the unborn baby justifies the infringement on women's autonomy and equality.[5] But this assumption that life begins at conception is ultimately a religious belief, and not a universal one at that. Consequently, these bans represent religiously-motivated laws that favor some religions over others and impose a religious view on those who do not

[1] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[2] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[4] States that have passed laws banning abortion at conception include Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Tennessee, Texas, West Virginia, and states that ban abortion at six weeks include Georgia, Iowa, Oklahoma, South Carolina. Five additional states ban abortion well before viability. Carter Sherman and Andrew Witherspoon, *Abortion Rights Across the United States: We Track Where Laws Stand in Every State*, THE GUARDIAN (Nov. 10, 2023), https://www.theguardian.com/us-news/ng-interactive/2023/nov/10/state-abortion-laws-us; Interactive Map, *US Abortion Policies and Access After Roe*, GUTTMACHER INSTITUTE (Jan. 24, 2024), https://states.guttmacher.org/policies/utah/abortion-policies.

[5] For example, when Mississippi Governor Phil Bryant signed the Mississippi ban challenged in *Dobbs*, he proclaimed, "I am committed to making Mississippi the safest place in America for an unborn child." Jessica Ravitz, *Mississippi Bans Abortions at 15 Weeks, Earliest in the Nation*, CNN, https://www.cnn.com/2018/03/19/health/mississippi-abortion-ban-15-weeks/index.html (Mar. 19, 2018, 7:02 PM).

share it. Such laws should violate the Establishment Clause of both the U.S. and state constitutions.

Abortion bans may also violate the Free Exercise Clause, which provides exemptions from laws that burden observers' ability to practice their faith. This is especially true given that the Roberts Court has made it easier than ever to qualify for a constitutionally-mandated religious exemption.[6] Current doctrine holds that if a law allows an exemption for a secular activity, then it must also provide an exemption for its religious counterpart. To do otherwise is to discriminate against religion.

Many religions require abortion in circumstances barred by existing abortion bans. Judaism, for example, teaches that life does not begin until birth, and that because the woman's wellbeing is more important than the pregnancy, pregnancies that threaten a pregnant woman's physical and even mental health should be terminated.[7] Because most abortion bans include a secular exemption, whether it be for IVF, pregnancies that result from rape, or pregnancies that endanger the life or health of the pregnant woman, those seeking religiously mandated abortions have a strong claim that they are entitled to a religious liberty exemption.

In reality, neither claim is likely to succeed before the current Supreme Court.[8] The Court has always been reluctant to recognize the religious roots of anti-abortion convictions, and its steady evisceration of Establishment Clause protections has made that recognition even less likely.[9] And although the current Court has vastly expanded religious exemptions, granting them at the expense of LGBTQ rights, women's rights, and public health,[10] it has not yet faced a case

[6] At least for the mostly conservative Christian plaintiffs that have recently come before them. *See infra* Section I.B.

[7] *See infra* Section II.B.2. Because the vast majority of pregnant people are women, I will use the term women to refer to them, but it is worth remembering that transgender men may also become pregnant.

[8] Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 321 (documenting that empirical study of Roberts Court's religion decision shows a sharp turn to the right).

[9] For example, in earlier decisions the Court struggled with deciding when the government could fund religious schools without violating the Establishment Clause. Now, the major question is whether declining to fund religious schools violates the Free Exercise Clause. *See* Espinoza v. Mont. Dep't of Revenue, 140 S.Ct. 2246 (2020); *see also* Carson v. Makin, 142 S.Ct. 1987 (2022). At one time, the Court took seriously the idea that the government endorsing Christianity made second-class citizens of Americans who were not Christian. More recently, it has allowed government sponsored Christian prayers and a government sponsored Latin cross monument. Town of Greece v. Galloway, 572 US 565, 591–92 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S.Ct. 2067, 2090 (2019).

[10] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S.Ct. 1719, 1724 (2018) (Christian bakers granted exemption from law barring LGBTQ discrimination); Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1875 (2021) (Catholic social service organization allowed to discriminate against LGBTQ families); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 701–02 (2014) (Christian store owners granted exemption from contraception mandate);

with a progressive rather conservative claimant in which the competing interest is not equality but an "unborn baby." Few scholars believe that the Supreme Court's support of religious liberty will extend to granting religious exemptions that would undermine rather than further conservative Christian values.[11]

The Supreme Court, however, is not the only court deciding these questions. Although unwelcome at the U.S. Supreme Court, these claims may have greater traction in the lower courts, especially those considering the issue under their own state constitution rather than the federal constitution. Indeed, among the increasing number of plaintiffs bringing these challenges, at least one has succeeded.[12]

I. THE ESTABLISHMENT CLAUSE CHALLENGE TO ABORTION BANS

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[13] Despite longstanding dispute over the scope of the Clause, no one contests that the government may not establish an official state religion or coerce nonbelievers into observing a favored religion by enacting its religious tenets into law.[14] Yet that is what laws that ban early abortions do. They codify the religious belief that life begins at conception—a belief that is by no means universal. While the Supreme Court has denied the religious underpinnings of earlier abortion restrictions—and will no doubt continue to do so—other courts may decide against turning a blind eye

Tandon v. Newsom, 141 S.Ct. 1294, 1297 (2021) (allowing religious to ignore emergency covid limits on gatherings in private homes).

[11] Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 236 ("The expectation is that courts will reject pro-abortion religious claims even as they treat claims against abortion as sacrosanct."); David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556, 1591 (2023) (predicting that "liberal Jewish claimants" will not "be entitled to the expansive protections offered by the new free exercise jurisprudence"); Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2323 ("[W]e are skeptical that the Supreme Court will ultimately require religious exemptions from restrictions on abortion."); Loren Jacobson, *Abortion and the Spiritual Imperative: Are the New Abortion Bans Susceptible to Religion Clause Challenges?*, 72 DEPAUL L. REV. 663, 699 (2023) ("[I]s there any hope that the current Supreme Court is likely to interpret the Free Exercise Clause or the Establishment Clause to prohibit such bans? Not much.").

[12] Religious challenges to abortion bans have been filed in Indiana, Florida, Kentucky, Missouri, and Idaho. Am. Compl. at 12, Generation to Generation, Inc. v. Florida, No. 2022 CA 000980 (Fla. 2d Cir. Ct. June 16, 2022); Compl. at 16–21, Pomerantz v. Florida, No. 2022-014373-CA-01 (Fla. 11th Cir. Ct. Aug. 1, 2022); Anonymous Plaintiff 1 v. Individual Members Med. Licensing Bd. of Indiana, No. 49D01-2209-PL-031056 (Marion Super. Ct. Dec. 2, 2022); Sobel v. Cameron, No. 22-CI-005189 (Ky. Cir. Ct. Oct. 6, 2022); Reverend Blackmon v. Missouri, No. 2322-CC00120 (Mo. Cir. Ct. Jan. 19, 2023); Satanic Temple v. Little, No. 1:22-cv-00411 (D. Idaho Sep. 30, 2022).

[13] U.S. CONST. amend. I. The Establishment Clause applies to the states through the Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[14] Schwartzman & Schragger, *supra* note 11, at 2305 ("The basic principle is that the state cannot have as its actual purpose religious reasons for legislation.").

as increasingly stricter abortion laws move closer to obvious reliance on religious rather than secular justifications.

A. *Establishment Clause Basics*

The Establishment Clause has long been interpreted to forbid the government from favoring one or some religions over others: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[15] To find otherwise risks the civil peace and jeopardizes the religious freedom of all.[16] It especially endangers religious minorities, as such favoritism is often the first step towards religious persecution of disfavored ones.[17] It also creates second-class citizens of those who do not share the government-endorsed beliefs: "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[18]

The government might abandon its secularity and favor one religion like Christianity over others in myriad ways. It may erect displays featuring sacred Christian symbols.[19] It may lead Christian prayers and coerce participation.[20] Most relevant here, it may pass laws that force people to obey Christian religious tenets.[21] "These laws conscript the authority of the state to compel individuals

[15] *See also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) ("The "principle . . . that government should not prefer one religion to another" is "at the heart of the Establishment Clause."); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."); Lee v. Weisman, 505 U.S. 577, 590 (1992) ("[T]he central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored.").

[16] Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 621 (2019) ("First, limiting government involvement with religion helps keep the peace because state-established religions have historically led to civil strife, if not war."); McDaniel v. Paty, 435 U.S. 618, 640 (1978) ("[A] purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife.").

[17] *See*, *e.g.*, Engel v. Vitale, 370 U.S. 421, 432 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

[18] James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, [ca. 20 June] 1785, NAT'L ARCHIVES ¶ 9.

[19] Allegheny County v. ACLU, 492 U.S. 573 (1989) (striking down government display of nativity scene). *But see Am. Legion*, 139 S.Ct. 2067 at (2019) (upholding government's Latin cross monument).

[20] *Weisman*, 505 U.S. at 591-92 (1992) (finding religious invocations by invited clergy at school graduation to violate Establishment Clause).

[21] Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617, 618 (2009) ("[I]t is unconstitutional for the government to enact a law that requires individuals to lead their lives in accord with the religious beliefs of others.").

to conform their behavior to the dictates of a particular religious belief, whether or not the individuals share that belief."[22]

It is not easy to translate this principle into doctrine today. The *Lemon* test, which held that laws violated the Establishment Clause unless they had a primarily secular purpose, once captured the idea that a secular government must be able to justify its laws in secular terms.[23] Otherwise the government begins to act like a theocracy, imposing theology onto unwilling citizens.[24] The Supreme Court, however, has recently rejected the *Lemon* test.[25] Nevertheless, despite extensive criticism of *Lemon*, the Court has still insisted on the secular motivations behind challenged state action,[26] so the principle that government laws cannot be primarily motivated by religious theology may yet remain.[27] If it does not, then the Establishment Clause is powerless against religiously-motivated laws, whether they mandate kosher meats or prohibit divorce.[28]

B. *Abortion Law as Codifying a Religious View*

In the United States, the main opponents of abortion are conservative Christians who believe that life begins at conception. Abortion bans, therefore, codify some people's religious conviction and force everyone to live according to this belief. Consequently, abortion bans should violate the Establishment Clause, which bars laws based on religious justifications alone.

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[22] *Id.*

[23] The *Lemon* test also required laws to have a primarily secular effect. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[24] Strictly speaking, a theocracy is a government based on religion and controlled by religious leaders.

[25] *Am. Legion*, 139 S.Ct. at 2080–87 (listing the shortcomings of *Lemon* and urging that "the Establishment Clause must be interpreted by reference to historical practices and understandings"); *Id.* at 2092 (Kavanaugh, J., concurring) ("As this case demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kutzman*); Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407, 2411 (2022) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by " 'reference to historical practices and understandings.'"): *Id.* at 2427 ("[T]he "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned Lemon and its endorsement test offshoot.").

[26] *See*, *e.g.*, *Am. Legion*, 139 S.Ct. at 2090 (arguing that the government's Latin cross monument honored those who fought and died in World War I rather than Jesus Christ).

[27] Although the Court did not focus on a secular purpose in *Bremerton*, it also viewed the challenged prayer as private speech protected by the free exercise and free speech clauses rather than government speech that triggered full Establishment Clause analysis. *Kennedy*, 142 S.Ct. at 2424.

[28] Schwartzman & Schragger, *supra* note 11, at 2314 ("If the Court were willing to accept religious ends as legitimate or compelling state interests, legislatures with religious majorities could reject same-sex marriage, impose religious restrictions on divorce, prohibit blasphemy, reinstate Sabbath laws, require school prayer, and much else—all without having to show that any of these policies are, or could be, justified by secular or public reasons.").

1. Abortion Bans Rooted in Religious Belief

Early abortion bans are irreducibly driven by the belief that conception marks the beginning of life, and that abortion, regardless of the timing, amounts to murder.[29] In the United States, this view is grounded in religion.[30] The overwhelming majority of Americans who campaign against early abortion, who pass laws outlawing abortion at all stages, and who uphold those laws do so based on the religious belief that an unborn baby entitled to life exists from the moment of conception.[31] As Sherry Colb has observed, "When virtually everyone who believes in a proposition is a religious person and virtually every secular person rejects the same belief . . . , it is clear that we have before us a religious and not a scientific belief."[32]

Alternative justifications for such bans, such as protecting the integrity of the medical profession or the mental health of pregnant women, collapse back onto the assumption that abortion always ends a life. The medical profession's reputation would not be jeopardized unless abortion was something nefarious. The risk of abortion to women's mental health assumes that women later regret killing their child, which likewise rests on equating a pregnancy with a living person of moral worth.[33]

U.S. politicians enacting these bans regularly stress that their opposition stems from their faith. As Linda Greenhouse noted, "Republican officeholders are no

[29] *See*, *e.g.*, Jacobson, *supra* note 11, at 690 ("[L]aws that ban abortion pre-viability are based on the beliefs of particular religious denominations about when a fetus should be treated like a living, breathing person").

[30] Justice Sotomayor made precisely this point during oral argument: "How is your interest anything but a religious view? The issue of when life begins has been hotly debated by philosophers since the beginning of time. It's still debated in religions. So, when you say this is the only right that takes away from the state the ability to protect a life, that's a religious view, isn't it?" Transcript of Oral Argument at 29, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 13-1392)

[31] Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, WIS. L. REV. 475, 477 (2023).

When U.S. adults were asked whether they thought religion was influencing government policies on abortion, 48% said a lot and 29% said some. Only 8% said religion had no influence at all. And that was in 2019, before the Supreme Court eliminated constitutional protection for abortion. ASSOCIATED PRESS & NORC CTR. FOR PUB. AFFS. RSCH., THE DECEMBER 2019 AP-NORC CENTER POLL 5 (2020), https://apnorc.org/wp-content/uploads/2020/02/Religion-Topline-2019.pdf; *see also* Sofia Resknick, *Anti-Abortion Attorneys Ascend Federal Government Ranks with Christian Right Legal Training*, IDAHO CAPITAL SUN (Dec. 12, 2023), https://idahocapitalsun.com/2023/12/12/anti-abortion-attorneys-ascend-federal-government-ranks-with-christian-right-legal-training/.

[32] Sherry F. Colb, *Why Free Exercise on Steroids Won't Benefit Progressive Religious People*, DORF ON LAW (Jan 3, 2022), https://www.dorfonlaw.org/2022/01/why-free-exercise-on-steroids-wont.html.

[33] *See generally* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1178–87 (2014) (citing studies refuting claim that abortion traumatizes women).

longer coy about their religion-driven mission to stop abortion."[34] Alabama Governor Kay Ivey described her state's abortion ban "as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God."[35] At the bill signing ceremony for Texas's abortion ban, Governor Greg Abbot proclaimed, "Our creator endowed us with the right to life and yet millions of children lose their right to life every year because of abortion."[36] When Mississippi's only abortion clinic closed, Governor Tate Reeves crowed on Twitter, "Today we wake up in a state where the church doors are open and the abortion clinic's doors are closed. All the Glory to God the Father! Amen!"[37]

States, too, announce the religious roots of their anti-abortion stance, sometimes in the abortion bans themselves. In proclaiming June as "Sanctity of Preborn Life Month," the Louisiana legislature asserts that "the Bible affirms that the preborn child is a person, bearing the image of God, from the moment of conception."[38] Wyoming's "Life is a Human Right Act" decrees that unborn babies are members of the human race from conception and that "all members of the human race are created equal and endowed by their creator with certain

[34] Linda Greenhouse, *God Has No Place in Supreme Court Opinions*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html.

[35] Press Release, Off. of the Ala. Governor, Kay Ivey, Governor Ivey Issues Statement After signing the Alabama Human Life Protection Act (May 15, 2019), https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/; *see also* Press Release, Off. of the Governor, Jim Justice, Gov. Justice Signs Born-Alive Abortion Survivors Protection Act (Mar. 3, 2020), https://governor.wv.gov/News/press-releases/2020/Pages/Gov.-Justice-signs-Born-Alive-Abortion-Survivors-Protection-Act.aspx?fbclid=IwAR2tXnnOAMXWMvb-YvBFCUuK6p-SIWgtCOY7pykPwOqQ_f-VwqmjK0Yl7CQ (West Virginia Governor Jim Justice proclaiming that signing an abortion law was "a no-brainer" because "every human life—born or unborn is precious and truly a gift from God.").

[36] Shannon Najmabadi, *Gov Greg Abbot signs into Law One of Nation's Strictest Abortion Measures*, TEX. TRIBUNE (May 19, 2021), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/.

[37] Thao Ta, *Governor Praises Closure of Mississippi's Only Abortion Clinic*, AP (July 7, 2022), https://wreg.com/news/mid-south/mississippis-only-abortion-clinic-closes/; *see also* Governor Kevin Stitt (@GovStitt), FACEBOOK (May 15, 2022), https://www.facebook.com/GovStitt/videos/371845548273190 ("I believe God has a special plan for every life. . . . Killing unborn children is not a part of the plan."); Austin Bailey, *Arkansas Senators pass Near-Total Abortion Ban*, ARKANSAS TIMES (Feb. 22, 2021), https://arktimes.com/arkansas-blog/2021/02/22/arkansas-senators-pass-near-total-abortion-ban-it-now-goes-to-house (reporting that the Senate sponsor of Arkansas's abortion ban explained "There's six things God hates, and one of those is people who shed innocent blood. I'm not going to be a part of any of that.").

[38] Baptist Message staff, *Louisiana Legislature Recognizes June as Sanctity of Preborn Life Month* (May 30, 2023), https://www.baptistmessage.com/louisiana-legislature-recognizes-june-as-sanctity-of-preborn-life-month/.

unalienable rights, the foremost of which is the right to life."[39] Missouri's abortion ban declares that "Almighty God is the author of life,"[40] and its lead sponsor confirms the link to religion by stating that "as a Catholic I do believe life begins at conception and that is built into our legislative findings."[41]

Even some state court judges are highlighting the religious roots of laws that declare life begins at conception. In interpreting the Alabama Constitution's "sanctity of unborn life" provision, the Chief Justice of the Alabama Supreme Court emphasized that "sanctity" means "holiness of life and character: GODLINESS."[42] After several pages of religious and biblical exegesis where he invokes Thomas Aquinas and John Calvin, among others,[43] the Chief Justice concludes, "In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: God made every person in His image; [and that] human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself."[44]

2. Codifying Theology Violates Establishment Clause

Although the Supreme Court will no doubt reject the claim that abortion bans violate the Establishment Clause, lower courts are not yet required to reach the same decision, and in any event, may interpret their own state constitutions to provide more expansive establishment protection.

Earlier Supreme Court cases have already rejected Establishment Clause challenges to abortion regulations.[45] In *Harris v. McRae* (1980), a case involving a ban on federal funding for abortion, the Court suggested than an abortion restriction does not violate the Establishment Clause simply because it "happens to coincide or harmonize with the tenets of some or all religions."[46] If it did, laws against theft and murder—which rise to the level of Commandments in

[39] WYO. STAT. § 35-6-121(a)(i-ii) (2023).

[40] The law continues "it is the intention of the general assembly of the state of Missouri to: (1) Defend the right to life of all humans, born and unborn. MO. REV. STAT. § 188.010; *see also* First Am. Pet. at 3 Reverend Blackmon v. Mo. No. 2322-CC00120 (Mo. Cir. Ct. Mar. 14, 2023). https://www.au.org/wp-content/uploads/2023/01/Rev.-Blackmon-v.-Missouri-Amended-Complaint-3.14.23.pdf.

[41] Another co-sponsor talked about how "from the Biblical side of it, . . . life does occur at the point of conception." *Blackmon*, No. 2322-CC00120 at *5.

[42] LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591, at *10 (Ala. Feb. 16, 2024).

[43] *Id*. at *10–13.

[44] *Id*. at *13.

[45] Notably, however, the Supreme Court has not directly addressed an establishment clause challenge to an abortion ban. Although it did have the opportunity to address whether Missouri can declare in a preamble that life begins at conception, the Supreme Court held the issue was unripe: "Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice." Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989).

[46] Harris v. McRae, 448 U.S. 297, 319 (1980).

Abrahamic faiths[47]—would also violate the Establishment Clause. Thus, an anti-abortion law "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."[48]

The argument that early abortion bans reflect traditional values that merely coincide with certain religious tenets is not persuasive.[49] It is true that laws with secular justifications should not violate the Establishment Clause merely because religious justifications also support them. But the predicate for that claim is that there are genuine secular justifications for the law. There are plenty of genuine and legitimate secular reasons to outlaw theft.[50] But the same cannot be said of outlawing abortion from the moment of conception.[51]

At least one lower court agrees. In *EMW Women's Surgical Center v. Cameron* (2022), a Kentucky state court judge found that the state's abortion ban assumed that "life begins at the very moment of conception" and that this is a "distinctly Christian and Catholic belief."[52] Other religions, the court explains, have very different views.[53] To codify one is "theocratic based policymaking" and violates Kentucky's Establishment Clause.[54] Other courts, unwilling to

[47] In several versions of the Ten Commandments, "Thou shalt not murder" is the Sixth of the Ten Commandments and "thou shalt not steal" is the Eighth Commandment.

[48] *Harris*, 448 U.S. at 319.

[49] Lower courts regularly rebuff Establishment Clause challenges to abortion regulations on these grounds. *See*, *e.g.*, Doe v. Parson, 960 F.3d 1115, 1118 (8th Cir. 2020) (rejecting challenge to Missouri mandatory abortion counseling that expresses states view that life begins at conception and that abortion "will terminate the life of a separate, unique, living human being"); Doe v. Att'y Gen. of Ind., 630 F. Supp. 3d 1033, 1056 (S.D. Ind. 2022) (rejecting challenge to Indiana law requiring that medical facilities bury or cremate an aborted pregnancy at any stage as they would any other person who died).

[50] Secular reasons include protecting victims of theft from financial harm and perhaps psychological harm if they no longer feel safe; protecting the community; protecting the economy. There may even be some genuine secular reasons for a government's refusal to fund abortions (the issue in *Harris*) as opposed to banning them altogether.

[51] As discussed earlier, *see supra* notes 23-29 and accompanying text, ostensible secular reasons usually collapse back into the religious assumption. Another reason to oppose abortion is that its availability undermines women's traditional role as mother: If women have sex, it ought to be with an eye towards bearing and raising children. This too may have its roots in religion. As Justice Bradley wrote to justify excluding women from the legal professions: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). In any event, even if the desire to maintain "a wide difference in the respective spheres and destinies of man and woman" were secular, it is nothing more than thinly disguised sex discrimination and therefore illegitimate.

[52] EMW Women's Surgical Center v. Cameron, No. 22-CI-003225, at *15 (Ky. Cir. Ct. July 22, 2022) https://www.aclu-ky.org/sites/default/files/22ci3225-order_12.pdf.

[53] *Id*. at *15–16.

[54] *Id*. at *16; *see also id.* at *19 ("[B]y ordaining that life begins at the very moment of fertilization, the General Assembly has adopted the religious tenets of specific sects or denominations.").

abandon a secular government as eagerly as the U.S. Supreme Court, might follow suit.[55]

In sum, the Establishment Clause is meant to ensure a secular government whose laws can be justified on secular grounds. Because early abortion bans represent an attempt to codify a theological perspective on when life begins, they ought to violate the Establishment Clause. While some lower courts may follow the Supreme Court's example of denying this reality, others may not.

II. THE FREE EXERCISE CHALLENGE TO ABORTION BANS

Challenges to abortion bans may be brought under the Free Exercise Clause as well, which guarantees constitutional protection for religious observance. The protection is not absolute, but recent Supreme Court decisions have made it much more available.[56] Consequently, pregnant challengers who argue that abortion laws undermine their ability to live according to the dictates of their faith should have a strong claim. Note, though, that a Free Exercise Clause victory would not eliminate an abortion ban entirely; instead, it would require an exemption for those whose religious directives clash with it.

A. *Background*

Three conditions must be met before the Free Exercise Clause requires an exemption: the challenged law (1) cannot be neutral and generally applicable; (2) must imposes a substantial burden on a sincere religious belief;[57] and (3) must fail strict scrutiny.[58] Judicially-created exemptions, once fairly rare,[59] have now become almost presumed. At least, they have been for the primarily conservative Christian Supreme Court litigants who have benefited from this expanded right to follow their faith regardless of the impact on others.[60]

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[55] *Cf.* Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., No. 26 MAP 2021, 2024 WL 318389, at *114 (Pa. Jan. 29, 2024) (Wecht, J., concurring) ("Religiously inspired abortion restrictions may constitute the establishment of religion.").

[56] *See* Sepper, *supra* note 11, at 181 ("[I]n the last decade, the Supreme Court has turbocharged religious liberty rights.").

[57] *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28 (2014) (stating that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere'"); Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1187 (2017) ("The rule is simple: to qualify for a religious accommodation, a claimant must demonstrate sincerity.").

[58] Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).

[59] Even before *Smith* added the extra non-neutral-or-generally-applicable requirement, the Supreme Court more often than not found that a law did not impose a substantial religious burden or that it satisfied strict scrutiny. RONALD J. KROTOSZYNSKI, JR., , LYRISSA BARNETT LIDSKY, CAROLINE MALA CORBIN, & TIMOTHY ZICK, THE FIRST AMENDMENT: CASES AND THEORY 755–58 (2023).

[60] *See, e.g.*, Epstein & Posner, *supra* note 8, at 338 ("In practice, the Court's rulings have mostly but not exclusively protected the conservative values of mainstream Christian organizations against secular laws, including public health orders to counter the COVID-19

1. Few Laws Are Neutral and Generally Applicable

Neutral laws of general applicability have not violated the Free Exercise Clause since *Employment Division v. Smith*.[61] One way the Supreme Court has reshaped the religious liberty landscape is to redefine "neutral and generally applicable" such that almost no law (federal or state) qualifies.[62] This redefinition makes constitutionally-mandated religious liberty exemptions much more available.

As originally conceived, a law was neutral if it did not target religion, and it was generally applicable if it applied broadly to the relevant population.[63] The two interrelated inquiries were designed to flush out hostile laws targeting religion, which were few and far between.[64]

Now, the hallmark of a law lacking neutrality and general applicability is not animus[65] but the failure to accord religion "most favored nation" status.[66] That is, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[67] As a result, a single exemption may defeat neutral and general applicability, as it may indicate a secular activity being treated more favorably than its religious counterpart.

pandemic and laws intended to prevent discrimination against sexual minorities and protect reproductive rights.").

[61] *Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'.").

[62] Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 539 (2022) ("The Roberts Court has not explicitly overruled *Smith*, but it has in effect repudiated most of its doctrinal significance.").

[63] *See infra* note 65.

[64] Although rare, laws that target religion are not unknown. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524–27 (1993) (describing how Hialeah passed ordinances outlawing a core Santeria religious practice after discovering a Santeria church was planning to open in the community).

[65] *Cf.* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 729-30 (describing how the "most favorite nation" approach would eviscerate the *Smith* rule that laws that "bear no indicia of discriminatory intent" are constitutional). Of course, animus also will defeat neutrality, and Schwartzman and Schragger provide examples of comments made by those enacting abortion bans that reflect more religious animus than comments the Supreme Court has found to be religiously hostile. *See* Schwartzman and Schragger, *supra* note 11, at 2320.

[66] Linda Greenhouse, *"Justice on the Brink" and the Rule of Law*, 47 U. DAYTON L. REV. 1, 3–4 (2022) ("*Tandon v. Newsom* thus established, without a grant of plenary review, without briefing or argument, a 'most favored nation' status for religion: a religious claim had to be treated at least as well as the most favorably treated secular claim, no matter the objective reason for the distinction.").

[67] Tandon v. Newsom, 141 S.Ct. 1294, 1296 (2021).

Moreover, any secular activity that undermines the law's goals in the same way as the religious activity may count as a secular counterpart,[68] and the Court has cast its net widely to find secular counterparts. For example, during a COVID-19 surge, California temporarily banned gatherings of more than three households in private homes, full stop.[69] Whether the gatherings were secular or religious did not matter, and the law made no exceptions.[70] Nonetheless, the Court still concluded that the government discriminated against religion because it banned religious gatherings of three or more families at private homes while permitting "comparable secular activities," namely secular gatherings of three or more families at public places like hardware stores and hair salons,[71] all while ignoring the lower court's evidence-based conclusion that the former posed a greater risk than the latter.[72]

2. Substantial Burden Not Required

Doctrinally, the Free Exercise Clause requires exemptions only for laws that substantially burden an objector's sincere religious beliefs. This requires that the objector's religious belief be sincere, and that the law significantly impedes it. Yet, as the Supreme Court applies the requirement today, it veers on a formality. Indeed, it is not altogether clear whether the Supreme Court still requires a separate showing of substantial burden, at least in free exercise cases where it has concluded that the law discriminates against religion.

It is nothing new for the Court to avoid probing inquiries into sincerity.[73] The worry is that a court may find someone's unorthodox or eccentric or simply

[68] *Tandon*, 141 S.Ct. at 1296 ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."); *see also* Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

[69] *Tandon*, 141 S.Ct. at 1298 (Kagan, J., dissenting).

[70] *Id.* (Kagan, J., dissenting).

[71] *Id.* at 1297.

[72] *Id.* at 1298 (Kagan, J., dissenting) ("But Judges Milan Smith and Bade explained for the court that those activities do pose lesser risks for at least three reasons. First, 'when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting.' . . . Second, 'private houses are typically smaller and less ventilated than commercial establishments.' And third, 'social distancing and mask-wearing are less likely in private settings and enforcement is more difficult.' . . . No doubt this evidence is inconvenient for the *per curiam*'s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments.") (cleaned up).

[73] Elizabeth Reiner Platt, *The Abortion Exception: A Response to 'Abortion and Religious Liberty'*, 124 COLUM. L. REV. F., at * 8 (forthcoming 2024) ("[S]incerity is rarely disputed by opposing counsel or analyzed at all by courts"). The exception is reserved for prisoners' claims as well as those claiming a religious exemption from criminal drug laws. *See, e.g.*, *Burwell*, 573 U.S. at 717 n.28 (pointing to United States v. Quaintance, 608 F.3d 717, 718–19 (10th Cir. 2010), which involved "the Church of Cognizance, which teaches that marijuana is a deity and sacrament").

unfamiliar religious conviction insincere,[74] thereby passing judgment on religious tenets in violation of the Establishment Clause.[75] The Court certainly has not questioned sincerity in any of its recent religious liberty decisions.[76]

The Court has also diluted the "substantial burden" requirement for free exercise exemptions. A law need not ban observers from a sacrament or force them to violate a central religious tenet. Instead, it suffices if law requires a religious observer to facilitate someone else's actions that strays from their religious beliefs. For example, those whose religion teaches that marriage is reserved for a man and a woman would be directly burdened by (theoretical) laws that forced them to marry someone of the same sex.[77] The Supreme Court, however, has also accepted the claim that *endorsing* a same-sex marriage by helping a same-sex couple become foster parents[78] or *facilitating* a same-sex marriage by creating a wedding cake for a same-sex couple imposed a substantial religious burden[79]—a much more attenuated burden.

In fact, a recent Supreme Court case dropped "substantial" when describing the requirement.[80] In *Kennedy v. Bremerton School District*, a Christian football coach at a public school complained that he was prevented from praying in the middle of his school's football field immediately after school games. To be clear, the school had not prohibited all his on-the-job prayers but had requested that the coach adjust their timing or location to avoid the appearance of school endorsement.[81] Nonetheless, questioning neither sincerity nor substantiality, the

[74] Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 64 (2014) ("At the core of courts' apprehension to weigh religious beliefs is the dangerous temptation to confuse sincerity with the underlying truth of a claim. Particularly for unorthodox beliefs, the challenge is that '[p]eople find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held.'").

[75] *See* Chapman, *supra* note 57, at 1196–97 ("In *United States v. Ballard*, the Court held that the Constitution forbids passing judgment on the accuracy of a religious accommodation claimant's beliefs, but not on the claimant's sincerity.").

[76] *See, e.g.*, *Burwell*, 573 U.S. at 726 (accepting claim that a contraceptive mandate imposed a substantial religious burden because plaintiffs asserted it, and HHS did not question plaintiffs' sincerity).

[77] Barring them from marrying someone of the opposite sex would also directly and substantially burden their free exercise of religion.

[78] Fulton v. City of Phila., 141 S. Ct. 1868, 1881–82 (2021).

[79] Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n, 584 U.S. 617, 638-39 (2018).

[80] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–22 (2022) ("[A] plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened [versus substantially burdened] his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'").

[81] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1013 (9th Cir. 2021) (describing how the school "suggested that 'a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games.' Kennedy, of course, could also pray on the fifty-yard line after the stadium had emptied, as he did on September 18.").

Court held that the coach's inability to pray at work in exactly the manner he wanted violated the Free Exercise Clause.[82]

While *Kennedy*'s language raises the question of whether the burden still needs to be substantial, *Tandon v. Newsom*'s language raises the question of whether plaintiffs need assert any burden at all, as its "most favored nation" test makes no mention of substantial burdens: "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."[83]

It is not clear whether the Court assumed the inability to gather and worship in person was a substantial burden but did not articulate it, or whether it thought that the discrimination against religion was the substantial burden, or both. The bottom line is that the substantiality of the burden may no longer be a distinct inquiry.

3. The Strictest of Strict Scrutiny

Finally, strict scrutiny, which used to be ever so gentle,[84] has become much stricter. Today's more rigorous test can be described as "strict in theory and fatal in fact."[85]

Strict scrutiny has become nearly impossible to satisfy in part because the Supreme Court has insisted that the precise question is not whether the government has a compelling interest in protecting health or eliminating discrimination or promoting a particular goal, but whether it has a compelling interest in refusing to grant a religious exemption.[86] That is, rather than ask whether ending discrimination against same-sex couples is a compelling government interest, courts should ask whether preventing one social-service

[82] This, of course, assumes that his religion requires him to pray after football games, which is not an established religious requirement in most faiths.

[83] Tandon v. Newsom, 141 S.Ct. at 1296. Indeed, the only "burden" *Tandon* mentions is the government's burden of proving the law passes strict scrutiny. *Id*. at 1296. The word "burden" appears nowhere in the *per curium* decision in *Roman Catholic Diocese* either. Instead, the Court holds: "Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny.'" Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 67 (2020).

[84] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) ("While in other constitutional areas the compelling state interest test is fairly characterized as '"strict" in theory and fatal in fact,' in the religion cases the test is strict in theory but feeble in fact."); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (calling free exercise scrutiny "strict in theory, but ever-so-gentle in fact").

[85] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[86] Fulton v. City of Philadelphia 141 S.Ct. 1868, 1881 (2021) ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'").

organization from discriminating is compelling.[87] "This framing puts a thumb on the scale since it considers only the consequences of one exemption rather than all the exemptions that will follow, and it sympathetically adopts the viewpoint of the religious objector over those who are harmed by the religious exemption."[88] Moreover, if the law is at all underinclusive (which most laws often are since the government does not usually solve problems in one fell swoop,[89] the Court will probably question whether a law truly furthers a compelling government interest given the incomplete solution. If the law is underinclusive due to an exemption, it will likely complain that the government "offers no compelling reason why it has a particular interest in denying an exception to [the religious objector] while making them available to others."[90]

Providing a single secular exception may also lead to the conclusion that a law was not narrowly tailored unless the government proves that the religious activity undermines the government's goal more than the exempted secular activity: "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too."[91]

In short, it has become easier than ever to obtain a religious exemption, especially from laws that include any secular exemptions. First, allowing even a single secular exemption while declining to offer a comparable religious exemption defeats any contention that the law is neutral and generally applicable. Second, a secular exemption casts doubt on the government's claim that it has a compelling government interest in refusing the religious exemption. Third, it suggests that the law is not narrowly tailored; if it can provide a secular exemption, why not a religious one?[92]

B. *Religious Liberty Exemption from Abortion Bans*

Given today's extremely expansive protection for religious liberties, a Jewish woman seeking a religious exemption from an early abortion ban should have a

[87] *Id.* ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.").

[88] Corbin, *Religious Liberty for All?*, *supra* note 31, at 493.

[89] *Fulton*, 141 S.Ct. at 1882 ("The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures.").

[90] *Id.*

[91] Tandon v. Newsom, 141 S.Ct. 1294, 1297 (2021).

[92] Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L. J. F. 1106, 1113–14 (2022) ("The very logic that implicates strict scrutiny—that a secular interest or entity is exempt, but a religious one is not—automatically locks in the conclusion that the lack of an exemption for religion is either not compelling, not narrowly tailored, or both.").

strong chance of succeeding.[93] First, if an abortion ban contains exemptions, and most do, it is unlikely to be neutral and generally applicable. Second, while Judaism is no more monolithic than Christianity, with different denominations having different teachings on the appropriateness and necessity of abortion,[94] Jewish law requires that a pregnancy be ended in certain circumstances.[95] Abortion bans may make obeying this religious commandment impossible.[96] Finally, most states will not be able to show that their ban passes strict scrutiny, especially if the law allows secular exemptions. While I focus on the Jewish faith, parallel claims can be made by other religions.[97]

1. Bans Are Not Neutral and Generally Applicable

Although neutral laws of general applicability do not violate the Free Exercise Clause, laws that "treat *any* comparable secular activity more favorably than religious exercise" are not neutral and generally applicable.[98] Abortion bans usually have exceptions.[99] Common ones will allow abortion after a rape,[100] for

[93] Members of other faiths have filed similar suits, but I will focus on the numerous Jewish ones.

[94] *See* Rabbi Emily Langowitz & Rabbi Joshua R.S. Fixler, *Abortion and Reproductive Justice: A Jewish Perspective*, RELIGIOUS ACTION CTR. REFORM JUDAISM (Sept. 2, 2021), https://rac.org/blog/abortion-and-reproductive-justice-jewish-perspective.

[95] *See, e.g.*, Order Granting Plaintiffs' Motion for Preliminary Injunction, *Anonymous Plaintiff 1 v. Individual Members of Med. Licensing Bd. of Indiana*, No. 49D01-2209-PL-031056, at 9 (Ind. Super. Ct. Marion Cnty. Dec. 2, 2022) ("An abortion is mandated [in Jewish law] to stop a pregnancy that may cause serious consequences to the woman's physical or mental health.") [hereinafter Order Granting].

[96] Langowitz & Fixler, *supra* note 94.

[97] *See, e.g.*, Order Granting, *supra* note 95, at 9–10 ("Islam also does not believe that a fetus is ensouled at the moment of fertilization or conception. . . . Muslim scholars indicate that within 40 days of conception, it is proper and appropriate to seek an abortion for any reason . . . . Once the fetus reaches 40 days from conception, conservative Muslim scholars believe that an abortion must be available if there is a pressing need that justifies it in the eyes of Islamic law. . . .includ[ing] the physical or mental health of the mother.").

[98] *Tandon*, 141 S.Ct. at 1296 (2021).

[99] Of the eighteen states that ban abortion either from the moment of conception or at six weeks, all eighteen include an exception to protect the pregnant person's life and sixteen (all but Arkansas and South Dakota) include some other kind of exemption, allowing abortion if the woman was raped, if her health is in jeopardy, if the fetus is unlikely to survive. A few bans explicitly exclude IVF embryos from their purview.

[100] States with early abortion bans that provide allow an exception for rape include: Georgia: Ga. Code § 16-12-141(b)(2); Idaho: Idaho Code § section 18-622(2)(b); Indiana: S.B. 1, 122nd Leg., 1st Spec. Sess. (Ind. 2022) Ind. Code § 16-34-2-1(a)(2)(A); Iowa: Iowa Code §§ 146C.2(1) & 146C.1(4)(a) & (b);Mississippi: Miss. Code § 41-41-45(2); North Dakota: N.D. Cent. Code § 12.1-19.1-032(2); South Carolina: S.C. Code §§ 44-41-650(A); West Virginia: W. Va. Code §16-2R-3(c); Georgia: GA. Code § 1612-141; and Wyoming: WYO. STAT. § 35-6-124(a)(iii).

a pregnancy that will not survive,[101] or if the pregnancy will seriously injure[102] or kill[103] the woman. Several explicitly allow disposal of leftover IVF embryos.[104] Others do not ban abortions until twelve or more weeks into the pregnancy.[105] Because most laws allow abortions for secular reasons but not

[101] States with early abortion bans that provide an exception for fetal lethal anomalies include: Alabama: Ala. Code § 26-23H-3(1) (ectopic pregnancy and fetus with "lethal anomaly"); Arkansas: Ark. Code § 5-61-403(1)(B)(iii) (ectopic pregnancy only); Georgia: Ga. Code § 16-12-141(b)(3) ("pregnancy is medically futile"); Idaho: Idaho Code § 18-604(1)(c) (ectopic or molar pregnancy only); Indiana: Ind. Code § 16-34-2-1 ("lethal fetal anomaly"); Iowa: Iowa Code § 146C.1(4)(d) ("fetal abnormality that in the physician's reasonable medical judgment is incompatible with life"); Louisiana: La. Stat. tit. 14 § 87.1(1)(b)(iii), (iv) & (vi) (ectopic pregnancy or "removal or an unborn child who is deemed to be medically futile"); North Dakota: N.D. Cent. Code § 12.1-19.1-01(1)(b) & (c) (ectopic or molar pregnancy only); Okla. Stat. tit. 63 § 1-730(A)(1) (ectopic pregnancy only); South Carolina: S.C. Code § 44-41-660 ("fatal fetal anomaly"); West Virginia: W. Va. Code § 16-2R-3(a)(1) & (2) (ectopic pregnancy or "embryo or fetus is nonviable"); and Wyoming: Wyo. Stat. §§ 35-6-122(a)(i)(C) (ectopic pregnancy) & 35-6-124(a)(iv) ("lethal fetal anomaly or the pregnancy is determined to be a molar pregnancy").

[102] Georgia's ban provides a common formulation of the health exception: A doctor may perform an abortion to "prevent . . . the substantial and irreversible physical impairment of a major bodily function of the pregnant woman," Ga. Code § 16-12-141(a)(3), while also clarifying that this exception does not apply "if it is based on a diagnosis or claim of a mental or emotional condition of the pregnant woman or that the pregnant woman will purposefully engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function." *Id.* All but four states with early abortion bans provide similar health exceptions including Alabama: Ala. Code §§ 26-23H-4(b) & 26-23H-3(6); Indiana: Ind. Code § 16-34-2-1(a)(1)(A)(i); Iowa: Iowa Code §§ 146C.2(1) & 146A.1(6)(a); Kentucky: Ky. Rev. Stat. §§ 311.723(2)(c) & 311.720(9); Louisiana: La. Public Health and Safety § 40:1061(F) & La. Stat. tit. 14 § 87.1(18); Missouri: Mo. Rev. Stat. §§ 188.017(3) & 188.015(7); North Dakota: N.D. Cent. Code § 12.1-19.1-03(1); Oklahoma: Okla. Stat. tit. 63 § 1-731.3(A); South Carolina: S.C. Code §§ 44-41-630 (B) & 44-41-640(A); Tennessee: Tenn. Code § 39-15-213(c)(1); Texas: Tex. Health & Safety Code § 170A.002(b)(3); West Virginia: W. Va. Code §§ 16-2R-3(a)(3) & 16-2R-2 (definition of "medical emergency"); and Wyoming: Wyo. Stat. § 35-6-124(a)(i).

[103] All of the states with early bans that provide an exception to protect the pregnant woman from serious physical risks also permit abortion to save the woman's life. *See supra* note 102. Early-stage abortion states that provide "life" exceptions without health exceptions include: Arkansas: Arkansas: Ark. Code §§ 5-61-404(a) & 5-61-403(3); Idaho: Idaho Code §§ 18-622(2)(a) & 18-604(9); Mississippi: Miss. Code § 41-41-45(2); and South Dakota: S.D. Codified Laws § 22-17-5.1.

[104] The abortion laws in Indiana and West Virginia clarify that IVF embryos are beyond the scope of the state's ban. *See* Ind. Code § 16-34-1-0.5 ("This article does not apply to in vitro fertilization."); W. Va. Code § 16-2R-4(a)(4) ("Abortion does not include . . . [i]n vitro fertilization"); *see also* Sepper, *supra* note 11, at 221 ("[V]irtually all bans allow the disposal of embryos created through in vitro fertilization").

[105] Other states that limit abortion at specific pregnancy weeks less than 20 weeks include: Arizona: Ariz. Rev. Stat. § 36-2322(B) (15 weeks); North Carolina: N.C. Gen. Stat. § 90-21.81A(a) (12 weeks); and Utah: Utah Code § 76-7-302(2)(a) (18 weeks).

comparable religious ones, they are therefore not neutral and generally applicable.

A state might argue that an exception to save a woman's life or health is not comparable to an exception to allow that woman to practice her faith. However, the question is not whether the activities are the same, but whether they undermine the government's interest to the same degree.[106] Most abortion bans are passed in the name of embryonic or fetal life.[107] Since the government's interest is protecting the embryo or its potential life, allowing abortion for one reason is arguably comparable to allowing abortion for just about any other reason.[108] The pregnancy ends regardless.

The government may try to reframe a ban's goals so that religious exemptions undermine them more than the secular exemptions. For example, if the law's goal is recharacterized as minimizing the death toll, then ending a life in order to save a life is not comparable to ending a life in order to allow religious practice.[109] Consequently, a ban with only a life exception might still be considered neutral and generally applicable.

However, an asserted goal must be genuine and not a sham.[110] A legislative history focused entirely on protecting the "unborn child" belies this claim, as does the narrowness of the exemption meant to save the pregnant woman's life. Indeed, a few states only allow it as an affirmative defense.[111] In others, the statute's language and especially implementation limits life-saving abortions for when death is imminent. For example, Arkansas forbids abortion "except to save the life of a pregnant woman in a medical emergency." Pregnant women with cancer have been denied abortions because they were not yet close enough to

[106] Tandon v. Newsom, 141 S.Ct. 1294, 1296 (2021) ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.").

[107] Strictly speaking, early abortion bans save embryos rather than fetuses as the pregnancy does not become a fetus until around the tenth week of pregnancy. *Pregnancy Week by Week*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302 (explaining that pregnancy officially becomes a fetus at Week 11).

[108] The one exception to this argument may be laws that allow abortions for pregnancies with fatal fetal anomalies. The government's goal of promoting fetal life is undermined less by ending a pregnancy that was not going to survive compared to ending a pregnancy that would.

[109] In the former case, the net is zero deaths, while in the latter, the net is one death.

[110] *Cf.* McCreary Cnty. v. Am. Civ. Liberties Union Ky., 545 U.S. 844, 864 (2005) (holding that government's purpose "has to be genuine, not a sham, and not merely secondary to a religious objective").

[111] Max Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications of the Provision of Abortion Services*, WOMEN'S HEALTH POLICY (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/.

death,[112] as was a seven-week pregnant woman with kidney failure.[113] Even women with *nonviable* pregnancies have been denied abortions despite the danger.[114] This pervasive unwillingness to protect women makes clear that the states' goal is promoting fetal life, not maternal life.[115] Of course, a court

[112] Mary Alice Parks, *For Pregnant Women with Cancer, Doctors Fear Abortion Bans 'Could Be a Death Sentence*," ABC NEWS (July 19, 2022), https://abcnews.go.com/Health/pregnant-women-cancer-doctors-fear-abortion-bans-death/story?id=85948248 ("[M]ultiple oncologists told ABC News that cancer patients may not qualify for those [life-saving] exceptions as the new laws are currently written"); *Cf.* Heather Grey, *How Strict Abortion Laws Are Delaying Cancer Treatment*, HEALTHLINE (Oct 27, 2022), https://www.healthline.com/health-news/how-strict-abortion-laws-are-delaying-cancer-treatment ("[M]ultiple pregnant women were denied cancer treatment until they could travel out of state for an abortion"); Charlotte Huff, *New Abortion Laws Jeopardize Cancer Treatment for Pregnant Patients*, CBS NEWS (Sept. 22, 2022), https://www.cbsnews.com/news/abortion-laws-cancer-treatment-pregnant-patients/.

[113] Aria Bendix, *How Life-threatening Must a Pregnancy Be to End It Legally*, NBC NEWS (June 30, 2022), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026 (reporting that although kidney failure is usually considered life-threatening, her Texas doctor arranged an abortion out-of-state because "I will not be able to do it here. I'm going to have to wait until she's actually dying").

[114] *See*, *e.g.*, Selena Simmons-Duffin, In Oklahoma, *A Woman Was Told to Wait Until She's 'Crashing' for Abortion Care*, NPR (Apr. 25, 2023), https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals (describing how Oklahoma woman with a nonviable pregnancy was told that "we cannot touch you unless you are crashing in front of us or your blood pressure goes so high that you are fixing to have a heart attack."); Elizabeth Cohen and John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (June 20, 2023), https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html (reporting that even though water broke and doomed Amanda Zurawski's much wanted pregnancy and put her at risk of fatal sepsis, Texas doctors would not terminate until she went into septic shock).

Even states with health exceptions have denied abortions of nonviable fetuses. Abigail Adams, *Never Ending Nightmare, An Ohio Woman Was Forced to Travel Out of State for an Abortion*, TIME (Aug. 22, 2022), https://time.com/6208860/ohio-woman-forced-travel-abortion/ (Ohio hospital would not end 99% nonviable pregnancy of women with clotting disorder despite risk of dangerous illness or blood clots). Bayliss Wagner, *Kate Cox Did Not Qualify for an Abortion in Texas, State Supreme Court Says*, USA TODAY (Dec. 12, 2023), https://www.usatoday.com/story/news/nation/2023/12/12/kate-cox-didnt-qualify-for-an-abortion-texas-supreme-court-says/71890378007/ (despite Kate Cox's dangerous pregnancy complications, Texas Supreme Court refused to allow her to terminate her much wanted yet nonviable fetus).

[115] Because it is uncertain how close to death a women must be, doctors are often too scared to provide abortions even when women do qualify for one. Yet states have made little effort to clarify their vague laws. Lisa H. Harris, *Navigating Loss of Abortion Services*, N. ENG. J. MED. (June 2, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2206246#.Yn2CbLw4QWE.twitter ("What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%?"); Amy Shoenfeld Walker, *Most Abortion Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023) ("Having the

inclined to reject a religious liberty claim may be disinclined to probe the government's assertion.

Regardless, abortion bans that provide IVF, rape, or health exceptions contain secular counterparts, as do bans at twelve or more weeks with no exceptions whatsoever. A twelve week ban still has to reckon with the fact that it allows abortions that are not even medically necessary at eleven weeks but fails to allow them when they are religiously necessary after twelve weeks. After all, an earlier abortion ends potential life to the same degree as a later abortion.[116] The government might dispute the comparability: a fetus at eleven weeks is less developed than a fetus at thirteen weeks. But if the goal is protecting fetal life, an eleven-week fetus is as much a fetus as a thirteen-week fetus.[117] Even harder to justify is permitting disposal of unwanted embryos from IVF procedures but not via an early abortion.

This reasoning might create a perverse incentive for states to ban abortion entirely with no exemptions whatsoever. The first problem is constitutional: total bans strengthen the Establishment Clause claim. The assertion that a ban merely overlaps with religious beliefs rather than imposes them becomes less persuasive when abortions are barred from the moment of conception regardless of the consequences.[118] The second problem is political. Such punitive abortion laws are highly unpopular, with one typical poll finding that only 9% of Americans

legal right on the books to get an abortion and getting one in practice are two distinctly different things.").

[116] Tandon v. Newsom, 141 S.Ct. 1294, 1297 (2021) ("First, California treats some comparable secular activities more favorably than at-home religious exercise . . . . Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of transmission than applicants' proposed religious exercise at home.")

[117] Does that logic require equating a viable fetus at twenty-four weeks with one at fourteen weeks? No, because the government's interest in a fourteen week fetus is protecting potential life, whereas its interest in a viable fetus at twenty-four weeks is protecting life: while people may disagree when life begins, there is at least a secular basis for concluding that it starts once the fetus is able to survive outside the womb.

[118] Schwartzman & Schragger, *supra* note 11, at 2329 ("Abortion absolutism could run into Establishment Clause problems, . . . categorical abortion bans will seem more like expressions of religious doctrine than a balanced pursuit of secular ends.").

support complete abortion bans.[119] Thus, even legislatures keen on extremely restrictive laws might not want to risk the political repercussions.[120]

2. Bans Impose a Substantial Burden on a Sincere Religious Exercise

The next requirement—that the abortion ban imposes a substantial burden on the plaintiff's sincere, religious exercise—should also prove easy to meet given well-established Jewish teachings and recent Supreme Court decisions. Indeed, the Supreme Court seems to presume a substantial burden if it finds religious discrimination.

Like many faiths, Judaism teaches that life is sacred.[121] At the same time, Jews do not believe that life begins at conception.[122] On the contrary, a pregnancy is described as "mere water" before forty days[123] and is considered

[119] Only 9% Americans polled thought that "abortion should be never be permitted under any circumstance" and only another 8% though that 'abortion should be allowed only to save the life of the pregnant person." Even among Republicans polled, the numbers were 13% and 15%. Poll: *Americans Want Abortion Restrictions. But Not As Far As Red States Are Going*, NPR (Apr. 26, 2023), https://www.npr.org/2023/04/26/1171863775/poll-americans-want-abortion-restrictions-but-not-as-far-as-red-states-are-going; Shefeli Luthra, *Total Abortion Bans Are Not At All Popular*, THE 19TH (Sept 18, 2023), https://19thnews.org/2023/09/poll-abortion-americans-complex-views/ ("Only 9 percent of Americans believe that abortion should be illegal in all circumstances."); Geoff Mulvihill & Linley Sanders, *Few Adults Support Full Abortion Bans, Even in States that Have Them, an AP-NORC Poll Finds*, THE 19TH (July 12, 2023), https://19thnews.org/2023/09/poll-abortion-americans-complex-views/. *See also* Lauren Sforza, *Near Record 55% Support Abortion Rights*, THE HILL (Nov. 20, 2023), https://thehill.com/policy/healthcare/4319428-abortion-support-record-high-survey/ (finding that 86% of American polled supported exception in cases of rape/incest and 89% support exceptions when women's health is endangered).

[120] Maryann Cousens, *Abortion Restrictions Continue to be Unpopular Among Battleground Constituents*, NAVIGATOR (Nov. 8, 2023) https://navigatorresearch.org/abortion-restrictions-continue-to-be-unpopular-among-battleground-constituents/.

[121] *See, e.g.*, Rabbi Julie Zupan, *What Is the Reform Jewish Perspective on Abortion*, REFORMJUDAISM.ORG, https://reformjudaism.org/learning/answers-jewish-questions/what-reform-jewish-perspective-abortion (last visited Mar. 3, 2023) (discussing the Jewish belief "that life is sacred"); *see also, e.g.*, Compl. at *3, *Pomerantz v. Florida*, No. 2022-014373-CA-01 (Fla. Cir. Ct. Aug. 1, 2022) ("The sanctity of human life is *the* core tenet of Judaism.") [hereinafter *Pomerantz* Complaint].

[122] NAT'L COUNCIL JEWISH WOMEN, *Judaism and Abortion*, https://www.ncjw.org/wp-content/uploads/2019/05/Judaism-and-Abortion-FINAL.pdf (last visited Mar. 4, 2023); Fred Rosner, *The Fetus in Jewish Law*, MY JEWISH LEARNING (last visited Dec. 29, 2023) ("An unborn fetus in Jewish law is not considered a person (Heb. nefesh, lit. "soul") until it has been born.").

[123] Lisa Fishbayn Joffe, *Do Abortion Bans Violate Jews' Religious Rights?*, BRANDEIS UNIV. (June 16, 2022), https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-judaismjoffe.html ("The Talmud, a compendium of rabbinical commentaries and laws written during the first millennium C.E., characterizes a fetus as 'mere water' . . . before 40 days gestation."); NAT'L COUNCIL JEWISH WOMEN, *Abortion and Jewish Values TOOLKIT* 16 (2020) [hereinafter NCJW], https://www.ncjw.org/wp-

part of the woman's body until birth,[124] as captured by the Talmudic phrase "a fetus is its mother's thigh."[125] The fetus does not become a distinct living being "until birth begins and the first breath of oxygen into the lungs allows the soul to enter the body."[126] In fact, the Hebrew word for "soul" is the same as the Hebrew word for "breath."[127]

Moreover, Jewish law commands that if a pregnancy threatens a woman, it must be terminated.[128] Although debate surrounds the necessary level of threat,[129] there is general agreement that "it is considered a mitzvah, a

content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf [https://perma.cc/7PMA-F57X] ("The Talmud (Yevamot 69b) asserts that the fetus is 'mere fluid' before 40 days of gestation.").

[124] *See* NAT'L COUNCIL JEWISH WOMEN, *supra* note 122. The Torah describes how a fight between two men injures a pregnant woman and causes her to miscarry. The Torah then explains that the punishment for ending the pregnancy would be a fine, as compared to the punishment for fatally harming the women, which is a life for a life. "The common rabbinical interpretation of this verse is that the men did not commit murder and that the fetus is not a person." *Id.*; *see also* Joffe, *supra* note 123 ("If the fetus were seen as a full human being, the punishment would again be execution, not financial compensation.").

[125] Dr. Ronit Irshai, *A Fetus Is Not an Independent Life: Abortion in the Talmud*, THETORAH.COM, https://www.thetorah.com/article/a-fetus-is-not-an-independent-life-abortion-in-the-talmud (last visited Dec. 26, 2023); *see also id.* ("If we read these texts in light of each other, a clear picture emerges of a four stage process: 1. Until the fetus is formed—40 days in the Hellenistic medical concept—the fetus has no status at all. 2. From 41 days until the beginning of active labor, the fetus is a part of the mother. 3. At active labor, the fetus is an independent, though inferior, life. 4. Once the head (or more) of the fetus is outside the mother, it is a human life like any other.").

[126] *See* NAT'L COUNCIL JEWISH WOMEN, *supra* note 122; *see also* WOMEN'S RABBINIC NETWORK, *Abortion Care Is Health Care, Forcing Someone to Carry a Pregnancy Violates Jewish Law and Constitutional Rights* (June 24, 2022), https://womensrabbinicnetwork.org/resources/Documents/WRN%20Statements/WRN%20Statement%20-%20Supreme%20Court%20Decision%20on%20Roe%20VS%20Wade.pdf [https://perma.cc/88DR-WAX5] ("The Torah, the Mishnah, and the Talmud—Judaism's most sacred and authoritative text—do not view a fetus as a soul until it is born. Rather, the fetus is considered part of the parent's body until delivery.").

[127] WOMEN'S RABBINIC NETWORK, *supra* note 126; *see also* Rabbi Allison Berry, *Between Our Souls and Our Breath*, TEMPLE SHALOM (June 26, 2019), https://www.templeshalom.org/blogs?post_id=889493 ("[I]n the Jewish tradition . . . the question of when life begins is answered in one word: nefesh. The soul and breath are intrinsically connected to one another.").

[128] Zupan, *supra* note 121 ("Centuries ago, the Talmud concluded that the life of the mother always takes precedence over the fetus, teaching, '[I]f a woman who was having trouble giving birth . . . her life comes before its life' (Mishneh Ohalot 7:6)."); *see also* Shira Silkoff, *What Does Judaism Believe About Abortion?*, JERUSALEM POST (May 28, 2020), https://www.jpost.com/judaism/article-707738 [https://perma.cc/W8MK-Y4CC] ("Jewish views on abortion differ from denomination to denomination, although all agree that if a woman's life is in danger due to her pregnancy, she can, or even must, undergo an abortion.").

[129] Langowitz & Fixler, *supra* note 94 ("Later commentators debate in great detail the implications of this text, particularly the breadth or narrowness of the definition of a threat to

commandment, to save the life of a mother when she is at risk of life-threatening complications."[130] Some strands of Judaism interpret this to require termination if the mother's physical or psychological well-being is in danger.[131] In other words, Jewish law may require an abortion in situations barred by abortion bans.[132] Consequently, laws outlawing abortion may well deny Jewish women the right to abide by the commands of their faith.[133]

Jewish plaintiffs should have little difficulty in establishing their sincerity. An unfamiliar or eccentric belief might give a court pause, but Judaism is well known[134] and the claim is well-established in the Torah and Talmud.[135] In any event, as described in Part II.B.2, the Supreme Court rarely challenge a plaintiff's sincerity.[136] Although it has been suggested that Reform Jews, who often view Jewish law as nonbinding, cannot sincerely suffer substantial religious burdens,[137] the argument cannot stand under the Court's highly

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the life of the woman. Some are more permissive of a range of emotional as well as physical impacts . . . .").

[130] Joffe, *supra* note 123. Joffe explains there are different justifications for this rule. One is simply that the fetus is not yet a life. The other is that even if a life, the fetus in this situation is a rodef, a pursuer, "a human who is trying to kill another human." *Id. See also* Matt Keely, *Rabbi Reveals Why Abortion Access is Important—and Supported by Scripture*, NEWSWEEK (May 4, 2022), https://www.newsweek.com/rabbi-reveals-why-abortion-access-important-supported-scripture-1703611 ("[A] pregnancy that endangers life is considered a Rodef and *must* be terminated").

[131] NCJW, *supra* note 123, at 16 ("[V]arious Jewish sources explicitly state that abortion is not only permitted but is required should the pregnancy endanger the life or health of the pregnant individual. Furthermore, 'health' is interpreted by many rabbis to encompass psychological health as well as physical health."); WOMEN'S RABBINIC NETWORK, *supra* note 127 ("[F]orcing someone to carry a pregnancy that they do not want or that endangers their life is a violation of Jewish law because it prioritizes a fetus over the living adult who is pregnant."); Joffe, *supra* note 123(noting that even in Orthodox Judaism "the definition of when pregnancy jeopardizes the mother's life has been expanded to include severe pain and suffering, including to her mental health").

[132] Schraub, *supra* note 11, at 1576 ("While different Jewish denominations take different views on abortion, virtually all agree that Jewish religious law does not just permit but sometimes requires abortion in certain circumstances.").

[133] Abortion bans may also impede the ability of Jewish clergy to counsel their congregation and Jewish doctors the ability to provide the medical care their faith dictates. One Florida lawsuit was brought on behalf of rabbis complaining that their religious counseling could be viewed as aiding and abetting abortion subject to criminal liability: "Given their general duties and work as Jewish Clergy, Plaintiffs intend to engage in counseling regarding abortion beyond the narrow limits of HB 5 and, therefore, risk incarceration and financial penalties." *Pomerantz* Compl., *supra* note 121, at 6.

[134] In fact, three recent Justices have been Jewish—Justice Breyer, Justice Ginsburg and Justice Kagan, who is still on the Court.

[135] *See supra* notes 121-27 and accompanying text.

[136] *See supra* Section II.B.2.

[137] Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion,"* VOLOKH CONSPIRACY (June 6, 2022), https://reason.com/volokh61olokh06/20/tentative-thoughts-on-the-jewish-claim-to-a-religious-abortion/. He argues that reform Jews cannot

deferential approach to sincerity and its abandonment of any requirement that a religious belief be mandated, or even central.[138] It is, after all, not core to Christianity to express disapproval of same-sex marriage. In short, as Elizabeth Sepper points out, "The initial (and damning) error of this argument is that current law explicitly rejects a requirement of compulsion."[139]

The more subtle problem is that such an approach adopts one religious tradition's understanding of obligation while ignoring others, raising Establishment Clause concerns.[140] In particular, it insists on an expressly conservative Christian account of religious obligation as obedience to God that necessitates some restriction on individual liberty. In contrast, "Jewish religious interpretation is famously not tethered to unquestioned obedience to divine will."[141] Instead, as David Schraub explains, liberal Jews may also have a religious obligation to follow their own considered judgment on matters,[142] including their judgment on when abortion is necessary for their own well-being.[143]

Furthermore, dismissing this burden as too slight is untenable given the other often far more attenuated burdens the Supreme Court has deemed substantial. The Court has recognized that when a religion opposes a certain type of marriage, forcing a believer to facilitate or endorse such a marriage is a substantial burden.[144] The case is even stronger if a religion opposes a certain

satisfy substantial burden because they do not consistently view Jewish law (halacha) as mandatory.

[138] Note too that the religious exercise protected Religious Freedom Restoration Act, whose analysis parallels free exercise, does not have to be "central to . . . a system of religious belief." 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A).

[139] Sepper, *supra* note 11, at 201.

[140] Mira Fox, *This Law Professor Argued that Reform Jews Aren't Devout Enough to Merit Religious Freedom*, THE FORWARD (June 22, 2022), https://forward.com/culture/507161/reform-jews-abortion-freedom-of-religion/ ("defining liberal religious practice as less legitimate could lead to a lack of protection for all but the strictest religious movements"); Schraub, *supra* note 11, at 1586 ("[T]he willingness of conservative legal advocates to press for this highly particular and sect-specific understanding of religious obligation should be seen as a pivot towards express Christian preferentialism.").

[141] *See* Schraub, *supra* note 11, at 1584.

[142] *Id.* at 1583 (In Judaism, "it is perfectly plausible for a religious obligation to take the form of respecting an individual's free choice."); Sepper, *supra* note 11, at 202 ("[A]n abortion permitted by official doctrine may become personally obligatory after consultation with God.").

[143] *See* Schraub, *supra* note 11, at 1583 ("[W]hat Jewish law requires is respect for a woman's judgment as to whether she wishes to proceed with a pregnancy."); *Id.* at 1586 ("Once that judgment is made and that fact is established, the abortion in such a case is just as religiously 'obligatory' as is one mandated by health considerations."); Sepper, *supra* note 11, at 203 ("Failure to exercise religiously informed conscience is itself violative of religious imperative.").

[144] The Court has also held that providing health insurance coverage for a medicine that may possibly induce an abortion is a substantial burden—a claim the Court accepted on the grounds that the religious objectors believed that they were facilitating sin. In that case, it was

type of pregnancy, and the law forces a believer to actually undergo that pregnancy. The pregnant woman is not merely endorsing or facilitating someone else's irreligious conduct; she herself is failing to honor a commandment.[145]

Finally, recall that *Tandon*—which lacks a substantial burden analysis altogether[146]—suggests that laws that discriminate against religious counterparts are immediately subject to strict scrutiny.[147] In other words, substantial burden may well be assumed in religious challenges to abortion bans.

3. Bans Fail Strict Scrutiny

The bans' under-inclusiveness in denying religious liberty exemptions while allowing secular counterparts may defeat both prongs of strict scrutiny, furnishing yet another reason these religious liberty claims should win. In fact, the current six-to-three Supreme Court has not yet held that any law passes strict scrutiny in a free-exercise challenge.[148]

a. *No Compelling Government Interest*

Although saving innocent lives is undoubtedly a compelling government interest,[149] a state's argument that its early ban advances it depends on the belief that life begins at conception, something the First Amendment challenges reveal

not certain an abortion would occur as there was only a possibility that the medicines might terminate a fertilized egg. Little Sisters Poor Saints Peter & Paul Home v. Pennsylvania, 140 S.Ct. 2367, 2377 (2020). If being forced to facilitate a possible religious breach was a substantial burden, then surely being forced to actually and definitely commit one is, too.

[145] If it is a substantial burden to end a pregnancy for those who believe that a embryo is more valuable than the woman carrying it, then it is also a substantial burden to fail to end a pregnancy for those who believe that the endangered woman is more valuable than the embryo she is carrying.

[146] Tandon v. Newsom, 141 S.Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."); *accord* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 67 (2020) ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest."); *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (applying strict scrutiny after finding that bakery suffered religious discrimination).

[147] The free exercise funding cases also proceeded directly from finding religious discrimination to applying strict scrutiny, skipping any substantial burden analysis. *See, e.g.*, Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2021); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017); Espinoza v. Montana Dep't of Revenue, 140 S.Ct. 2246 (2020); Carson v. Makin, 142 S.Ct. 1987 (2022).

[148] In the past ten years, the Supreme Court has never rejected a free-exercise or RFRA-religious-liberty claim.

[149] Defending its ban, for example, Indiana argued that any abortion "ends the life of an innocent human being" and the state has a compelling interest in protecting the death of these "vulnerable human beings." Order Granting, *supra* note 95, at 32 (quoting Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, at 32–33).

is not a universal truth but a particular religious viewpoint. An Indiana court rejecting the state's justification correctly reasoned that "the State's interest is based entirely on the legislative determination that 'human physical life' begins when sperm meets egg."[150] This it cannot do.[151] Because when life begins is a contested theological determination, a state law that codifies one religious viewpoint violates the Establishment Clause.

To avoid this establishment problem, a state may argue that its compelling interest is saving potential life or protecting embryonic/fetal life.[152] Again, the assumption that a four or six or eight week embryo deserves more legal protection than the person carrying it is based on religious dogma and therefore Establishment Clause issues remain.

In any event, unless the law bars all abortions throughout the pregnancy, the government's actual burden is proving it has a compelling interest in denying the religious exemption. More specifically, it must explain why it refuses to take steps to avoid serious injury to a pregnant woman's spiritual well-being when it willingly does so to avoid serious injury to her physical well-being (health exception) or psychological well-being (rape exception) or, for bans at twelve or more weeks, no injury at all.[153] In fact, according to Supreme Court precedent, the existence of a secular exemption undercuts the claim: how compelling can the government interest be in denying an exemption for a religious reason when the government allows an exemption for a nonreligious one?[154]

b. Not Narrowly Tailored

The same under-inclusiveness that casts doubt onto whether the state's interest in enforcing its ban against Jewish women is truly compelling also defeats the state's claim that its law is narrowly tailored.[155] As established in the COVID-19 cases, the government must prove that the religious exception

[150] *Id.* at 32 (quoting IND. CODE § 16-34-2-1.1(a)(1)(E) (2022)).

[151] As Rabbi Michael Adam Latz explained, "[w]hile I certainly understand that there are people who disagree with me, in a nation for which religious pluralism is a hallmark, to impose one religious tradition on this is not actually how a democracy functions, it's how a theocracy functions." Lindsay Schnell, *Jews, Outraged by Restrictive Abortion Laws, Are Invoking the Hebrew Bible in the Debate*, USA TODAY, https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/ [https://perma.cc/28BT-NE9E] (July 28, 2019, 4:56 PM).

[152] *Cf.* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2261 (2022) ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life.").

[153] That burden likewise exists for states that do not protect IVF embryos.

[154] One reason that the Supreme Court rejected the claim that an anti-discrimination law advanced a compelling government interest in ending discrimination against the LGBTQ community is the fact that "[t]he creation of a system of exceptions … undermines the City's contention that its non-discrimination policies can brook no departures." Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1882 (2021).

[155] *See supra* notes 148-54 and accompanying text.

undermines the government's goal more than the secular exception to satisfy narrow tailoring.[156]

As discussed earlier, the government's goal of promoting potential life is as undermined by allowing exceptions for physical health (the secular reason) as they are by allowing exceptions for spiritual health (the religious reason).[157] The same holds true for a 12 week ban with no exceptions allowing abortions at 11 weeks (the secular reason) but not at 13 weeks (the religious reason).[158] And the same holds true for every state that allows the demise of IVF embryos but not pregnant Jewish women's embryos. Therefore, the government should fail to make its showing. Instead, according to current doctrine, the refusal to accommodate people's sincere religious beliefs merely reflects hostility towards religion.[159]

In short, under existing free exercise jurisprudence, the government should have a difficult time arguing that its abortion ban passes strict scrutiny.

CONCLUSION

Although *Dobbs* eliminated substantive due process protection for abortion, the religion clauses of the First Amendment of the U.S. Constitution or the religion clauses of state constitutions may provide some measure of protection instead.

Historically, the Establishment Clause ensures that the government's laws are secular rather than religious. Yet religious dogma rather than secular justifications underpin laws that outlaw abortion from the moment of conception or soon thereafter. Indeed, supporters do not shy away from proclaiming the bans' religious roots. The same Supreme Court that has eviscerated Establishment Clause protections is not likely to find these bans unconstitutional. State courts, however, need not follow federal law when interpreting their own state constitution equivalents. Consequently, because it violates separation of church and state to impose the religious tenets of some onto everyone, some courts may be willing to strike down very early abortion bans on establishment grounds.

These bans may also violate the Free Exercise Clause, especially given the greatly expanded protection the Roberts Court has afforded religious liberty claimants. Most states do not protect all embryos, and providing secular exemptions while withholding comparable religious exemptions now amounts

[156] *Id.* As the Supreme Court repeatedly argued in its COVID-19 decisions, if the government can make an exception for a secular reason, then surely it can make an exception for a religious reason.

[157] The rape exceptions are even more comparable to the religious exceptions in that they both involve the psychological well-being of the pregnant woman.

[158] Recall that California's law limiting all gatherings at private homes to three households whether religious or secular was not narrowly tailored because it did not impose similar limits on secular gatherings outside the home. Tandon v. Newsom, 141 S.Ct. 1294, 1296–97 (2021).

[159] *See supra* notes 121-47 and accompanying text.

to unconstitutional religious discrimination. The remedy is providing a religious exemption from the law, which means a religious exemption from these very early abortion bans.