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The Implications of Free Exercise Clause Jurisprudence for State Abortion Bans

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I. Introduction

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overruled prior precedent set by *Roe v. Wade* and made it possible for states to restrict abortions.[1] Before the *Dobbs* decision, 19 states had in effect pre-viability bans, banning abortion before a fetus is likely to survive on its own.[2] Since *Dobbs*, a significant number of states have passed laws severely restricting abortion access, which can be referred to collectively as the "State Abortion Bans." Since June 2023, one year after *Dobbs*, 25 states have pre-viability bans in effect.[3] While the specifics vary, these bans generally prohibit abortions after a certain point in pregnancy, with some states implementing abortion bans regardless of gestational duration and others allowing abortions based on gestational duration, between 6 and 18 weeks' gestation.[4] All State Abortion Bans have included secular exemptions, or State Ban Exemptions, for situations including preserving the life of the mother, addressing serious risks to health, or pregnancies resulting from rape and incest.[5]

Despite the State Ban Exemptions in the State Abortion Bans, some women may seek abortions for reasons grounded in their religious beliefs. They may have a claim that abortion is necessary for reasons of religious conscience, or because their faith considers the unborn

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[1] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[2] *Abortion Rights and Access One Year After Dobbs*, LEAGUE OF WOMEN VOTERS (August 2, 2023), https://www.lwv.org/blog/abortion-rights-and-access-one-year-after-dobbs#:~:text=As%20of%20June%202023%2C%20one,at%2020%2D22%20weeks%20LMP.
[3] *Id.*
[4] *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (April 12, 2024), https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans. 14 states have banned abortion regardless of gestational duration. 27 states have abortion bans based on gestational duration. Of these 27 states, 7 states ban abortion at or before 18 weeks' gestation, while 20 states ban abortion at some point after 18 weeks. Each of the states banning abortion contain one or more exemptions, including threat to the life of the pregnant person, threat to the general health of the pregnant person, threat to the physical health of the pregnant person, pregnancy resulting from rape, pregnancy resulting from incest, and diagnosis of a lethal fetal anomaly. *Id.*
[5] Mabel Felix, Laurie Sobel, and Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (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/.

child/fetus to have a particular status. This is because some religions do not oppose abortion. Other religions that oppose abortion generally may still allow for abortions in situations that are not included in the State Ban Exemptions. Some religions prioritize the mother's health and well-being over the fetus and would therefore counsel for abortion in situations that are not listed in the State Ban Exemptions. Other religions give total deference to the woman's personal moral judgment or religious conscience regarding the decision to terminate the pregnancy. The role of clergy and others in religious organizations may include counseling their members on abortions according to their faith. Although the State Ban Exemptions outline several secular exemptions to the State Abortion Bans, there will be times when women seek abortions for religiously motivated reasons that are not defined as exemptions under the State Abortion Bans.

Because the United States is a religiously diverse country, a variety of religions hold different views on abortion and members exercising their faith can come into conflict with the State Abortion Bans. Religions, including Judaism, Buddhism, the Presbyterian Church, and the Unitarian Church have religious views that differ from those of the abortion laws that have been imposed after *Dobbs*.[6] When a law includes secular exemptions but fails to provide analogous religious exemptions, courts are required to apply strict scrutiny. The model laid out in *Sherbert v. Verner*, *Wisconsin v. Yoder*, and *Fulton v. City of Philadelphia* should be followed and strict scrutiny should be applied. Under this standard of review, the government must demonstrate that the law furthers a compelling state interest that is narrowly tailored to achieve that interest using the least restrictive means.[7] The rational basis standard of review established in *Employment Division v. Smith* is inapplicable because the ban on abortion includes secular exemptions, thus

[6] *Dobbs*, 597 U.S. at 215.
[7] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

triggering strict scrutiny.[8] Thus, religious claims for abortions where the abortion would be otherwise prohibited should receive strict scrutiny judicial review under the Free Exercise Clause. In other words, courts must determine if the law substantially burdens religion, if the state has a compelling interest in not providing an exemption, and if any less restrictive alternatives exist.

Today, individuals affiliated with religions that would counsel or permit abortions in certain circumstances have been litigating for exemptions from abortion bans in more conservative states. Notable cases in Florida and Indiana demonstrate the surge in legal challenges that stem from religiously diverse beliefs regarding when an embryo attains the status of an actual human being, or whether a mother should be given more importance than a fetus. In Florida, members of the Jewish faith filed a lawsuit, asserting that the ban on abortions after 15 weeks contradicted Jewish teachings and impeded the practice of their faith.[9] Similarly, in Indiana, members of various religious faiths filed a complaint, asserting that the ban on abortion does not have a compelling interest in preventing religiously motivated health care decisions.[10] A state appellate court, affirming the lower court, held that the Plaintiffs were entitled to a preliminary injunction against enforcement of the strict abortion laws.[11]

This paper argues that State Abortion Bans containing secular exemptions are in violation of the Free Exercise Clause, as they fail to provide religious exemptions despite accommodating secular conduct. With the application of a strict scrutiny standard of review, religious exemptions should be afforded to the ban on abortion. Allowances should be afforded for individuals whose

[8] Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
[9] Complaint, Lama Karma Chotso v. Florida, No. 2022-CA-014371, 2022 WL 3155355 (11th Cir. August 1, 2022).
[10] Individual Members of Medical Licensing Board of Indiana v. Anonymous Plaintiff 1, No. 22A-PL-2938, 2024 WL 1452489 (Ind. Ct. App., Apr. 4, 2024).
[11] *Id.* at 29-30.

religious beliefs conflict with the strict abortion laws in place. Women should be able to receive counseling for pregnancy, abortion, and contraception through their religion. Furthermore, clergy should be able to provide this counseling. This paper will proceed as follows. Section II will discuss the historical context surrounding abortion law. Section III will discuss the different standards of review from prior Supreme Court decisions that would govern any free exercise challenge to State Abortion Bans, leading to the conclusion that strict scrutiny will apply. Section IV will expand on religious diversity and discuss the various viewpoints of different religions with respect to abortion. Section V will describe the current litigation that has been filed and the decisions that have been issued. In the end, the question of whether religiously-motivated abortions are protected under the Free Exercise Clause will depend upon the judicial balancing done on a case-by-case basis.

II. Historical Context

Abortion has been a topic of debate for many years. Different interpretations of the Constitution's Due Process Clause have yielded different outcomes in Supreme Court cases. In the early 20th century, abortion was banned nationwide and was illegal to perform during any stage of pregnancy, with exceptions for if the mother's life was at risk, though this was a decision solely in the hands of doctors.[12] In the late 1960s and early 1970s, nationwide efforts were made to reform abortion laws in nearly every state.[13] In 1966, a group of doctors known as the San Francisco 9 were put on trial for performing abortions on women who had been exposed to rubella, which caused birth defects.[14] The uproar in support for the doctors led to California

[12] *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD (last visited, May 8, 2024), https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today.
[13] *Id.*
[14] *Id.*

amending its stance on abortion, sparking some states across the nation to either overturn their abortion laws or begin to widen the circumstances in which abortion was allowed.[15] By 1973 Alaska, Hawaii, New York, and Washington completely repealed abortion laws. New York went as far as legally recognizing abortion.[16] To contrast New York's progress, in Texas, "procuring an abortion" was still criminalized unless it was done to save the mother's life.[17]

Texas's laws were challenged in 1973, in the infamous Supreme Court case, *Roe v. Wade*.[18] Jane Roe, a Dallas resident, filed a lawsuit against Henry Wade, the Dallas District Attorney, on the grounds that the Texas laws regarding abortion were not only unconstitutionally vague but also infringed on her rights to privacy which are protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments.[19] The Supreme Court found that under the Due Process Clause, a "right of privacy" is fundamental and protects a pregnant woman's choice of whether or not to have an abortion.[20] In other words, the Supreme Court held that the ban against abortion violated the Due Process Clause. This led to the nationwide protection of abortion rights which also led to safer and more accessible abortions. *Roe v. Wade* became a precedent for other cases which further protected a woman's right to abortion, such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed that the right to an abortion was constitutionally protected.[21] However, abortion was not completely unregulated prior to *Dobbs*. While women and doctors had a lot of freedom to decide their reproductive rights, *Roe* still allowed states to

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See generally* Roe v. Wade, 410 U.S. 113 (1973).
[19] *Id.* at 120.
[20] *Id*. at 152.
[21] *See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the core holding of *Roe*).

regulate abortion in the second and third trimesters.[22] Furthermore, *Casey* allowed regulations as long as it did not place an "undue burden" on women.[23]

However, in the Supreme Court's most recent abortion decision in *Dobbs v. Jackson Women's Health Org.* in 2022, the Court held that the Constitution does not confer a right to abortion.[24] In *Dobbs*, Mississippi's Gestational Age Act provided that "except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."[25] Jackson Women's Health Organization challenged Mississippi's Gestational Age Act on the grounds that it counteracted *Roe* and *Casey*.[26] Ultimately, the Court ruled that the Constitution does not grant a right to abortion, overruling *Roe v. Wade*. Abortions are to be regulated by state legislatures.[27] The justices decided that, "the right to abortion is not deeply rooted in the nation's history and tradition; regulations and prohibitions of abortion are governed by the same "rational basis" standard of review as other health and safety measures."[28]

III. The Free Exercise Clause and Standards of Review

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[29] The Free Exercise Clause preserves the right of American citizens to accept and practice any religion, including beliefs, rituals, and expressions based upon that religion. It also recognizes a right in the individual to interpret a

[22] *Roe*, 410 U.S. 113, 164 (1973).
[23] *Casey*, 505 U.S. at 878.
[24] *Dobbs*, 597 U.S. 215 (2022).
[25] *Id.* at 232.
[26] *Id.* at 230.
[27] *Id.* at 300.
[28] *Id.*
[29] U.S. Const. amend. I.

religion and to make decisions based in religious conscience.[30] Furthermore, the Clause also allows for exemptions in certain circumstances, depending on the standard of review employed and as long as exemptions are made for religious reasons.[31] The interpretation and application of the Free Exercise Clause has evolved over the years, with different standards of review bouncing back and forth between rational basis and strict scrutiny. Identifying and applying the appropriate standard of review to a law is essential in protecting individual rights and challenging laws.

The Supreme Court established a strict scrutiny standard of review for burdens on religious exercise in 1963. In *Sherbert v. Verner*, a woman was fired from her job after refusing to work on her Saturday Sabbath.[32] After filing a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act, the State Commission denied her application, alleging that the woman failed, without good cause, to accept available suitable work that was offered to her.[33] The court imposed a strict scrutiny standard of review on laws that burden free exercise rights.[34] In this case, the Court determined that this denial substantially burdened her religious exercise and that South Carolina did not have a compelling interest to justify that burden.[35]

The Court continued to apply strict scrutiny, even when the law was clearly facially neutral and generally applicable. In 1972, in *Wisconsin v. Yoder*, the court upheld a free exercise challenge to Wisconsin's compulsory school attendance law that required a child's school attendance until age 16.[36] Respondents, who were part of the Amish community, declined to send

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[30] *See, e.g.*, Thomas v. Review Board, 450 U.S. 707 (1981); Frazee v. Ill. Dept. of Empl. Secur., 489 U.S. 829 (1989); U.S. v. Seeger, 380 U.S. 163 (1965).
[31] *Thomas*, 450 U.S. at 714.
[32] *Sherbert*, 374 U.S. at 399.
[33] *Id.* at 401.
[34] *Id.* at 403-404.
[35] *Id.*
[36] *Yoder*, 406 U.S. at 207.

their children to school after they completed the eighth grade because they believed that their children's attendance at high school was contrary to the Amish religion and way of life.[37] The Court held that because the Amish objection to formal education beyond eighth grade was firmly grounded in their central religious concepts, requiring Amish children to attend school violated the free exercise clause.[38] Furthermore, the Court stated that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[39]

The standard of review drastically changed in 1990, in *Employment Division v. Smith*.[40] Prior to *Smith*, the standard of review employed was the strict scrutiny standard of review for laws that substantially burdened the free exercise of religion. If the government wanted to uphold a law, the government had to demonstrate that the law had a compelling interest and that the law was narrowly tailored to serve that interest. However, with the decision in *Smith*, the Court departed from *Sherbert* and *Yoder* and moved towards a rational basis standard of review. In *Employment Division v. Smith*, the Supreme Court ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[41] The landscape of Free Exercise Clause challenges changed significantly after this decision as the Court turned to the rational basis test instead, ultimately narrowing the impact of *Sherbert*. In this case, an Oregon law prohibited the knowing or

[37] *Id.*
[38] *Id.* at 210.
[39] *Id.* at 214.
[40] *Smith,* 494 U.S. 872 (1990).
[41] See *Smith*, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

intentional possession of a "controlled substance" unless the substance was prescribed by a medical practitioner.[42] Peyote, a controlled substance, was ingested for religious purposes by the Native American Church.[43] Individuals challenged the state law after being denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct". The standard of review imposed by the court was rational basis review – that generally applicable laws not targeting specific religious practices do not violate the Free Exercise Clause.[44]

A. Exceptions to *Smith*

Sherbert and *Yoder*, though ruled prior to *Smith*, are exceptions to the principles laid out in *Smith*. The Supreme Court's decision in *Smith* did not overturn the precedents set in *Sherbert* and *Yoder*. While *Smith* held that neutral laws of general applicability not targeting specific religious practices do not violate the Free Exercise Clause, the Court recognized two exceptions where strict scrutiny applies. When the government makes an "individualized assessment" as it did in *Sherbert*, the *Smith* court reasoned that the government must show that the denial is justified by a compelling governmental interest.[45] Viewing *Yoder* as a "hybrid rights" decision, the *Smith* Court held that when a Free Exercise claim is combined with another constitutional right, such as parental rights over a child's education, strict scrutiny applies.[46] Both *Sherbert* and *Yoder* provide heightened protection for religious freedoms and allow for exemptions from neutral laws of general applicability if the law substantially burdens religious practices.

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[42] *Id.* at 874.
[43] *Id.*
[44] *Id.* at 885.
[45] *Id.* at 884.
[46] *Id.* at 882.

In addition to the *Sherbert* and *Yoder* carve-outs in *Smith*, a law that is targeted at religion is not neutral and general and will continue to enjoy strict scrutiny. In 1993, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that a law that imposes special burdens on religious activities may not be considered neutral or generally applicable and will likely trigger heightened scrutiny.[47] In this case, a city in Florida adopted an ordinance prohibiting ritual sacrifice of animals.[48] However, the Santeria religion used the sacrifice of animals as part of their religious rituals.[49] The Court held that the ordinance was neither neutral nor generally applicable.[50] Because the ordinances applied exclusively to the Santeria religion, strict scrutiny was required.[51] After applying strict scrutiny, the Court found that the ordinance was unconstitutional—the government's interest in safe and sanitary disposal of animal remains could be achieved by other means without burdening the Santeria religion's practice.[52] The standard of review of the Free Exercise Clause after *Lukumi* was that a neutral law of general applicability must meet rational basis of review, but a law that is not neutral or generally applicable must meet strict scrutiny review.

In 2018, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a same-sex couple requested that a cakeshop design their wedding cake, but the owner declined to do so because his religion does not accept same-sex marriage.[53] After filing a charge with the Colorado Civil Rights Commission alleging discrimination, the Commission determined that the shop's actions violated the Colorado Anti-Discrimination Act.[54] During the hearing, the Commission

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[47] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[48] *Id.*
[49] *Id.* at 524.
[50] *Id.* at 536.
[51] *Id.*
[52] *Id.* at 544.
[53] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018).
[54] *Id.* at 622.

members disparaged the owner's religion.[55] The Supreme Court held that Commission's hostility was inconsistent with the First Amendment's guarantee that laws be applied in a neutral manner towards religion.[56] Once again, the court held that laws must be applied in a neutral manner with regard to religion.

B. Newer type of *Smith* Exception: Development of "Most Favored Nations" Status

Under the "most favored nations" theory, a law that broadly covers both secular and religious conduct would not be considered "neutral and generally applicable" under *Smith* if it contains any exemptions comparable to the requested religious exemption.[57] In other words, if there exists any exemption that favors secular activity, then there is a presumption that a religious exemption may also exist, and can only be denied if the law without a religious exemption satisfies strict scrutiny.[58] In 2020, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, New York Governor Andrew Cuomo enforced an executive order during the COVID-19 pandemic, imposing severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones.[59] In red zones, no more than 10 persons could attend religious services, and in orange zones, no more than 20 people could attend religious services.[60] Petitioners contended that these restrictions violated the Free Exercise Clause, especially because nonreligious organizations within the area remained open.[61] The Supreme Court held that while protecting individuals from the spread of the COVID-19 virus was a compelling interest, the restriction was not neutral or generally applicable due to the existence of many secular exemptions for businesses and other uses that

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[55] *Id.* at 635.
[56] *Id.* at 640.
[57] Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2238-39 (2023).
[58] *Id.* at 2238-39.
[59] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020).
[60] *Id.* at 66.
[61] *Id.*

were comparable to religious gatherings in terms of the risk of the spread of the COVID-19 virus.[62] The Court employed the strict scrutiny standard of review and concluded that no compelling interest justified the different treatment for religious gatherings.

In 2021, in *Tandon v. Newsom*, the Court said explicitly what was implicit in *Cuomo*: that whenever a law contains an exception for a secular activity, but does not include a comparable religious exemption, it should not be seen as "neutral" and "generally applicable."[63] In this case, California imposed a restriction on all gatherings, including religious ones, in private homes because of the COVID-19 pandemic.[64] Here, because hair salons, retail stores, movie theaters, and other secular activities were given more favorable treatment by allowing those activities to host a greater number of people, the Court ruled that this restriction was not neutral or generally applicable.[65] The Court upheld a strict scrutiny standard of review for government regulations that treat any comparable secular activity more favorably than religious exercise.[66] The Court held that, to establish that the restriction on religious gathers in private homes due to the pandemic satisfies strict scrutiny, the government must "do more than assert that certain risk factors 'are always present in worship, or always absent from the other secular activities' the government may allow."[67] As a result, the Supreme Court granted an injunction for relief against state regulations that limited religious gatherings in private homes, stating that secular activities did not pose a lesser risk than religious activities.[68]

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[62] *Id.* at 67.
[63] Tandon v. Newsom, 141 S. Ct. 1294 (2021).
[64] *Id.*
[65] *Id.* at 1297.
[66] *Id.* at 1298.
[67] *Id.* at 1296 (quoting South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of GORSUCH, J.).
[68] *Id.* at 1297.

The "most favored nation" theory and *Sherbert*'s "individualized assessment" came together in the 2021 case of *Fulton v. City of Philadelphia*.[69] In that case, the Supreme Court held that the City of Philadelphia's refusal to contract with Catholic Social Services (CSS) unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise Clause.[70] CSS contracted with Philadelphia for over 50 years to provide foster care services to needy children in Philadelphia.[71] CSS held a religious belief that marriage is a sacred bond between man and woman, so they refused to certify same-sex married couples.[72] The City of Philadelphia refused to renew their contract with CSS due to CSS's refusal to license same-sex couples to be foster parents, arguing that CSS violated both a non-discrimination provision in the agency's contract as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.[73] In *Fulton*, the Court found that Philadelphia's non-discrimination policy was not neutral and generally applicable because a section of the contract permitted exceptions to the non-discrimination requirement at the "sole discretion" of the Commissioner.[74] Although an exception had never been granted, the inclusion of a mechanism for discretionary exceptions – the mere fact that an exemption could be carved out – meant that it was not neutral or generally applicable, and that the *Smith* standard of review did not apply. *Fulton* incorporates elements from *Cuomo* and *Tandon*, while also drawing inspiration from *Sherbert*'s notion of an individualized assessment, given the exemption in *Fulton* was discretionary. The Court in *Fulton* held that the City of Philadelphia failed to satisfy strict scrutiny, as it did not have a compelling

[69] *Fulton*, 141 S. Ct. 1868 (2021).
[70] *Id.* at 1873.
[71] *Id.* at 1875.
[72] *Id.* at 1872.
[73] *Id.*
[74] *Id.* at 1873.

interest in denying a religious exemption to CSS.[75] Furthermore, the Court held that the City's denial of the religious exemption was not the least restrictive means of furthering its interest, given the existence of the discretionary exemption mechanism in the policy.[76]

IV. Religious Diversity

The *Smith* rational basis standard does not apply to the ban on abortion. Because the ban on abortion includes secular exemptions, heightened scrutiny is required. *Smith* would be applicable if there was a total ban on abortion, with no exceptions regarding the life of the mother, fetal abnormalities, rape, incest, or more. However, because those exceptions do exist, *Smith* is not the appropriate standard of review as the ban on abortions is not generally applicable and facially neutral.

A. Different Religions hold different positions as to when life begins, and different levels of moral significance are given to a mother and the developing child.

Many different religions hold different positions as to where life begins, whether at conception, at birth, or at a specific time during the pregnancy. Judaism, for instance, believes that life begins at birth. In the Jewish faith, during the first forty days, the embryo is considered merely water, and from day forty-one until the pregnancy is recognized, it is considered only a doubtful embryo/fetus.[77] Furthermore, the fetus in utero does not have a human status, so its

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[75] The City asserted that its non-discrimination policies served three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children, but the court held that once properly narrowed, the City's asserted interests were insufficient because the City failed to show that granting CSS an exception would put those goals at risk. The compelling interest of protection from liability was also insufficient because it was mere speculation. Finally, the compelling interest of equal treatment of prospective foster parents and foster children could not justify denying CSS an exception for its religious exercise. *See Id.* at 1881-1882 (2021).

[76] *Id.* at 1873.

[77] Tirzah Meacham (leBeit Yoreh) and Yoelit Lipinsky, *Abortion: Halakhic Perspectives*, JEWISH WOMEN'S ARCHIVE (July 27, 2022), https://jwa.org/encyclopedia/article/abortion#:~:text=During%20the%20first%20forty%20days,Niddah%203%3A7).

destruction would not be considered murder in Judaism.[78] Because a fetus is not considered a person under Jewish law, fetuses are not afforded the rights that a living person is afforded.[79] Judaism also finds that not only is abortion is permitted, but *required* if a pregnancy endangers the life or health of the pregnant individual.[80]

Similarly, the Buddhist faith believes that an embryo or fetus is not equal to a pregnant individual.[81] In the Buddhist faith, a Lama, or a Buddhist spiritual leader, guides their disciples on their path to enlightenment. This guidance includes counseling on abortion. In a lawsuit brought by Lama Karma Chotso, a Buddhist Lama in Miami-Dade County, Chotso asserted that denying him the right to counsel and support his disciples on abortion, birth control, and pregnancy prevented him from being an effective spiritual guide in the way that is intended by the Buddhist faith.[82] A Lama's role in the Buddhist faith is one that is essential to the religion in guiding disciples and furthering the values of Buddhism. Clergy therefore make the argument that the restriction on abortion, without an exemption for religions, violates their free exercise because it does not allow clergy to properly counsel their disciples.

In the Presbyterian faith, the church is responsible for providing guidance and support to those seeking abortion.[83] The 217th General Assembly clarified the role of the Presbyterian Church, stating that pastors are obliged to counsel with and pray for those who face decisions surrounding pregnancy.[84] The inability to provide this effective counseling would be restrictive of the Presbyterian faith. If clergy were prevented from counseling those who are facing issues

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[78] *Id.*
[79] *Advocacy Resource: Judaism and Abortion*, NATIONAL COUNCIL OF JEWISH WOMEN (last visited, May 8, 2024), https://www.ncjw.org/wp-content/uploads/2019/05/Judaism-and-Abortion-FINAL.pdf.
[80] *Id.*
[81] Complaint, *Lama Karma Chotso v. Florida*, No. 2022-CA-014371 (11th Cir. August 1, 2022).
[82] *Id.*
[83] *Abortion/Reproductive Choice Issues*, PRESBYTERIAN MISSION (last visited, May 8, 2024), https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/.
[84] *Id.*

with contraception, pregnancy, or abortion, but rather, were forced to counsel based upon the ban on abortion, this would be distorting the core beliefs of a religion.

In addition, many clergy members of different faiths have blessed abortion clinics and the supported the right to abortion based upon their religious beliefs. In 2018, four Christian pastors and one rabbi gathered to bless an abortion clinic in Bethesda, Maryland.[85] An ordained minister in the United Church of Christ who served in United Methodist and Presbyterian Church USA congregations stated, "We give honor to all of these women who choose to come to [the abortion clinic]."[86] Even clergy members of the same faith differ in their views on abortion – while some believe that their religion allows for abortion, others of the same religion believe that it is forbidden. While the question and interpretation of a religion's views on abortion is not up to the law to decide, this reemphasizes the point that the right to an abortion is a religious liberty right.

Just as different religions hold different positions on where life begins, different levels of moral significance are afforded to a mother and an unborn child. For example, the Presbyterian Church believes that a woman's choice of whether or not to have an abortion is a personal one.[87] In Judaism, the interests of the pregnant individual always come before that of the fetus.[88] In Buddhism, a core tenet of the faith is the sanctity of individual choices while on the path to Buddha, including choices surrounding pregnancy, childbirth, family planning, and abortion.[89] While beliefs on the beginning of life and different levels of moral significance afforded to a

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[85] Julie Zauzmer, *Clergy Gather to Bless One of the Only U.S. Clinics Performing Late-Term Abortions*, THE WASHINGTON POST (Jan. 29, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/29/clergygather-to-bless-an-abortion-clinic-which-provides-rare-late-term-abortions-inbethesda/?utm_term=.760670a044d7.
[86] *Id.*
[87] Nick Skaggs and David Staniunas, *Reproductive Justice and the PC (USA)*, PRESBYTERIAN CHURCH (USA) (May 17, 2022), https://www.pcusa.org/news/2022/5/17/reproductive-justice-and-pcusa/.
[88] *Abortion and Jewish Values Toolkit*, NATIONAL COUNCIL OF JEWISH WOMEN (last visited, May 8, 2024), https://www.ncjw.org/wp-content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf.
[89] Complaint, *Lama Karma Chotso v. Florida*, No. 2022-CA-014371, 2022 WL 3155355 (11th Cir. August 1, 2022).

mother and an unborn child vary in these religions, they are not automatically beliefs about abortion. In other words, a religion that believes life begins at birth does not necessarily mean that fetal life has zero moral significance. Rather, these religions may view the fetus as a dependent, developing, or potential life that must be balanced against the life and wellbeing of the pregnant individual. In this framework, abortion may be permitted or even required in certain circumstances, since in moral terms the fetus is not considered a full person equal to the mother. The religious diversity highlights how State Abortion Bans, by failing to provide exemptions, violate the free exercise rights of faiths that do not consider the fetus to be equal to a living person or that prioritize the autonomy of the pregnant individual. Clergy of various faiths have even blessed abortion clinics based on their religious beliefs, further demonstrating that abortion access is a matter of religious liberty.[90] This diversity of views within and across religions highlights the constitutional vulnerability of rigid abortion bans that do not accommodate sincere religious beliefs.

B. The Strict Scrutiny of State Abortion Bans in order to Achieve Religious Exemptions for Religiously-Motivated Abortions and Related Counseling

The abortion ban includes secular exemptions, including preventing death, pregnancies resulting from rape or incest, and lethal fatal anomalies.[91] However, based on the standard of review established in *Tandon v. Newsom*, because this law contains secular exemptions and not religious exemptions, it cannot be viewed as neutral and generally applicable.[92] Under the strict scrutiny standard of review, women and clergy have the opportunity to demonstrate that the

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[90] Julie Zauzmer, *Clergy gather to bless one of the only U.S. clinics performing late-term abortions*, THE WASHINGTON POST (January 29, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/29/clergy-gather-to-bless-an-abortion-clinic-which-provides-rare-late-term-abortions-in-bethesda/.
[91] Mabel Felix, Laurie Sobel, and Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (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/.
[92] *Tandon*, 141 S. Ct. 1294 (2021).

abortion ban creates a substantial burden, while the government is tasked with demonstrating a compelling governmental interest, as well as a showing that not allowing for religious exemptions is the least restrictive means in furthering that interest.

Many states have enacted Religious Freedom Restoration Acts (RFRAs), modeled on the federal version[93], that provide a strict scrutiny standard of review for free exercise issues by virtue of these state laws. As of right now, 28 states have passed a state RFRA.[94] Under these Acts, the state generally requires that the government demonstrate that the law that substantially burdens an individual's sincere religious beliefs is the least restrictive means of furthering a compelling governmental interest.[95] This heightened level of judicial review is compatible with the Supreme Court's free exercise jurisprudence, which has provided greater protection for religious liberties in the recent decades, including for kosher and halal diets for prisoners, relief from zoning and landmark regulations on churches and ministries, and exemptions from jury service.[96] While the scope and application of RFRAs vary by state, they afford individuals greater protection for their religious beliefs.

The government may argue that allowing broad religious exemptions to the State Abortion Bans may open doors to insincere or fabricated religious claims, undermining the law's compelling interest in protecting fetal life. However, the Courts have addressed this concern in the context of affording religious exemptions in the vaccine context, demonstrating that a less restrictive alternative is available. In *Doster v. Kendall*, Air Force service members challenged a COVID-19 vaccine mandate, alleging that the mandate substantially burdened their religious

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[93] 42 U.S.C. Sec. 2000bb.
[94] *Religious Freedom Restoration Act Information Central*, BECKET (last visited, May 8, 2024), https://www.becketlaw.org/research-central/rfra-info-central/.
[95] *Id.*
[96] Frederick Gedicks and Michael McConnell, *Interpretation: The Free Exercise Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/265#the-free-exercise-clause.

exercise in violation of the First Amendment and the Religious Freedom Restoration Act.[97] The Government claimed that they had a compelling interest in military readiness and health of its troops.[98] Because the Air Force permitted medical and administrative exemptions, which are inherently secular, they were required to show that denying religious exemptions was the least restrictive means of furthering their compelling interest.[99] The Government failed to demonstrate that denying religious exemption requests was the was the least restrictive means of furthering their compelling government interests, especially when it had granted secular exemptions.[100] As part of the Air Force's own process of reviewing religious exemption requests, they require military chaplains to conduct in-depth interviews to evaluate, and opine on, the sincerity of a service member's beliefs.[101] The Court noted that this was a less restrictive means of addressing the government's interest.[102] Applying this reasoning, the government could implement a similar process in reviewing requests for religious exemptions to State Abortion Bans. Requiring plaintiffs to provide an affidavit or clergy attestation to demonstrate the sincerity of their religious beliefs regarding abortions would be a less restrictive alternative than a blanket of denial on all religious exemptions, as it would allow the government to protect their interests without burdening free exercise rights.

V. State Free Exercise Challenges to Abortion Bans

In present day, individuals in religious groups who are part of religions that do not give primacy to a child/fetus have filed lawsuits seeking religious exemptions from the abortion ban in more conservative states. Because of the differing beliefs of when an embryo

[97] Doster v. Kendall, 54 F.4th 398, 405 (6th Cir. 2022).
[98] *Id.* at 407.
[99] *Id.* at 420.
[100] *Id.* at 421.
[101] *Id.* at 407-408.
[102] *Id.*

or a fetus is believed to be a child, the abortion ban has been challenged. More specifically, the rigidity of the abortion ban that does not allow abortions for people whose faith would ordinarily allow them to have one has been challenged. This poses significant challenges to the constitutionality of strict abortion bans that do not accommodate diverse religious views on when life begins and the moral status of abortion.

A. Cases Filed

Florida's State Abortion Ban banned and criminalized all abortions after 15 weeks from the first day of a woman's last menstrual period with limited exceptions, including to save a pregnant woman's life, avert a serious risk of substantial and irreversible physical impairment of a major bodily function, or fatal fetal abnormality.[103] The Congregation L'Dor Va-Dor of Boynton Beach filed a lawsuit, arguing that the State Abortion Ban violates Jewish teachings and burdens the ability for Jewish individuals to practice their faith.[104] Under Florida's Religious Freedom Restoration Act, which requires a strict scrutiny standard of review, the state is prohibited from substantially burdening a person's exercise of religion even if the burden results from a law of general applicability, unless the government can demonstrate that the application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[105] The Plaintiffs argue that the Act places a substantial burden upon the religious practices of the Plaintiffs with regards to abortion, including access to religious counseling, education, care, comfort, and guidance, as well as the right to receive and

[103] Complaint for Declaratory Relief and for Temporary and Permanent Injunction, Generation to Generation, Inc. v. Florida, No. 37-2022-CA-000980 (Fla. 2nd Cir. June 10, 2022).
[104] *Id.*
[105] *Id.*

provide quality reproductive healthcare, including abortion.[106] The Plaintiffs further argue that even if the State had a compelling interest, the State Abortion Ban is not the least restrictive means in furthering that interest.[107] The crux of the First Amendment rests upon the right of individuals to freely exercise their religion, and precedent has established that laws that are not neutral and generally applicable will likely be afforded religious exemptions if secular exemptions exist. While the ban on abortion may be generally applicable to any pregnant person, its neutrality is defeated by the existence of secular exemptions. Although Florida's exemptions to the State Abortion Ban are limited in nature, their mere existence means that the State must have a compelling interest, and that the law must survive strict scrutiny.

B. Cases Decided

Most recently, the Indiana Court of Appeals upheld the preliminary injunction granted by the lower court against the abortion ban based on the Indiana Religious Freedom and Restoration Act, which tracks the strict scrutiny standard of review.[108] The case was brought by an anonymous group of plaintiffs, including members of the Jewish faith, an individual believing in the "supernatural force or power in the universe that connects all humans", and members of Hoosier Jews for Choice.[109] Under Indiana's RFRA, "a governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person: (1) is in furtherance of a

[106] *Id.*
[107] *Id.*
[108] *Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489 (Ind. Ct. App., Apr. 4, 2024).
[109] *Id.* at 3.

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[110]

The Plaintiffs' argued that the Abortion Law substantially burdened their sincere religious beliefs for two reasons. First, the Plaintiffs argued that their sincere religious beliefs directed them to seek pregnancy terminations criminalized by the Abortion law.[111] Second, they argued that the State has no compelling interest in preventing these religiously motivated health care decisions, and even if a compelling interest existed, the abortion law is not the least restrictive means of furthering that interest.[112] The burden fell on the state to demonstrate that the law is the least restrictive means of furthering a compelling government interest.. However, the Court held that the State did not establish a compelling interest, nor did it establish that the abortion law is the least restrictive means of furthering a compelling interest.[113] While the State argued that it had a compelling interest in protecting a human life that begins at fertilization, it did not show that this compelling interest is satisfied by denying the Plaintiffs' religious-based exceptions that prioritize a mother's health over potential human life that begins at fertilization.[114] The Court found that this interest was underinclusive, as the law allowed secular exceptions while denying religious ones.[115] Furthermore, the Court held that the state did not adequately explain the distinct harm from granting a religious exemption, rather than relying on broadly formulated interests.[116] For instance, the Court highlighted how the Abortion Law allows abortions when the pregnancy

[110] Ind. Code § 34-13-9-8(b).
[111] *Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff 1*, No. 22A-PL-2938 (Ind. Ct. App., Apr. 4, 2024).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

is a result of rape or incest or when the fetus has been diagnosed with a lethal fetal anomaly.[117] However, the State failed to explain why victims of rape or incest are entitled to abortions, but why women with sincere religious beliefs that afford them abortions are not afforded them under state law.[118] Furthermore, the State did not explain how allowing an abortion of a "fetus diagnosed with a lethal fetal anomaly" advanced the State's alleged compelling interest in protecting potential life.[119] The Court concluded that the state failed to show the abortion law was the least restrictive means of furthering its interest in protecting fetal life.[120] In allowing secular exemptions but denying religious ones, it is not the least restrictive means.

The Court's analysis in this case aligns with the "most favored nations" theory applied in *Cuomo*, which holds that if an exemption exists that favors secular activity, there is a presumption that a religious exemption may also exist and can only be denied if it satisfies strict scrutiny.[121] Here, the court found that the state's allowance of secular exemptions for rape, incest, or lethal fetal anomalies undermined its ability to show a truly compelling interest that could not accommodate religious exemptions.[122] Furthermore, the Court's analysis aligns with the required strict scrutiny analysis in finding that the state did not demonstrate that its abortion ban was the least restrictive means of furthering its interest in protecting fetal life, given the existing secular exemptions.[123]

Because of the existence of secular exemptions, the ability to show a compelling governmental interest is more difficult, as the secular exemptions inherently demonstrate that

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

enforcement of the ban is not necessary. In *Fulton*, the Court held that the contract between CSS and the City of Philadelphia, which included policies prohibiting sexual orientation discrimination, incorporated a system of individual exemptions, and accordingly, the City could not "refuse to extend that exemption system to cases of 'religious hardship' without compelling reason."[124] Similarly, because of the existence of secular exemptions with the ban on abortions, refusing to extend exemptions for religious reasons cannot be done without a compelling interest, thus allowing for a greater likelihood of religious exemptions.[125]

C. Other Concerns

The concerns regarding counseling, as seen in the Florida case filing, are not new. In 2019, the City of Baltimore brought a RFRA challenge to a regulation prohibiting doctors from offering patients proper counseling or information about abortion services.[126] The complaint alleged that the rule did not contain exemptions for patients whose religious exercise would be substantially burdened by the inability of physicians to provide honest counseling.[127] A doctor's inability to provide proper medical care substantially burdened patients who believed in abortion, such as Jewish or Buddhist individuals.[128] Because doctors could not provide proper counseling to these individuals due to the law, individuals were not given the right to freely exercise their religion on the issue of abortion.

VI. Conclusion

[124] *Fulton*, 141 S. Ct. 1868 (2021).
[125] *Cuomo*, 141 S. Ct. 63 (2020); *Tandon*, 141 S. Ct. 1294, (2021); *Fulton*, 141 S. Ct. 1868 (2021).
[126] Under the Health and Human Services "Final Rule", abortion cannot be "the only option presented," even if the patient does not want to receive counseling about other options; the patient's options must be presented in a "factual, objective, and unbiased manner"; and for any option presented, the provider must discuss the "risks and side effects to both mother and unborn child." 84 Fed. Reg. at 7725, 7747.
[127] Mayor of Balt. v. Azar, 973 F.3d 258 (4th Cir. 2020).
[128] *Id.*

Recently, the Alabama Supreme Court ruled that frozen embryos were legally protected children.[129] But this again is not the belief held by many other religions, who do not consider a fetus or embryo a "child" until much later in the pregnancy, or after birth. In his concurring opinion in this case, Chief Justice Parker cited to various sources, including verses from the Bible and Christian theologians.[130] However, this reliance on primarily Christian ideologies is yet another reason why such stringent laws as the State Abortion Bans should be reviewed under strict scrutiny. Christianity has dominated the American legal system, but as the country becomes more religiously diverse, laws should reflect and give deference to this fact. The Constitutional rights being afforded to embryos and fetuses as opposed to upholding the constitutional rights of individuals based on their religion under the free exercise clause demonstrates contradiction in the law.

The standard of review for laws based on the freedom of religion under the First Amendment has certainly evolved over time. Because secular exemptions exist for the ban on abortion, the law is not considered neutral and generally applicable. *Smith*'s rational basis review is not applicable. Rather, strict scrutiny is the appropriate standard of review. The Court's decisions in *Cuomo*, *Tandon*, and *Fulton* clarify that laws with secular exemptions are not "neutral" or "generally applicable" under *Smith*, so the government must show that their compelling interest is pursued through the least restrictive means. Furthermore, the diversity of religious views on when life begins and deference conferred upon mothers versus child/fetus underscores how the State Abortion Bans are violative of the Free Exercise Clause and rights afforded by it. The Supreme Court's evolving jurisprudence poses significant

[129] Kim Chandler and Geoff Mulvihill, *What's next after the Alabama ruling that counts IVF embryos as children?*, AP NEWS (February 22, 2024), https://apnews.com/article/alabama-frozen-embryos-ivf-storage-questions-1adbc349e0f99851973a609e360c242c.
[130] *Id.*

challenges for the constitutionality of State Abortion Bans that fail to accommodate religious exercise while they accommodate for secular reasons. Providing religious exemptions appears necessary to survive strict scrutiny review.