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A Religious Right to Abortion: Legal History and Analysis

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A RELIGIOUS RIGHT TO ABORTION:

LEGAL HISTORY & ANALYSIS

AUGUST 2022

READER'S NOTE

Free exercise rights are a highly complex and dynamic area of law. This memo is intended to provide information on how religious liberty law might intersect with reproductive healthcare, and should not be taken as legal advice. Anyone considering filing any lawsuit related to religion or abortion rights should be careful to consult with a wide variety of legal experts and community stakeholders, including grassroots organizations directly engaged in helping people access abortion care.

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Introduction

There is a long and rich history of religious support, across a wide range of faith traditions, for the right to reproductive autonomy, including abortion.[1] A number of religious denominations, including the Presbyterian Church,[2] Reform[3] and Conservative[4] Judaism, the United Church of Christ,[5] and the Unitarian Universalist Association,[6] support a legal right to abortion in most or all circumstances. Several religious denominations have even—long before the Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*—issued statements explaining that the right to reproductive health care is an essential aspect of their members' religious freedom.[7]

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[1] See, e.g., Public Rights/Private Conscience Project, Comment Letter on Protecting Statutory Conscience Rights in Health Care (Mar. 27, 2018); Brief of Catholics for Choice *et. al.* as Amici Curiae, Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022); Fredrick Clarkson, *The Prochoice Religious Community May Be the Future of Reproductive Rights, Access, and Justice* (Sept. 28, 2020), https://politicalresearch.org/2020/09/28/prochoice-religious-community-may-be-future-reproductive-rights-access-and-justice.

[2] PRESBYTERIAN CHURCH (U.S.A.) OFFICE OF THE GENERAL ASSEMBLY, *Report of the Special Committee on Problem Pregnancies and Abortion* 11 (1992), http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities").

[3] CENTRAL CONFERENCE OF AMERICAN RABBIS, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, (1984), https://www.ccarnet.org/ccar-resolutions/abortion-1984/ (stating that "the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy."); UNION FOR REFORM JUDAISM, *Reproductive Rights* (last visited Aug. 1, 2022), https://urj.org/what-we-believe/resolutions/reproductive-rights.

[4] THE RABBINICAL ASSEMBLY, *Resolution on Reproductive Freedom*, (June 15, 2011), https://www.rabbinicalassembly.org/resolution-reproductive-freedom ("the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.").

[5] UNITED CHURCH OF CHRIST, *General Synod Statements and Resolutions Regarding Freedom of Choice* (last visited Aug. 1, 2022), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 ("for 20 years, Synods of the United Church of Christ have affirmed a woman's right to choose with respect to abortion.").

[6] UNITARIAN UNIVERSALIST ASSOCIATION, *Right to Choose 1987 General Resolution* (1987), https://www.uua.org/action/statements/right-choose ("the 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.").

[7] See, e.g., CENTRAL CONFERENCE OF AMERICAN RABBIS, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, *supra* note 3 ("freedom of choice in the issue of abortion is directly related to the First Amendment's guarantee of religious freedom"); THE RABBINICAL ASSEMBLY, *Resolution on Reproductive Freedom*, *supra* note 4 (to "deny a woman and her family full access to the complete spectrum of reproductive healthcare, including contraception, abortion-inducing devices, and abortions, among others, on religious grounds is to deprive these women of their Constitutional right to religious freedom."); UNITED CHURCH OF CHRIST, *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 5 ("The theological…views on when human life begins are so numerous and varied that that one particular view should not be forced on society through its legal system."); UNITARIAN UNIVERSALIST ASSOCIATION, *1987 General Resolution*, *supra* note 6 (stating that that any legislative attempt to restrict abortion access is "an infringement of the principle of separation of church and state in that it tries to enact private morality into public law"); EVANGELICAL LUTHERAN CHURCH IN AMERICA, *A Social Statement on Abortion* (1991), http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf?_ga=2.200020200.771729105.1520894009-874109350.1520894009 ("[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment"); THE 195TH GENERAL ASSEMBLY, *The Covenant of Life and The Caring Community & Covenant and Creation: Theological Reflections on Contraception and Abortion*, 104-05 (1983) *available at* https://www.presbyterianmission.org/wp-content/uploads/8-covenant-of-life-and-covenant-and-creation-

Moreover, many congregations, religious organizations, and faith leaders actively support the right to abortion because of their religious beliefs. For example, clergymembers from a range of faith traditions have participated in ceremonies to bless abortion clinics.[8] Religious organizations including the National Council of Jewish Women, Catholics for Choice, Religious Coalition for Reproductive Choice, Spiritual Alliance of Communities for Reproductive Dignity, and many others advocate for comprehensive access to contraception and abortion. Before *Roe v. Wade* legalized abortion across the country in 1973, the Clergy Consultation Service on Abortion, a national network made up of an estimated 2,000 faith leaders nationwide (mainly Protestant and Jewish), helped hundreds of thousands of people access abortion care.[9]

According to recent data from the Pew Research Center, 62% of U.S. adults say that abortion should be legal in all or most cases. This includes many people of faith including 71% of Black Protestants and about six-in-ten Catholics and white non-evangelical Protestants.[10] Earlier studies have shown strong support for abortion rights within smaller U.S. religious communities, including 83% of Jews, 82% of Buddhists, 68% of Hindus, and 55% of Muslims.[11] Many members of religious denominations that oppose abortion nevertheless support the right to abortion access, including nearly a third (30%) of Southern Baptists, and over a quarter (27%) of Latter-day Saints.[12]

Finally, some medical providers' religious faith motivates them to offer their patients comprehensive reproductive health care, including abortion. Dr. George Tiller, who was murdered by an anti-abortion activist while serving as an usher in his Lutheran Church, referred to his work providing abortion care as a "ministry."[13] Two members of Dr. Tiller's staff echoed this view, stating respectively, "I felt I was doing the Lord's work," and "God put me here to do this work."[14] Dr. LeRory Carhart, an abortion provider and observant Methodist, stated in an interview, "I think what I'm doing is because of God, not in spite

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1993.pdf (supporting "national policy [on abortion] that embodies that conviction, carefully guarding the separation of church and state with respect for the freedom of the individual's conscience."); THE ARCHIVES OF THE EPISCOPAL CHURCH, *Reaffirm General Convention Statement on Childbirth and Abortion* (1994), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1994-A054 (expressing the "deep conviction that any proposed legislation on the part of national or state governments regarding abortions must take special care to see that the individual conscience is respected.").

[8] 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/clergy-gather-to-bless-an-abortion-clinic-which-provides-rare-late-term-abortions-in-bethesda/?utm_term=.760670a044d7.

[9] JOSHUA D. WOLFF, MINISTERS OF A HIGHER LAW: THE STORY OF THE CLERGY CONSULTATION SERVICE ON ABORTION 110 (1998) *available at* http://classic.judson.org/images/Ministers_of_a_Higher_Law_Chapter_4.pdf.

[10] PEW RESEARCH CENTER, *Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade* (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/#americans-views-of-abortion.

[11] David Masci, *American Religious Groups Vary Widely in Their Views of Abortion*, PEW RESEARCH CENTER (Jan. 22, 1018), http://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/.

[12] *Id.*

[13] Carol Joffe, *Working with Dr. Tiller: His Staff Recalls a Tradition of Compassionate Care at Women's Health Care Services of Wichita*, REWIRE (Aug. 15, 2011), https://rewire.news/article/2011/08/15/working-tiller-staff-recollections-women-health-care-services-wichita/ ("As noted earlier, Dr. Tiller was a highly spiritual person, and he periodically referred to the clinic's work as a 'ministry.'").

[14] *Id.*

of God."[15] Dr. Sara Imershein has described providing abortion care as a "mitzvah."[16] One article on a Jewish website stated that Imershein and four other Jewish abortion providers contacted by the writer all "described the resonance between their Judaism…and their decision to provide abortion care."[17] Dr. Curtis Boyd, a Unitarian, first became an abortion provider when he was asked by a minister and member of the Clergy Consultation Service to perform the procedure illegally prior to *Roe v. Wade*.[18] Dr. Boyd explained, "Finally, my work had the larger meaning I'd sought. My religious ideals became immediate and personal."[19]

Despite the many religious denominations, organizations, and individuals that support the right to abortion as a matter of faith, few courts have issued rulings addressing the argument that there is a religious liberty right—under constitutional or statutory religious liberty protections—to access, facilitate, or provide abortion care. This memo explores this theory in more detail, covering the following:

- **A brief overview of religious liberty laws.** Religious freedom in the U.S. is protected by the U.S. Constitution, state constitutions, as well as myriad state and federal religious liberty statutes.

- **The history of legal claims articulating a religious right to abortion:** Both before and after *Roe* legalized abortion nationwide, patients, doctors, and faith leaders all brought numerous legal claims alleging that they had a religious liberty right to provide, access, or help others to access abortion. Almost none of these claims were ever fully litigated.

- **How religious liberty claims might be made today:** Many state laws passed over the past few decades robustly protect the free exercise of religion. Most of these laws prohibit state governments from placing a substantial burden on the exercise of religion unless doing so is necessary to advance a compelling government interest. Such religious liberty protections might—if a lawsuit is successful—limit the state's ability to criminally prosecute or otherwise punish people of faith who feel religiously obligated to access or help others access abortion care.

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[15] Tiffany Arnold, *An Interview with Dr. LeRoy Carhart*, GERMANTOWN PATCH (Aug. 16, 2011), https://patch.com/maryland/germantown/an-interview-with-dr-leroy-carhart. In an interview, Dr. Carhart explained his religious views on abortion as consistent with his overall obligations as a health care provider, stating "I think it's no different than with someone who has had a heart attack: If we were to save their life are we going against God's will because if medicine didn't intervene, the patient was going to die? Is that what God wants, for a person to die?…It's the same thing with a flawed pregnancy. People wouldn't think God created a flawed pregnancy to punish or test the parents. I think that it's just like any other medical condition, something that happens. God has provided us with a way to educate people to help take care of it. I think that because a certain, small group of people don't believe in it doesn't mean that it's not the right thing to do." *Id.* In another article, Dr. Carhart noted that while "he believes in God 'very strongly,'" he stopped going to church "when his pastor told him he was risking his safety by predictably appearing in the pews every week." Zauzmer, *supra* note 8.

[16] A Hebrew word meaning a "commandment," or, colloquially, a good deed.

[17] Steph Herold, *What It's Like for Jewish Moms Who Are Abortion Providers*, KVELLER (May 15, 2017), https://www.kveller.com/what-its-like-for-jewish-moms-who-are-abortion-providers/.

[18] Dr. Curtis Boyd, *How the First Legal Abortion Clinic in Texas Came to Be*, THE HUFFINGTON POST (Nov. 3, 2016), https://www.huffingtonpost.com/entry/how-the-first-legal-abortion-clinic-in-texas-came-to_us_581a08dde4b0bd7151a2535c.

[19] *Id.*

1. An Overview of Religious Liberty Law

In the U.S., the right to freely exercise one's religion is protected by a web of overlapping state and federal provisions, which vary in their precise application and available remedies. These protections include:

a. The U.S. Constitution: The First Amendment's Free Exercise Clause

The Free Exercise Clause states that "Congress shall make no law…prohibiting the free exercise of religion," and bans the federal government, as well as state and local governments, from infringing on religious practice. Under the Free Exercise Clause, any state actions that are intentionally "designed to persecute or oppress a religion or its practices" may be held unconstitutional and void.[20] For example, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court struck down a Florida state law that the Court determined was *intentionally drafted* in order to prohibit Santería animal sacrifice rituals.[21]

If and when the Free Exercise Clause limits enforcement of *non-discriminatory* laws and policies that nevertheless infringe on religious practice is a more complex question. Over the past 150 years, the U.S. Supreme Court has changed course several times in its assessment of when the Free Exercise Clause provides people of faith with a right to religious exemptions from laws that do not intentionally target religion.[22] The current foundational Free Exercise case—*Employment Division v. Smith*—takes a narrow approach, explaining that regularly exempting people of faith from neutral laws that limit their religious exercise would be "courting anarchy."[23] *Smith* holds that people do not have a broad religious liberty right to be exempt from laws that are "neutral" and "generally applicable."

In 2021, however, the new conservative supermajority on the U.S. Supreme Court stretched the holding of *Smith* to its limit. In *Tandon v. Newsom*, the Court ruled in a "shadow docket"[24] opinion that any time a law contains an exception for a secular reason, but does not include a comparable religious exemption, it should *not* be seen as "neutral" and "generally applicable."[25] Specifically, the Court ruled that public health regulations designed to limit the spread of COVID-19 must allow people to gather for religious exercise if they allow gatherings in other "comparable" settings, such as grocery stores.[26] According to the Court, "whether two activities are comparable for purposes of

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[20] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1992).
[21] *Id.*
[22] *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1879); Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Employment Division v. Smith, 494 U.S. 872 (1990).
[23] Smith, 494 U.S. at 888.
[24] The "shadow docket" is a term for when the Supreme Court issues rulings, typically on emergency matters, without full briefing and argument. The Court's far more expansive use of the shadow docket during the COVID pandemic was the subject of much criticism. *See, e.g.,* Stephen I. Vladeck, *The Supreme Court is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html.
[25] Tandon v. Newsom, 141 S.Ct. 1294, 1296 (2021) ("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.").
[26] Elizabeth Reiner Platt, Katherine Franke, and Lilia Hadjiivanova, *We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic*, THE LAW, RIGHTS, AND RELIGION PROJECT (2021),

the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[27] This ruling—to the extent the Court continues to apply it outside the context of pandemic church closures[28]—would significantly undermine *Smith*, as nearly every law and policy contains limits or exceptions that might be deemed "comparable" to a requested religious exemption.[29] Several members of the Court have also indicated that they are open to overruling *Smith* entirely in favor of a new Free Exercise test that provides a more expansive right to religious exemptions.[30]

Even under pre-*Smith* standards, Free Exercise Clause challenges to neutral laws did not result in such laws being made void. Rather, they allow for some form of exemption or accommodation from the law for religious objectors. For example, in the 1972 case *Wisconsin v. Yoder*—a challenge brought by Amish families to a state law requiring school attendance until age 16—the Supreme Court ruled not that the law should be struck down, but only that it should not be enforced on the Amish religious objectors.[31]

b. The U.S. Constitution: The First Amendment's Establishment Clause

The Establishment Clause, which reads "Congress shall make no law respecting an establishment of religion," is the provision of the Constitution guaranteeing the separation of church and state. Laws, policies, and practices that are found to violate the Establishment Clause must be struck down. For example, in the 1987 case *Edwards v. Aguillard*, the Supreme Court overturned a Louisiana law that required any public school that taught evolution to also teach creationism.[32]

In 2022, the Supreme Court rejected one of the most longstanding Establishment Clause standards—the "Lemon test"[33]—in favor of interpreting the clause by "reference to historical practices and understandings." [34] The Court has ruled in several cases that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[35] For example, in 1961, the Court upheld a state "Blue law" that barred

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https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/We%20The%20People%20%28of%20Faith%29%20Report.pdf.

[27] Tandon, 141 S.Ct. at 1296.

[28] Some commentators have argued that the Court's opinion in *Fulton v. Philadelphia* suggest an unwillingness to apply its ruling in *Tandon* outside the COVID-19 context. Jim Oleske, *Fulton Quiets Tandon's Thunder: A Free Exercise Puzzle*, SCOTUS BLOG (June 18, 2021), https://scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/. *See also* Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87 (2022).

[29] For example, antidiscrimination laws often exempt small businesses, minimum wage laws exempt contract and tipped workers, and vaccine requirements exempt those with medical contraindications.

[30] Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1876 (2021) ("[petitioner] urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so.").

[31] Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) ("Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes.").

[32] Edwards v. Aguillard, 482 U.S. 578 (1987).

[33] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (internal citations omitted).

[34] Kennedy v. Bremerton School District, 142 S.Ct. 2407, 2428 (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.'"); *see also* Carson as next friend of O.C. v. Makin, 142 S.Ct. 1987 (2022).

[35] McGowan v. Maryland, 366 U.S. 420, 442 (1961). *See also* Harris v. McRae, 448 U.S. 297 (1980).

businesses from opening on Sunday in a case brought by Jewish business owners.[36] In the 1980 case *Harris v. McRae*, the Court upheld federal funding restrictions on abortion, ruling "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[37]

c. *The Religious Freedom Restoration Act*

In 1993, in response to the *Employment Division v. Smith* decision limiting the right to religious exemptions under the Constitution, Congress passed a broad religious exemption law titled the Religious Freedom Restoration Act (RFRA).[38] Under RFRA, a religious practitioner is entitled to an exemption from *any law, policy, or act of the* federal government that substantially burdens their religious exercise, unless the government can show that this burden is the least restrictive means of furthering a compelling government interest. While RFRA was originally intended to provide religious exemptions from federal, state, and local laws and policies, a 1997 Supreme Court opinion limited RFRA such that it now provides religious exemptions *only* from federal laws and policies.[39] Note that the remedy for a RFRA violation is a religious exemption or accommodation for the religious objector(s); it cannot be used to overturn a law or policy.

d. *State Constitutions*

Every state constitution contains protections for religious liberty. While many state free exercise and establishment clauses are interpreted to mirror their federal counterparts, a few are interpreted more expansively. For example, some state free exercise clauses are interpreted in a way that is more akin to the federal RFRA "strict scrutiny" standard than the *Employment Division v. Smith* Free Exercise Clause standard. Some state courts have likewise interpreted their state establishment clauses more broadly than the federal counterpart, often based on distinct state constitutional language or history.

e. *State RFRAs*

Since the federal RFRA only applies to actions taken by the federal government, many states have passed their own versions of RFRA. Today, nearly half the states have such laws. While individual statutory language and application varies somewhat from state to state, many were written to mirror the federal RFRA. Many state RFRAs can be used as an affirmative legal claim or as a legal defense, including a defense to criminal prosecution. Like the federal RFRA, the remedy for a violation of state RFRAs is an accommodation or exemption from the law or policy for religious objector(s)—not the wholesale overturning of the law or policy.

f. *Additional laws*

In addition to RFRAs, both the federal government and the states have adopted hundreds, if not thousands, of discrete religious exemption laws and policies, ranging

[36] McGowan, 366 U.S. 420.
[37] McRae, 448 U.S. at 319-20.
[38] 42 U.S.C. §§ 2000bb-4, *et. seq.*
[39] City of Boerne v. Flores, 521 U.S. 507 (1997).

from federal policies that allow Native Americans to use peyote for religious rituals despite federal drug laws, to state exemptions from child welfare statutes that protect parents who withhold medical care from their children in favor of "faith healing." In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies the strict scrutiny standard to state and local policies that burden religious exercise in two specific contexts—land use regulations that burden religion (such as the use of zoning laws to prevent the construction of a house of worship) and regulations on persons being held in state institutions, such as prisons or public psychiatric facilities.[40]

2. A History of the Religious Right to Abortion

Both before and after *Roe v. Wade*, various individuals including patients, doctors, and ministers brought legal claims requesting a religious liberty right to access, facilitate, or provide abortion. Several of these claims involved members of the Clergy Consultation Service on Abortion (CCS), the network of faith leaders mentioned above that helped people find safe legal and illegal abortion care, and vetted abortion providers prior to *Roe*. Abortion-related religious liberty claims have rarely been fully litigated, though, and only a few judicial opinions have directly addressed the issue.

In 1980, a federal district court found in *McRae v. Califano* that the right to free exercise of religion encompasses some abortion-related rights, holding that a "woman's conscientious decision…to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights…surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment."[41] The opinion was later reversed on procedural (standing) grounds, and much has changed in both the federal judiciary and Free Exercise law since that decision.[42]

More recently, The Satanic Temple (TST)—a nontheistic group whose seven fundamental tenets include the belief that "One's body is inviolable, subject to one's own will alone"—have filed multiple lawsuits alleging that various state abortion restrictions, including biased informed consent requirements, violate its members' free exercise of religion.[43] Thus far, these cases have not succeeded; for instance, TST's challenge to a Missouri law mandating (among other things) a long waiting period prior to getting an abortion was rejected after Missouri's state supreme court determined that the plaintiff in the case "failed to allege how the 72-hour waiting period violates her religious beliefs."[44]

In suits that are still ongoing, Baptist and Unitarian claimants have also challenged, on religious grounds, state laws requiring that healthcare providers cremate or bury embryonic and fetal tissue following an abortion or miscarriage, regardless of their patients' wishes.[45] An overview of these suits, as well as numerous other pre- and post-

[40] 42 U.S.C. §§ 2000cc, *et. seq*.
[41] McRae v. Califano, 491 F. Supp. 630, 742 (E.D.N.Y. 1980).
[42] Harris v. McRae, 448 U.S. 297 (1980).
[43] Doe v. Parson, 960 F.3d 1115 (8th Cir. 2020) (*cert den'd* 141 S.Ct. 874 2020); Doe v. Parson, 567 S.W.3d 625 (Mo. 2019); Complaint, Satanic Temple v. Hellerstedt, 2021 WL 410748 (S.D. Tex. Feb. 5, 2021).
[44] Doe v. Parson, 567 S.W.3d at 630.
[45] Order Denying Motion to Dismiss, Doe v. Minnesota, Minn. 2d Jud. Dist. No. 62-cv-19-3868 (Dist. Ct. Minn. June 25, 2020) *available at* https://lawyeringproject.org/wp-content/uploads/2021/01/2020-06-25-Order-on-MTD.pdf; Complaint, Doe v. Attorney General of Indiana, S.D. IND. NO. 1:20-CV-3247 (S.D. Ind. Dec. 21, 2020)

Roe claims alleging a religious right to provide, facilitate, or access abortion, can be found in an appendix to this memo.

It's worth noting that in the early 1990s, some anti-abortion activists opposed the passage of the federal RFRA specifically because they feared that it could be used to protect access to abortion (recall that RFRA was originally intended to provide exemptions from state as well as federal laws). In 1992, shortly after the Court reaffirmed the constitutional right to abortion in *Planned Parenthood v. Casey*, the general counsel for the National Right to Life Committee presented testimony before the senate judiciary committee. His remarks, titled "Why the Religious Freedom Restoration Act Must Expressly Exclude a Right to Abortion," stated that the Committee "is opposed to the RFRA without an amendment excluding a claim to a right to an abortion under the RFRA"—a prospect he called "a real danger, not a remote one."[46] The general counsel for the U.S. Catholic Conference also expressed qualms that RFRA would be used to secure a right to abortion, stating in testimony, "We cannot support legislation that will jeopardize state abortion regulations intended to protect unborn life."[47] In fact, the "Religious Freedom Act," an alternative to RFRA that expressly excluded abortion, was drafted and introduced into Congress by Rep. Chris Smith (R-NJ) in 1991.[48]

That said, the notion that the federal RFRA would protect abortion rights was rejected by other RFRA proponents at the time. This heated debate over RFRA and abortion focused on claims brought by *patients seeking abortion*, rather than on the religious rights of those seeking to perform or facilitate abortion.

While there is little definitive case law on the religious right to abortion under the Free Exercise Clause or RFRA, pre-*Dobbs* claims challenging abortion restrictions and related laws under the federal Establishment Clause have been rejected in several lawsuits, including *Harris v. McRae*, mentioned above, and *Bowen v. Kendrick*.[49] Legislative history suggesting that a law was *specifically motivated* by religion may make for a stronger suit. Moreover, the state Establishment Clause provisions in some state constitutions may be interpreted more broadly than the federal Constitution.

For example, in the post-*Dobbs* case *EMW Women's Surgical Center v. Cameron*, a Kentucky state circuit court judge issued an unusual decision that, *sua sponte*,[50] found that two state laws banning abortion violated religious liberty protections of the Kentucky Constitution. The court stated that various religions "hold a wide variety of views on when life begins," and that the Kentucky state government "is not permitted to

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available at https://lawyeringproject.org/wp-content/uploads/2020/12/S.D.-Ind.-20-cv-03247-dckt-000001_000-filed-2020-12-21.pdf.

[46] *The Religious Freedom Restoration Act, Hearing Before the Senate Committee on the Judiciary*, 102d Cong, 2d Sess. on S. 2969 (Sept. 18, 1992) at 209 [hereinafter Senate RFRA Hearings] (statement of James Bopp, Jr.).

[47] *Id.* at 144 (statement of Mark E. Chopko).

[48] Religious Freedom Act of 1991, H.R. 4040, 102nd Cong. (1991), https://www.congress.gov/bill/102nd-congress/house-bill/4040/text?r=5&s=1.

[49] McRae, 448 U.S. 297 (1980); Bowen v Kendrick, 487 U.S. 589 (1988).

[50] A legal term meaning that the court issued an opinion on an argument not raised by either party. In this case, the complaint filed against the Kentucky abortion bans did not include any religious liberty arguments. *See* Verified Complaint for Injunctive and Declaratory Relief, EMW Women's Surgical Center v. Cameron, No. 22-CI-225 (Circ. Ct. Ky. June 27, 2022) *available at* https://www.aclu.org/legal-document/emw-womens-surgical-center-v-cameron-complaint.

single out and endorse the doctrine of a favored faith for preferred treatment."[51] It then ruled that both "the Trigger Ban and the Six Week Ban implicate the Establishment and Free Exercise Clauses by impermissibly establishing a distinctly Christian doctrine of the beginning of life, and by unduly interfering with the free exercise of other religions that do not share that same belief."[52] Based on this and other rulings, the court temporarily enjoined the bans. The Kentucky Court of Appeals paused this injunction several weeks later without ruling on the merits, allowing the abortion bans to be enforced.[53]

3. The Religious Right to Abortion Today

In the wake of the Supreme Court's decision overturning *Roe v. Wade*, there is a renewed interest in legal claims protecting the religious liberty rights of those who are called by faith to access, provide, or facilitate abortion care. In July 2022, a state court judge in Utah granted a preliminary injunction pausing that state's abortion ban, in part because he found that the challengers raised "serious issues...that should be the subject of further litigation," including a claim that the ban violated the "right of conscience" protected by the Utah Constitution.[54] In the same month, a Wyoming state judge similarly paused the state's criminal abortion ban, finding that the Plaintiffs' claims—including one under the state Constitution's protections for religious liberty—raised "important legal questions."[55] Several cases have been filed arguing that a Florida 15-week abortion ban infringes on the right to religious liberty protected by the Florida RFRA, state constitutional protections, and/or the U.S. Constitution.[56] It is likely that additional suits will follow, relying primarily on state RFRA provisions which provide the most direct potential path to religious exemptions from state abortion laws.

While the precise legal tests and standards may vary, most state RFRAs apply some version of the "strict scrutiny" legal standard to laws that infringe on religious practice. Thus, arguing for a religious right to perform, facilitate, or access abortion would typically need to undergo the following multi-step analysis:

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[51] Opinion & Order Granting Temporary Injunction at 15-16, EMW Women's Surgical Center v. Cameron, No. 22-CI-225 (Circ. Ct. Ky. July 22, 2022) *available at* https://www.aclu.org/legal-document/emw-womens-surgical-center-v-cameron-order-granting-temporary-injunction.
[52] *Id.* at 16.
[53] Order Granting Motion for Emergency Relief, EMW Women's Surgical Center v. Cameron, No. 2022-CA-0906-I (Ct. App. Ky. Aug. 1, 2022) *available at* https://ag.ky.gov/Press%20Release%20Attachments/Daniel%20Cameron%20v.%20EMW%20Women's%20Surgical%20Center.order%20granting%20emergency%20relief%2065.07(6).pdf.
[54] Order Granting Plaintiff's Motion for a Preliminary Injunction, Planned Parenthood Ass'n of Utah v. State, No. 220903886 (Utah D. Ct., Third Judicial District July 19, 2022), *available at* https://www.scribd.com/document/583248006/Preliminary-injunction. *See also* Motion for a Preliminary Injunction and Supporting Memorandum, Planned Parenthood Ass'n of Utah v. State, No. 220903886 (Utah D. Ct., Third Judicial District June 29, 2022) *available at* https://www.scribd.com/document/580534579/Planned-Parenthood-s-Motion-Memorandum-for-Preliminary-Injunction (arguing that "By imposing on Utahns the State's inherently spiritual and religious views that life begins in the earliest days of pregnancy, the Criminal Abortion Ban violates article I, section 4, of the Utah Constitution, the state's religion clause.").
[55] Order Granting Motion for Temporary Restraining Order, Johnson v. State, No. 18732 (Wy. Dist. Ct. of Teton Cnty. July 27, 2022) *available at* https://wyofile.com/wp-content/uploads/2022/08/Order-Granting-Motion-2.pdf. *See also* Complaint for Declaratory Judgment and Injunctive Relief, Johnson v. State, No. 18732 (Wy. Dist. Ct. of Teton Cnty. July 25, 2022), *available at* https://wyofile.com/wp-content/uploads/2022/07/Complaint-3.pdf (arguing that if abortion is criminalized, Wyomingites will lose "the right to follow their religion when such religion requires abortion be considered as a necessary health care measure to prevent serious harm or death to a woman.").
[56] Complaint, Generation to Generation Inc. v. State of Florida, No. 2022-CA-000980 (Leon Cty. Fla., Circ. Ct. June 10, 2022); Complaints, Jayaram Law Firm, https://jayaramlaw.com/HB5/ (last visited Aug. 4, 2022).

- *Sincerity*: Claimants would have to prove that their beliefs are sincerely held, and they are not attempting to perpetrate a fraud on the court. Proof of sincerity could include a demonstration that they have acted on their religious beliefs consistently in the past, that they have previously framed their beliefs and activities related to abortion in religious terms, and that they are able to testify clearly and consistently about their religious beliefs and practices.

  Beliefs that are unusual or idiosyncratic are protected to the same degree as more traditional or normative religious beliefs, and courts should be careful not to allow the sincerity inquiry to become an opportunity to question whether the claimant's views are reasonable or theologically "correct."[57] For example, the fact that the Roman Catholic Church, as an institution, opposes legal abortion does not negate the sincerity of an individual Catholic's belief that she is religiously obligated to access, or help others access, abortion care. In addition, the claimant's beliefs and practices on unrelated religious issues are not relevant to their sincerity. For example, whether or not a Jewish claimant keeps kosher or uses technology on Shabbat is not relevant to the question of whether they are sincere in their belief that they are religiously obligated to provide abortion care.

  Rather than merely reducing this element to a matter of pleading and accepting the claimants' assertion of sincerity, courts should undertake a meaningful assessment of the factual basis for the claim to sincerity.

- *Religiosity*: Claimants should be prepared to prove that their beliefs are religious rather than political or philosophical in nature. That said, the fact that a religious belief or act happens to overlap with a certain political ideology does not make the belief political rather than religious in nature.[58] While some federal

[57] Patrick v. LeFevre, 745 F.2d 153, 157 (2nd Cir. 1984) (holding that courts must "vigilantly separate the issue of sincerity from the fact-finder's perception of the religious nature of the claimant's beliefs. This need to dissever is most acute where unorthodox beliefs are implicated."); Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1031 (3rd Cir. 1981) ("we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs"); International Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2nd Cir. 1981) ("lay courts familiar with Western religious traditions characterized by sacramental rituals and structured theologies are ill-equipped to evaluate the relative significance of particular rites of an alien faith"); Philbrook v. Ansonia Bd. Of Educ., 757 F.2d 476, 282 (2nd Cir. 1985) ("We must avoid any test that might turn on 'the factfinder's own idea of what a religion should resemble'") (internal citations omitted); Reed v. Faulkner, 842 F.2d 960, 962 (7th Cir. 1988) ("This assemblage of beliefs will strike most Americans as bizarre, but then most Americans are not Rastafarians, and religious beliefs often strike the nonbeliever as bizarre"); Mosier v. Maynard, 937 F. 2d 1521, 1526 (10th Cir. 1991) ("courts carefully avoid inquiring into the merits of particular religious beliefs in an effort to gauge sincerity"); Jolly v. Coughlin, 76 F.3d 468, 476 (2nd Cir. 1996) ("courts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be"); Theriault v. Silber, 453 F.Supp. 254, 257 (W. D. Tex 1978) (acknowledging the existence of religious bias, and noting that the court was "most familiar" with the "Judeo-Christian tradition"); Peterson v. Wilmur Communications, Inc. 205 F.Supp.2d 1014, 1023 (D. Wisc. 2002) ("the question of whether I find a belief moral, ethical or otherwise valid in this subjective sense is decidedly not at issue" in evaluating Title VII claim); Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Comm. Of City of N.Y., 55 N.Y.2d 512, 522–23 (N.Y. 1982) ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.").

[58] When addressing the question of whether a belief or ideology was religious in nature in the Establishment Clause context, the Supreme Court has explained that a government action or position should not be considered religious merely because it coincides with a particular religious belief. McGowan v. State of Maryland, 366 U.S. 420 (1961); Rigdon v. Perry, 962 F.Supp. 150 (D.D.C. 1997). The reverse is also true: the fact

prosecutors during the Trump administration attempted to attack the religiosity of certain faith actors in federal RFRA lawsuits,[59] courts are generally loathe to probe the issue of religiosity. Some ideologies that have been deemed non-religious in courts include ethical veganism, objectivism, white supremacy, and the Church of the Flying Spaghetti Monster.[60] Determining whether a claimant's beliefs are "religious" requires courts to consider the mixed question of whether, objectively, the claimant's beliefs are "religious" and whether, subjectively, the claimant themself understands their beliefs to be religious.

- *Substantial burden*: Claimants would have to prove that state laws regulating abortion impose a substantial burden on their religious exercise. The fact that plaintiffs disagree with a law for religious reasons is insufficient—they must demonstrate that the law restricts their ability to undertake religiously motivated acts, or requires them to act in ways that conflict with their religious beliefs. The precise definition of a "substantial burden" varies by state. This element is a question of law, rather than fact—meaning it should be decided by a judge based on legal precedent.

  Clergymembers who feel religiously called to help people access abortion care could draw on ample case law where courts have held that the provision of various services to the public—such as food and shelter—constitutes a form of protected religious exercise that is burdened by government restrictions, such as zoning and food safety regulations.[61] Note that persons bringing a religious liberty

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that a religious belief or act overlaps with a political ideology does not make the belief inherently political. For example, in *Hobby Lobby*, the claimants' opposition to contraceptive coverage mirrored conservative political beliefs about abortion and the Affordable Care Act. Yet at no time did the Court find that the beliefs of the RFRA claimants were political rather than religious in nature.

[59] For example, the Department of Justice (DOJ) under Trump questioned the religiosity of Safehouse, a faith-based harm reduction nonprofit, arguing that the founders' "true motivation is socio-political or philosophical—not religious—and thus not protected by RFRA." Motion for Judgment on the Pleadings at 24, United States v. Safehouse, No. 2:19-cv-00519 (E.D. Pa. June 11, 2019). In another case, DOJ attorneys argued that a RFRA claim brought by anti-war Catholics "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification." Petitioner's Response to the Court's Aug. 15, 2018 Order Directing Supplemental Briefing at 10, United States v. McAlister, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. Sept. 5, 2018).

[60] *See, e.g.*, Friedman v. Southern Cal. Permanente Medical Group, 102 Cal. App. 4th 39, 70 (Cal. Ct. of Appeal 2002) ("While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy"); U.S. v. Zielinski, 2013 WL 2636104 at *15 (N.D.N.Y. 2013) ("Based on my review of defendant's evidence concerning Objectivism, I conclude that it is a manner of processing information that is more appropriately considered a philosophy, rather than a religion"); Hale v. Federal Bureau of Prisons, 2018 WL 1535508 at *7 (D. Colo. 2018) ("By limiting itself to the basic questions of white people and a single idea to answer all such questions, Creativity makes it all too clear that it is not a religion, but instead a secular, 'monofaceted' belief in white supremacy masquerading as a religion"); Cavanaugh v. Bartelt, 2016 WL 1446447 (D. Neb. 2016) aff'd (8th Cir. 2016) (holding that Church of the Flying Spaghetti Monster is not a religion within the meaning of RLUIPA). Further, one Missouri trial court ruling on a Satanic Temple claim held that the "Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent or offensive." Doe v. Nixon, 2017 WL 2362217 (Mo. Cir. 2017). The Court gave little reason for this assessment, "even on a motion to dismiss where the court is supposed to 'assume that all of the plaintiff's averments are true, and liberally grant[] to plaintiffs all reasonable inferences therefrom.'" Christen E. Hammock, *Mary Doe Ex Rel. Satan? Parody, Religion Liberty & Reproductive Rights*, 40 COLUM. J. GENDER & L. 46, 82 (2020).

[61] For numerous examples of such cases, see Elizabeth Reiner Platt, Katherine Franke, Kira Shepherd and Lilia Hadjiivanova, *Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right* 42-44 (2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.s12.19.pdf; Kelli Stout, *Tent Cities and RLUIPA: How a New Religious-Land-Use Issue*

claim seeking the right to access abortion care would typically have to show that their abortion was religiously *motivated* (rather than merely religiously permitted). However, at least in most instances, they would not need to show that it was religiously *required*.

- *Compelling interest*: Once a claimant demonstrates a substantial burden on their sincere religious exercise, the burden shifts to the government to show a countervailing compelling interest in enforcing the relevant statute on the claimants requesting an exemption. The "compelling state interest" element is a question of law. At least under *federal* law, a compelling interest must be clearly articulated, individualized to the claimant, and specific; "broadly formulated interests justifying the general applicability of government mandates" are not considered compelling.[62] A marginal or incremental improvement in the advancement of a larger goal is also not regarded as compelling.[63] State RFRAs or constitutional provisions may have somewhat different definitions of a compelling state interest.

  In order to rebut a state's claim that it has an alleged compelling interest, claimants could point to examples of how the government fails to advance this interest in other contexts—including by noting existing exceptions, accommodations, or limits to the relevant law or policy. For example, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, the Supreme Court referenced a longstanding religious exemption for peyote use in rejecting the government's asserted compelling interest in uniform enforcement of federal drug laws.[64] Similarly, in the Third Circuit case *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, involving religious exemptions from a no-beards policy for Muslim police officers, the court held that "[t]he Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its 'no-beard' policy."[65]

- *Least restrictive means*: Finally, in order to prevail against a state RFRA challenge, the government typically must show that enforcing the state statute on the claimants is *necessary* to advancing its compelling state interest(s). Other language used to describe this element of the strict scrutiny test is that enforcement of the law on the claimants must be "narrowly tailored" or the "least restrictive means" of advancing the relevant state interest(s). This element is a question of law.

  Similar to the "compelling government interest" prong of the test, claimants could point to existing exceptions, accommodations, or limits to the relevant law or policy in order to demonstrate that advancing the state's articulated interest does not require uniform enforcement of the law. For example, in *Burwell v. Hobby Lobby*, a federal RFRA case, the Supreme Court held that enforcement of

Aggravates RLUIPA, 41 SETON HALL L. REV. 465 (2011); Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?*, 7 U.C. IRVINE L. REV. 291 (2017).

[62] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430-31 (2006).

[63] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 803 n.9 (2011) ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

[64] O Centro, 546 U.S. at 420-21.

[65] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3rd Cir. 1999).

the Affordable Care Act contraceptive mandate on objecting companies was not necessary to advancing the government's interest in providing cost-free contraception to employees, because the fact that the government had "already established an accommodation for nonprofit organizations with religious objections" proved that the state "has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."[66]

Even if no such exemptions from the law currently exist, claimants could also suggest alternative means by which the government could achieve its asserted compelling interest(s) that would be less burdensome to their religious practice. For example, in *Hobby Lobby*, the companies suggested in their brief that "[t]he most obvious less-restrictive alternative" to provide cost-free contraceptives "is for the government to pay for its favored contraceptive methods itself."[67]

Note that this memo does not address many other procedural questions that may be relevant to a state RFRA or other religious liberty claim, such as standing or—in the case of a challenge to a private enforcement law such as Texas's S.B.8—whom is the appropriate party to sue. This memo also provides no guidance on potential civil or criminal liability for those who are religiously bound to seek, provide, or facilitate abortion care, possibly in violation of state law.

Conclusion

There are numerous strategic and legal considerations relevant to bringing any lawsuit. Litigation at the intersection of religious freedom and reproductive health is a highly complex matter that requires careful planning. Furthermore, this tactic comes with serious risks, particularly for those individuals and organizations that are most vulnerable to criminal prosecution—including people self-managing an abortion and organizations that actively facilitate abortion care, especially those led by people of color.[68] Those considering such litigation should seek information and guidance from legal experts in religion and reproductive rights law, as well as from the community-based organizations most at risk of being prosecuted under state abortion bans.

For additional questions about religious liberty law for those called to seek, offer, or facilitate abortion care, please contact the Law, Rights, and Religion Project at **lawrightsreligion@law.columbia.edu**.

[66] Burwell v. Hobby Lobby, 573 U.S. 682, 731 (2014).
[67] Brief for Respondent-Appellee at 58, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (No. 13-354).
[68] Laura Huss, Farah Diaz-Tello & Goleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings*, If/When/How (2022), https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings (finding that women of color are disproportionally criminalized for self-managed abortion care).

Appendix I: Case Law

- *Clergy Consultation Service cases*: While law enforcement typically overlooked CCS's activities, there were a few prosecutions in which CCS members defended themselves, in part, using the First Amendment. In addition, a few CCS members brought affirmative suits arguing for a religious liberty right to offer abortion assistance. None of these cases resulted in a final decision on the merits. They include:

    - *Lyons v. Lefkowitz* (1970): CCS member and Methodist clergymember Rev. Jesse Lyons brought an affirmative lawsuit challenging New York State's prohibition on abortion. Lyons argued that the ban "restricted his right to offer pastoral counseling." His challenge (and others) were mooted when New York's state legislature legalized abortion.[69]

    - *Landreth v. Hopkins* (1971): Two members of CCS in Florida sued after facing investigation and pending grand jury charges for violation of a state law that prohibited advising on, advertising, or distributing printed material about abortion. They and several counselees challenged the law in federal court, arguing that it violated their rights to free speech and free exercise of religion. The suit was dismissed under the *Younger* doctrine, which holds that federal courts should not intervene in pending state court proceedings.[70]

    - *Commonwealth v. Brunelle* (1972): Massachusetts physician Pierre Brunelle was criminally prosecuted for performing illegal abortions. Among a range of defenses, he argued that the prosecution interfered with his religious practice. Historian Gillian Frank has called the case an "imperfect vehicle"[71] for making a religious liberty claim, as Brunelle was a profit-driven provider who had previously lost his medical license.

      As explained in a subsequent decision by the Supreme Judicial Court of Massachusetts, the trial court "declined to receive evidence concerning" Brunelle's religious liberty argument.[72] Faith leaders who were prepared to take the stand—including an Episcopal bishop, two rabbis, the president of the Unitarian Universalist Association, a Harvard Divinity School dean, and the rector of a Baptist church—were not permitted to testify. The witnesses had planned to explain that the abortion laws "were in substantial conflict with religious, moral, and sociological views entertained by them, their respective coreligionists, and others, and [were] a serious obstacle to advising persons turning to them for pastoral or professional advice."[73]

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[69] DORIS ANDREA DIRKS AND PATRICIA A. RELF, TO OFFER COMPASSION: A HISTORY OF THE CLERGY CONSULTATIONS SERVICE ON ABORTION 82, 93 (Univ. of Wisconsin Press) (2017).
[70] Landreth v. Hopkins, 331 F. Supp. 920 (N.D. Fla. 1971).
[71] Comments of Dr. Gillian Frank, "A Religious Right to Abortion?" (Dec. 13, 2020), https://www.youtube.com/watch?v=QYLdGeNpmeI.
[72] Commonwealth v. Brunelle, 361 Mass. 6 (Mass. 1972).
[73] *Id.* at fn. 4.

- *Commonwealth v. Hare* (1972): Presbyterian minister Robert W. Hare, a member of the Cleveland CCS, was charged in Massachusetts (where he had referred patients to Dr. Brunelle) with "accessory to abortion before the fact."[74] Hare's defense did not include a religious liberty argument, but as part of the surrounding media campaign, the Presbyterian Church of Cleveland issued a statement asking that Massachusetts criminally charge *them*, as Hare was acting on behalf of the Church. This public stance was thought to have contributed to a ruling in Hare's favor at the superior court.[75] The case was eventually dropped in the wake of *Roe*.

- *Doe v. Bolton* (1973): This direct challenge to Georgia's abortion ban was heard by the Supreme Court as a companion case to *Roe v. Wade*. In addition to the claims brought by patients and medical professionals, the suit included a claim brought by CCS clergymembers, who argued that the law infringed on their religious rights. In a short opinion, the Georgia district court ruled that the ministers had standing to challenge the law.[76] In its opinion enshrining a constitutional right to abortion, the Supreme Court ruled that it "need not" determine whether the ministers had standing, as "the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of…the clergymen."[77]

- *Planned Parenthood v. Fitzpatrick* (1975): This post-*Roe* case, which challenged a number of state abortion restrictions, was brought by a group of physicians and abortion counselors, including a branch of CCS. A federal district court found that CCS and the other "plaintiff-referral agencies have presented no evidence to support their contention that they may be prosecuted as counsel-conspirators or accessories, and this Court finds, after reading the Act and noting the barren state of the record, that such a conclusion could only be reached as a matter of pure speculation or conjecture on our part."[78] It therefore dismissed CCS from the suit for lack of standing.

- *YWCA v. Kugler* (1972): This pre-*Roe* case combined two challenges to New Jersey's abortion law brought by a variety of claimants, including the Young Women's Christian Association of Princeton. The claimants made a number of constitutional arguments, including that the ban "violates the proscription against an establishment of religion and the free exercise thereof under the First Amendment."[79] The federal district court did not discuss the Free Exercise claim, ruling instead on vagueness and privacy grounds. The court did find that the question of when life begins was "beyond the competence of judicial resolution."[80]

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[74] Commonwealth v. Hare, 361 Mass. 263 (Mass. 1972).
[75] Comments of Dr. Gillian Frank, "A Religious Right to Abortion?" *supra* note 71.
[76] Doe v. Bolton, 319 F.Supp. 1048, 1052 (N.D. Ga. 1970) ("all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice").
[77] Doe v. Bolton, 410 U.S. 179, 189 (1973).
[78] Planned Parenthood v. Fitzpatrick, 401 F.Supp. 554, 562 (E.D. Penn. 1975).
[79] YWCA v. Kugler, 342 F. Supp. 1048, 1056 (D.N.J. 1972).
[80] *Id.* at 1075.

- *Watkins v. Mercy Medical Center* (1973): Idaho physician Wilfred E. Watkins sued a Catholic hospital for denying his medical staff privileges after he refused to abide by the hospital's prohibition on sterilization and abortion. Dr. Watkins claimed that the denial violated his First Amendment Free Exercise rights. The Ninth Circuit ruled against him because the hospital was private.[81]

- *Akron Ctr. for Reproductive Health, Inc. v. City of Akron* (1979): This case challenged various Ohio abortion regulations, including waiting period requirements and an informed consent provision requiring doctors to tell their patient that "the unborn child is a human life from the moment of conception." A doctor argued that this "statement concerning human life is an interference with his free exercise of religion."[82] However, the federal district court ruled it unnecessary "to consider the physician plaintiff's free exercise claim."[83] Furthermore, a footnote in the opinion states that "[p]laintiffs also appear to assert that their claim based on the First Amendment's free exercise clause…[has] general applicability. The Court, however, does not agree and each section will be tested individually to determine whether these claims have merit."[84] The court rejected claimants' Establishment Clause claim, holding that "the belief that human life exists from the union of sperm and egg is not clearly and singularly a 'religious belief.'"[85]

- *Comm. To Defend Reproductive Rights v. Myers* (1979): In this case, claimants argued that "the state's decision not to fund elective abortions violates both the free exercise and the establishment of religion clauses of the First Amendment"—and specifically that "the funding decision in effect establishes a religious definition of life, and thus impermissibly advances the cause of a particular religion."[86] A California state court rejected the Establishment argument, and dismissed the Free Exercise claim in a single sentence, stating "We find no merit in appellants' contention that the decision not to pay for elective abortions infringes on the religious beliefs of indigent women who desire such abortions."[87]

- *Right to Choose v. Byrne* (1979): In this challenge to a state funding restriction on abortion, claimants argued that "the statutory limitation on Medicaid funding for abortions conflicts with the religious obligation of some Protestants and Jews and thus inhibits their free exercise of religion."[88] At trial, "[c]lergymen of five Protestant denominations and a Reform Jewish rabbi were called as witnesses on the issue of denial of the free exercise of religion. Only one, a Presbyterian theologian, testified to a religious duty of a pregnant woman under some circumstances to submit to an abortion…The other clergymen and the rabbi testified generally that under circumstances such as the foregoing abortion might be recommended as the most moral option available in the context of

[81] Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973).
[82] Akron Ctr. for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1203 (N.D. Ohio 1979).
[83] *Id.*
[84] *Id.* at fn. 7.
[85] *Id.* at 1189.
[86] Comm. To Defend Reproductive Rights v. Myers, 156 Cal. Rptr. 73, 83 (Cal. 1979) *vacated on other grounds in* 29 Cal.3d 252 (Cal. 1981).
[87] *Id.* at 84.
[88] Right to Choose v. Byrne, 165 N.J. Super. 443, 458 (Sup. Ct. N.J. 1979).

Christian or Jewish faith."[89] Based largely on this expert testimony, the state court challenged the Free Exercise claim. It held that "to sustain a free exercise of religion challenge on the ground that members of these denominations are thwarted in the exercise of the most moral option in accordance with their consciences would be to enlarge the First Amendment to protect individual decisions that are not primarily religious, beyond the First Amendment's recognized intendment. A pregnant woman's decision to terminate her pregnancy by abortion may be reached conscientiously in accordance with the general guidelines of her religion, but it cannot be defined as the fulfillment of a religious duty."[90]

The court also noted standing concerns, stating: "only a plaintiff who is an adherent of a religion has standing to raise the issue of infringement of its free exercise…No individual plaintiff is identified in the record as a member of any of the five Protestant denominations or of the Jewish sect whose free exercise of religion, according to plaintiffs, is derogated by" the state statute.[91]

Finally, the court also dismissed an Establishment Clause argument, holding that "this court cannot conclude that the legislative purpose in enacting the statute under attack was solely religious, excluding moral opposition."[92]

- *Harris v. McRae* (1980)*:* This challenge to the Hyde Amendment, which limits federal funding for abortion, included a challenge based on the free exercise rights of abortion patients. As explained in the later Supreme Court decision, a New York district court ruled that "insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the funding restrictions of the Hyde Amendment violate that constitutional guarantee."[93] However, the Court overruled this decision for lack of standing, holding that: 1) no individual pregnant patient had "alleged, much less proved, that she sought an abortion under compulsion of religious belief", and 2) the other plaintiffs lacked standing as they either "failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid" or they did "not satisfy the standing requirements for an organization to assert the rights of its membership."[94]

- *Margaret S. v. Edwards* (1980): In this challenge to a post-*Roe* Louisiana restriction on abortion, the federal district court declined to discuss the claimants' free-exercise argument and rejected an argument based on the Establishment Clause

[89] *Id.* at 460-61.
[90] *Id.* at 462.
[91] *Id.* at 463.
[92] *Id.* at 459.
[93] Harris v. McRae, 48 U.S. 297, 306 (1980). *See also* McRae v Califano, 491 F. Supp. 630, 742 (E.D.N.Y. 1980) ("The liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons."). The District court further stated that "A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment." *See id.*
[94] Harris v. McRae, 48 U.S. at 321.

as having "no merit."[95] The court found that "[p]olitical fragmentation over abortion splinters individual families as well as religions, political parties, and church groups. The Act does not outlaw abortion; it merely attempts to regulate it, which is a valid exercise of the State's police powers. The Court therefore concludes that the Act as a whole does not violate the First Amendment."[96]

- *ACOG v. Thornburgh* (1982): This was a challenge to numerous Pennsylvania abortion restrictions—including consent provisions, a 24-hour waiting period, and limits on who can perform an abortion—brought by doctors, clinics, and clergymembers. The federal district court dismissed the Free Exercise challenge brought by the clergy plaintiffs on standing grounds, holding: "plaintiff clergymen do not have standing either as individuals or on behalf of women whom they counsel" because "the challenged provisions have no direct impact on the plaintiff clergymen as individuals, because the Act has no provisions which directly or indirectly concern religious counseling."[97] The court further explained that, under the Supreme Court's decision in *Harris v. McRae*, "a free exercise claim in this case can be pursued only by a woman who seeks 'an abortion under compulsion of religious belief.'"[98]

- *Planned Parenthood of Mid-Michigan et al. v. Attorney-General of Michigan* (1991): According to testimony presented during the federal RFRA hearings, in this case "attorneys for the ACLU and Planned Parenthood Federation of America sought the right of *inter alia* the Religious Coalition for Abortion Rights to intervene as party-plaintiffs in a case challenging Michigan's parental consent to abortion for minors law. They set forth their claim in these words: COUNT IV: FREEDOM OF RELIGION 33. The parental consent and judicial bypass provisions of the parental consent law violate the right to freedom of religion of the citizens of Michigan by penalizing them for acting in accordance with their religious beliefs in seeking to exercise their right of privacy to an abortion. Proposed Intervening Plaintiffs' Complaint for Injunctive and Declaratory Relief at 7, Planned Parenthood of Mid-Michigan et al. v. Attorney-General of Michigan, No. D91 0571-AZ (filed Mar. 6, 1991)."[99] Any opinion(s) addressing these arguments are not easily accessible.

- *Sojourner v. Roemer* (1992): In a brief in this challenge to a post-*Roe* Louisiana abortion ban, the claimants argued that "women whose conscientious and religious beliefs and family circumstances dictate abortion as the only moral choice are prohibited from choosing a legal medical procedure."[100] It further noted that "Roe has permitted American women to participate fully and equally in society and to make life choices in line with their own religious and conscientious beliefs."[101] The Free Exercise argument was not addressed in the Fifth Circuit opinion striking down the law.[102]

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[95] Margaret S. v. Edwards, 488 F Supp. 181, 224 (E.D. La. 1980).
[96] *Id.* at 225.
[97] ACOG v. Thornburgh, 552 F. Supp. 791, 795 (E.D. Pa. 1982).
[98] *Id.* at 795.
[99] Senate RFRA Hearings *supra* note 46 at 218 (statement of James Bopp, Jr.).
[100] Brief for Appellees, Sojourner v. Roemer, No. 91-3677, 1991 WL 11251961, at *6 (5th Cir. Oct. 7, 1991).
[101] *Id.* at *34.
[102] Sojourner v. Roemer, 974 F.2d 27 (5th Cir. 1992).

- *Jane L. v. Bangerter* (1992): This complex lawsuit, which resulted in many legal opinions over the course of the 1990s, involved a challenge to several different Utah abortion restrictions based on numerous different legal theories—including the state and federal Free Exercise Clause and the Establishment Clause. In an affirmation, the plaintiff in the case stated: "I am a practicing Christian, and have talked to my minister about how to handle this unintended pregnancy. He helped me come to the conclusion that terminating this pregnancy was the choice consistent with my faith. It would be wrong for me to have another baby at this point: wrong for my children, wrong for me, and wrong for the baby to which I would give birth."[103]

  In two separate opinions, the federal and state Free Exercise claims were rejected by a federal district court citing *Employment Division v. Smith*.[104] Most notably, one opinion stated: "Since the Utah law is not aimed at violation of the free exercise of religion, and no additional constitutional rights are violated so as to meet the 'hybrid rights' exception, this court holds that the Free Exercise claim must be dismissed."[105] The case was mentioned by anti-abortion activists during legislative hearings over the proposed federal RFRA, as an example of how the *Smith* standard was necessary to prevent courts from finding a religious right to abortion.[106]

- *Guam Soc. of Obstetricians and Gynecologists v. Ada* (1992): This was a challenge brought by various plaintiffs, including a reverend, to an abortion ban passed in Guam in 1990. Among other things, plaintiffs argued that the ban violated the right to free exercise of religion. As discussed in federal RFRA hearings— the "ACLU argued [in the case] that 'Jewish and several Protestant faiths, each with a substantial number of adherents on Guam, hold religious beliefs that . . . under certain circumstances — to be determined in the first instance by the pregnant woman herself — a woman is morally permitted or, in some cases, even required to obtain an abortion.'" [107] The Guam District Court and Ninth Circuit decided the case by holding that *Roe v. Wade* applied in Guam, and did not address the

[103] *The Religious Freedom Restoration Act, Hearings Before the Subcommittee on Civil and Constitutional Rights of the House of Representatives Committee on the Judiciary*, 102d Cong, 2d Sess. on H.R. 2797 (May 13-14, 1992) at 455 [hereinafter House RFRA Hearings] (Affirmation of Jane Liberty from Jane L. v. Bangerter).
[104] Jane L. v. Bangerter, 794 F.Supp. 1528, 1535 (D. Utah 1992) ("this court applies federal constitutional analysis and holds that the Utah Act does not violate Utah's free exercise of religion clause. This conclusion is reached substantially for the same reasons set forth in this court's contemporaneously issued Memorandum Decision in which the Utah Act is held not to violate the federal Free Exercise Clause."); Jane L. v. Bangerter, 794 F.Supp. 1537 (D. Utah 1992) (dismissing federal Free Exercise claims).
[105] Jane L. v. Bangerter, 794 F.Supp. at 1547.
[106] Senate RFRA Hearings *supra* note 46 at 210 (statement of James Bopp, Jr.) ("Under Smith, free exercise of religion claims to an abortion right would be impossible. See, e.g., Jane L. v. Bangerter, No. 91-C-345G, slip op. at 9 (D. Utah Apr. 10, 1992) (orders vacating trial, etc.) ('This court holds that the Utah [abortion] statute as a matter of law does not interfere with free exercise of religion.' (citing Smith)); *Id* at 110 (statement of Mark E. Chopko) ("In 1992, the Utah federal district court, relying solely on Smith, rejected plaintiffs' free exercise challenge to the Utah abortion statute.").
[107] Senate RFRA Hearings *supra* note 46 at 217 (statement of James Bopp, Jr.) ("Abortion rights advocates again asserted their free-exercise right to abortion claim in the Guam abortion case, recently decided by the Ninth Circuit. Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Permanent Injunction, Doe v. Ada, No. 90-00013 (D. Guam 1990)").

religious liberty arguments.[108] In a footnote, however, the District Court judge chastised a politician who had justified the abortion ban by stating "Guam is a Christian community"; in his response, the judge quoted *School District of Abington Township (Pa.) v. Schempp*: "As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith."[109]

- *The Satanic Temple (TST) cases*:

    - *Doe v. Parson* (state) (2019): TST member Mary Doe challenged a Missouri law that required her, prior to having an abortion, to certify in writing that she: 1) had a chance to view an ultrasound at least 24 hours ahead of time; and 2) received an informed-consent booklet stating that the "life of each human being begins at conception." She argued that the law violated her rights under the Missouri state RFRA. A Missouri state appeals court ruled in favor of Mary Doe in 2017, holding that the case "raises real and substantial constitutional claims" and thus should not have been dismissed for failure to state a claim.[110] The Missouri Supreme Court found that the laws did not violate Doe's religious freedom, because the informed consent requirement only required that Doe be given an *opportunity* to have an ultrasound and read the booklet, not that she actually do so. The court further ruled that Doe "failed to allege how the 72-hour waiting period violates her religious beliefs."[111]

      It's worth noting that the litigation resulted in the Missouri Solicitor General stating on the record that a provision of the law which providers had interpreted as *mandating* an ultrasound in fact only mandated that they provide patients with an opportunity to receive an ultrasound.[112]

    - *Doe v. Parson* (federal) (2020): In a separate suit, TST member Mary Doe alleged that the same Missouri laws discussed above violated her rights under the U.S. Constitution.[113] Doe argued that the law violated her Free Exercise rights by placing conditions on her abortion that were antithetical to the Satanic Tenets. The Eighth Circuit ruled that the law was neutral and generally applicable, thus triggering only rational basis review. It then found that the law served a rational purpose to provide informed consent.[114] The opinion was issued before the Supreme Court ostensibly changed the standard for finding a law neutral and generally applicable in its COVID cases.

    - *Satanic Temple FDA letter* (2021): In August 2021, a lawyer representing TST sent a letter to the FDA demanding a religious exemption from certain

[108] Guam Soc. of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422 (Dist. Guam 1990); Guam Soc. of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992).
[109] Guam Soc. of Obstetricians and Gynecologists v. Ada, 776 F.Supp. at fn. 1 (internal citations omitted).
[110] Doe v Parson, 530 S.W.3d 571, 574 (Mo. Ct. App. 2017).
[111] Doe v Parson, 567 S.W.3d 625, 630 (Mo. 2019).
[112] Jack Denton, *Satanists Just Made it a Little Easier to Get an Abortion in Missouri*, PAC. STANDARD (Jan. 29, 2018), https://psmag.com/social-justice/satanists-just-made-it-a-little-easier-to-get-an-abortion-in-missouri.
[113] Doe v. Parson, 960 F.3d 1115 (8th Cir. 2020) (*cert den'd* 141 S.Ct. 874 2020).
[114] *Id.* at 1119.

rules that regulated access to the medication abortion drugs mifepristone and misoprostol.[115] No litigation has been initiated. The FDA has since eliminated the in-person pickup requirement for mifepristone.[116]

- *Satanic Temple v. Hellerstedt* (ongoing): In February 2021, prior to the passage of S.B. 8, TST challenged several abortion restrictions in Texas, including a mandatory sonogram and waiting period. The complaint alleged that these restrictions would interfere with plaintiff Mary Doe's decision to "engage in a religious ceremony that will culminate in the abortive act," in violation of (among other things) the Free Exercise Clause—framed as a hybrid Free Speech/Free Exercise claim—and the Texas RFRA.[117] At an initial conference in August 2021 before the Southern District of Texas, the plaintiffs did not object to the dismissal of their Texas RFRA claims for lack of subject matter jurisdiction by a federal court.[118] The litigation is ongoing.

- *Mayor and City Council of Baltimore v. Azar* (2019): In 2019, the City of Baltimore brought a RFRA challenge to a federal regulation promulgated by the Trump administration that prohibited doctors within the Title X program from offering their patients information about or referrals to abortion services. Baltimore argued that this "Gag Rule" "violates rights of religious conscience recognized by [RFRA] by prohibiting physicians from counseling patients on comprehensive reproductive health services even when their religious exercise requires them to engage in such counseling."[119] Interestingly, the complaint alleged that the rule violated the religious rights of doctors who both support and oppose abortion rights. The complaint also noted that the rule contained no exemption for "patients whose religious exercise would be substantially burdened by the inability of their physician to provide honest counseling."[120]

  In September 2019, Baltimore's RFRA complaint was dismissed without prejudice by a district court judge, who found that the city had "done little more than allege conclusory statements with no support to demonstrate any religious belief or how it has been substantially burdened."[121] The court held that "[t]hese allegations are insufficient to state a plausible claim that the Final Rule violates the RFRA."[122]

- *Doe v. Minnesota* (ongoing): In 2019, a group of healthcare providers and people of faith, including the First Unitarian Society of Minneapolis, challenged a variety

[115] Letter from Matthew A. Kezhaya to the Food and Drug Administration (Aug. 31, 2021) *available at* https://thetexan.news/wp-content/uploads/2021/09/Satanic-Temple-FDA-Letter.pdf.
[116] Celine Castronuovo, *Abortion Pill Access to Ease with In-Person Pickup Rule Nixed*, BLOOMBERG LAW (Dec. 17, 2021), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XBC86L5K000000?bna_news_filter=health-law-and-business#jcite.
[117] Complaint Seeking Declaratory and Injunctive Relief, Satanic Temple v. Hellerstedt, No. 4:21-CV-00387, 2021 WL 410748 (S.D.Tex. Feb. 5, 2021).
[118] Minute Entry Order, Satanic Temple v. Hellerstedt, No. 4:21-CV-00387 (S.D. Tex. Aug. 6, 2021) ("Plaintiffs The Satanic Temple, Inc and Ann Doe...noted no objection to the dismissal of their claims under Count 4 as to the Texas Religious Freedom and Restoration Act for lack of subject matter jurisdiction.").
[119] Complaint for Vacatur of Unlawful Agency Rule and Declaratory and Injunctive Relief, *Baltimore v. Azar*, No. 1:19-cv-01103 at 8 (D. Md. Apr. 12, 2019).
[120] *Id.* at 53.
[121] Mayor and City Council of Baltimore v. Azar, No. RDB-19-1103, 2019 WL 4415539 at *7 (D. Mary. 2019).
[122] *Id.*

of state abortion restrictions, including Targeted Regulation of Abortion Providers ("TRAP") laws, intrusive reporting requirements, biased "informed consent" laws, and a mandatory waiting period. The complaint included a claim that one law—a mandate to bury or cremate fetal remains—violated the right to religious freedom and prohibition on religious preference in the Minnesota Constitution. It notes that most abortion patients are religious, and that Minnesotans "have differing beliefs about the status of a fetus based on diverse religious and cultural traditions."[123] In 2020, the suit survived a motion to dismiss, and the litigation continues.[124]

- *Doe v. Attorney General of Indiana* (ongoing): In 2020, a group of providers and patients challenged Indiana's law mandating the burial or cremation of fetal remains as a violation of the Free Exercise Clause and Establishment Clause of the U.S. Constitution. The complaint alleges that by passing the law, "Indiana takes sides in a religious debate about whether personhood begins at fertilization" and "privilege[s] some people's religious and conscientious beliefs over others."[125] The case has not yet resulted in a judicial opinion.

- *Post-Dobbs cases*:

    - *EMW Women's Surgical Center v. Cameron* (ongoing): This case challenges a Kentucky trigger ban and six-week abortion ban. In July 2022, a state circuit court judge issued an unusual decision that, *sua sponte*, found that the two laws violated religious liberty protections of the Kentucky Constitution.[126] Based on this and other rulings, the court temporarily enjoined the bans. The Kentucky Court of Appeals paused this injunction several weeks later without ruling on the merits, allowing the abortion bans to be enforced.[127]

    - *Planned Parenthood Association of Utah v. State* (ongoing): In this challenge to Utah's abortion ban, plaintiffs included an argument that "By imposing on Utahns the State's inherently spiritual and religious views that life begins in the earliest days of pregnancy, the Criminal Abortion Ban violates article I, section 4, of the Utah Constitution, the state's religion

[123] Complaint at 33, Doe v. Minnesota, No. 62-cv-19-3868 (Dist. Ct. Minn. May 29, 2019) *available at* https://lawyeringproject.org/wp-content/uploads/2020/07/2019-05-29-Complaint.pdf.
[124] Order & Memorandum, Doe v. Minnesota, No. 62-cv-19-3868 (Dist. Ct. Minn. June 25, 2020) *available at* https://lawyeringproject.org/wp-content/uploads/2021/01/2020-06-25-Order-on-MTD.pdf.
[125] Complaint, Doe v. Attorney General of Indiana, No. 1:20-CV-3247 (S.D. Ind. Dec. 21, 2020) *available at* https://lawyeringproject.org/wp-content/uploads/2020/12/S.D.-Ind.-20-cv-03247-dckt-000001_000-filed-2020-12-21.pdf.
[126] Opinion & Order Granting Temporary Injunction at 16, EMW Women's Surgical Center v. Cameron, No. 22-CI-225 (Circ. Ct. Ky. July 22, 2022) *available at* https://www.aclu.org/legal-document/emw-womens-surgical-center-v-cameron-order-granting-temporary-injunction ("the Trigger Ban and the Six Week Ban implicate the Establishment and Free Exercise Clauses by impermissibly establishing a distinctly Christian doctrine of the beginning of life, and by unduly interfering with the free exercise of other religions that do not share that same belief."").
[127] Order Granting Motion for Emergency Relief, EMW Women's Surgical Center v. Cameron, No. 2022-CA-0906-I (Ct. App. Ky. July 22, 2022) *available at* https://ag.ky.gov/Press%20Release%20Attachments/Daniel%20Cameron%20v.%20EMW%20Women's%20Surgical%20Center.order%20granting%20emergency%20relief%2065.07(6).pdf.

clause."[128] In July 2022, a state district court judge issued a preliminary injunction pausing the ban, finding that the plaintiffs had raised serious legal arguments, including on religious liberty grounds.[129]

- *Johnson v. State* (ongoing): This challenge to Wyoming's criminal abortion ban included a claim based on state religious liberty protections in the Wyoming Constitution. Specifically, the complaint alleged that if abortion is criminalized, Wyomingites will lose "the right to follow their religion when such religion requires abortion be considered as a necessary health care measure to prevent serious harm or death to a woman."[130] In July 2022, a state court judge temporarily enjoined the ban so that the plaintiffs' claims, including their religion claims, could be heard.[131]

- *Florida challenges* (ongoing): As of August 2022, six separate legal challenges have been brought against Florida's 15-week abortion ban, arguing that the law violates provisions of the Florida RFRA, religious liberty protections in the state constitution, and the Free Exercise Clause and Establishment Clause of the U.S. Constitution.[132] No decisions have been issued in these cases.

[128] Motion for a Preliminary Injunction and Supporting Memorandum, Planned Parenthood Ass'n of Utah v. State, No. 220903886 (Utah D. Ct., Third Judicial District June 29, 2022), *available at* https://www.scribd.com/document/580534579/Planned-Parenthood-s-Motion-Memorandum-for-Preliminary-Injunction.
[129] Order Granting Plaintiff's Motion for a Preliminary Injunction, Planned Parenthood Ass'n of Utah v. State, No. 220903886 (Utah D. Ct., Third Judicial District July 19, 2022), *available at* https://www.scribd.com/document/583248006/Preliminary-injunction.
[130] Complaint for Declaratory Judgment and Injunctive Relief, Johnson v. State, No. 18732 (Wy. Dist. Ct. of Teton Cnty. July 25, 2022), *available at* https://wyofile.com/wp-content/uploads/2022/07/Complaint-3.pdf.
[131] Order Granting Motion for Temporary Restraining Order, Joh nson v. State, No. 18732 (Wy. Dist. Ct. of Teton Cnty. July 27, 2022) *available at* https://wyofile.com/wp-content/uploads/2022/08/Order-Granting-Motion-2.pdf.
[132] Complaint, Generation to Generation Inc. v. State of Florida, No. 2022-CA-000980 (Leon Cty. Fla., Circ. Ct. June 10, 2022); Complaints, Jayaram Law Firm, https://jayaramlaw.com/HB5/ (last visited Aug. 4, 2022).

Appendix II: Additional Analysis & Resources

- Elizabeth Reiner Platt, Katherine Franke, Kira Shepherd, Lilia Hadjiivanova, *Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right*, THE LAW, RIGHTS, AND RELIGION PROJECT (2019), https://lawrightsreligion.law.columbia.edu/content/whosefaithmatters.

- Violet S. Rush, *Religious Freedom and Self-induced Abortion*, TULSA LAW REVIEW (2019), https://digitalcommons.law.utulsa.edu/tlr/vol54/iss3/8/ ("This law review comment examines religious exercise in the context of self-induced abortion, ultimately demonstrating that caregivers who act from a religious or spiritual perspective can likely assert state Religious Freedom Restoration Acts (RFRAs) as a defense if they are charged with a crime such as the unauthorized practice of medicine").

- Olivia Roat, *Free Exercise Arguments for the Right to Abortion*, UCLA LAW REVIEW (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100833.

- Caroline Mala Corbin, *A Religious Right to Disregard Mandatory Ultrasounds*, CANOPY FORUM (2020), https://canopyforum.org/2020/04/01/a-religious-right-to-disregard-mandatory-ultrasounds/ ("Given that this trend [the expansion of protections for religious exercise] is here to stay, progressives should avail themselves of this expansive protection when faced with regressive laws.").

- Christen Hammock, *Mary Doe ex. rel. Satan?: Parody, Religious Liberty, & Reproductive Rights*, COLUMBIA JOURNAL OF GENDER & LAW (2020), https://journals.library.columbia.edu/index.php/cjgl/article/view/7058.

- Rev. Dr. Carlton W. Veazey & Marjorie Brahms Signer, *Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, NYU Review of Law & Social Change (2011), https://socialchangenyu.com/review/religious-perspectives-on-the-abortion-decision-the-sacredness-of-womens-lives-morality-and-values-and-social-justice/ ("This essay outlines some of the religious values that favor reproductive freedom.").