

RELIGIOUS LIBERTY FOR ALL? A RELIGIOUS RIGHT TO ABORTION

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One of the most notable trends in recent Supreme Court jurisprudence is the expansion of religious liberty rights. The right to practice one’s faith is a core feature of a democracy, but the Supreme Court has privileged that right over other equally critical ones, most notably the right to equal treatment. Thus, for example, the Court has held that for-profit companies have a religious right to exclude contraception from their health insurance plans and that nonprofit charities have a religious right to refuse to place foster children with same-sex couples. In these and similar cases, the religious beliefs aligned with conservative Christianity.

But what if the religious liberty claim were not brought by a conservative Christian but by a progressive Christian, or not a Christian at all, and the religious belief collided with traditional Christian ideology? More precisely, what might be the result of a religious liberty challenge to an abortion ban? This question is not farfetched, as Jewish and other faith groups in multiple states are challenging restrictive abortion laws based upon religious freedom. These plaintiffs argue that their state’s abortion ban impedes their ability to live out the commandments of their faith. Would the Supreme Court retrench its religious liberty doctrine in the face of these lawsuits? Or would expansive religious liberty exemptions be available for progressive views as well as conservative ones? Or neither? This Essay examines that question, as well as the implications of denying the progressive religious liberty claim.

Part I outlines the ballooning of religious liberty rights, and how they have usually helped conservative white Christians at the expense of less powerful groups. Part II applies the current expansive doctrine to a claim for a religious right to abortion, arguing it should succeed given recent decisions. Part III suggests that, despite the current doctrine, the Court will likely reject the claim and discusses what this failure indicates about the future of the Supreme Court.

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INTRODUCTION

One of the most notable trends in recent Supreme Court jurisprudence (especially since the conservative ascendancy) is the expansion of religious liberty rights.¹ The right to practice one’s faith is a core feature of a democracy, but the Supreme Court has privileged that right over other equally critical ones, most notably the right to equal treatment. Thus, for example, it has held that for-profit companies have a religious right to exclude contraception in their health insurance plans² and that nonprofit charities have a religious right to refuse to place foster children with same-sex couples.³

This privileging of religion even spills over into other areas. In *Dobbs v. Jackson Women’s Health Organization*,⁴ the Supreme Court upheld Mississippi’s fifteen-week abortion ban by eliminating the hitherto constitutional right to abortion. The ruling compromised the autonomy and equality of millions of women, who cannot control their

1. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 321 (“We show that from a statistical standpoint, the Roberts Court represents a sharp break from earlier Supreme Court religion jurisprudence” in large part due to “the appointment by Republican presidents of Supreme Court Justices who favor religious rights and liberties.”).

2. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709 (2014).

3. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

4. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

destinies or compete as equals without the ability to exert control over their own bodies.⁵ Although a substantive due process case, the abortion ban was motivated by the religious belief that life begins at conception.⁶ Indeed, the Supreme Court implicitly invoked this belief to distinguish abortion from all other substantive due process rights.⁷

In all these cases, the faith at issue was Christianity.⁸ And Christians have not yet finished asserting religious rights that compromise equality. Still up for resolution is whether nonprofit organizations and for-profit businesses with religious objections may claim a religious right to refuse to serve same-sex couples.⁹ Also at stake is whether Christian hospitals have a right to refuse gender-affirming care to transgender patients on religious grounds¹⁰ or whether Christian professors have a religious right to misgender their students,¹¹ among other claims percolating through the courts right now.¹² In other words, as expansive as religious liberty is now, it may become even more expansive.

5. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. at 2284 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

6. For example, when Mississippi Governor Phil Bryant signed the Mississippi ban challenged in *Dobbs*, he proclaimed, “I am committed to making Mississippi the safest place in America for an unborn child.” Jessica Ravitz, *Mississippi Bans Abortions at 15 Weeks, Earliest in the Nation*, CNN, <https://www.cnn.com/2018/03/19/health/mississippi-abortion-ban-15-weeks/index.html> [https://perma.cc/D59Z-TWH4] (Mar. 19, 2018, 7:02 PM). The current governor supports a total ban on the ground that he “believe[s] very strongly that that innocent unborn child in the mother’s womb is in fact a child” Ashton Pittman, *Gov. Reeves: Mississippi Will Ban Most Abortions from Conception if Roe Falls*, MISS. FREE PRESS (Dec. 6, 2021), <https://www.mississippifreepress.org/18665/gov-reeves-mississippi-will-ban-most-abortions-from-conception-if-ro-falls> [https://perma.cc/TCR8-H2V6].

7. See *infra* note 166.

8. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701–02 (2014) (Christian store owners); *Fulton*, 141 S. Ct. at 1875 (Catholic social service organization); see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018) (Christian bakers); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (2022) (Christian website designer).

9. The Supreme Court will soon decide *303 Creative v. Elenis*, where a Christian-owned company that designs websites asserts that it has a free speech right to discriminate against same-sex couples. 142 S. Ct. at 1106.

10. See, e.g., *Knight v. St. Joseph Health N. Cal.*, No. DR190259 (Cal. Super. Ct. Mar. 21, 2019); *Hammons v. Univ. of Md. Medical Sys. Corp.*, 551 F. Supp. 3d 567, 571 (D. Md. 2021).

11. See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 498, 502 (6th Cir. 2021).

12. See, e.g., *Hunter v. U.S. Dep’t of Educ.*, No. 6:21-cv-00474-AA, 2023 U.S. Dist. LEXIS 5745, (D. Or. Jan. 12, 2023) (considering whether schools receiving federal funds have the religious right to discriminate against LGBTQ+ students); *Doe v. Cath. Relief Servs.*, No. CV CCB-20-1815, 2022 WL 3083439 (D. Md. Aug. 3, 2022) (considering whether a religious nonprofit has a right to deny insurance benefits to same-sex spouses).

There is little indication that the Supreme Court intends to curtail religious liberty when the interest on the other sides help women or members of the LGBTQ+ community. But what if the religious liberty claim were not brought by a conservative Christian but by a progressive Christian, or not a Christian at all, and the religious belief collides with traditional Christian ideology? More precisely, what might be the result of a religious liberty challenge to an abortion ban? This question is not farfetched, as Jewish and other faith groups in multiple states have begun to challenge restrictive abortion laws based upon religious freedom. Plaintiffs in Florida,¹³ Kentucky,¹⁴ and Indiana¹⁵ argue that their state's abortion ban impedes adherents' ability to live out the commandments of their faith. Would the Supreme Court retrench its religious liberty doctrine in the face of these lawsuits? Or would expansive religious liberty exemptions be available for progressive views as well as conservative ones? Or neither? This Essay examines that question, as well as the implications of a denial of the progressive religious liberty claim.

Part I outlines the ballooning of religious liberty rights and how they have usually helped conservative white Christians at the expense of less powerful groups. Part II applies this expansive doctrine to a claim for a religious right to abortion, arguing it should succeed given recent decisions. Part III suggests that, despite the current doctrine, the Court will likely reject the claim and discusses what this failure indicates about the future of the Supreme Court.

I. EXPANSIVE RELIGIOUS LIBERTY PROTECTION

Religious liberty exemptions are available under both the U.S. Constitution's Free Exercise Clause and certain federal and state statutes.

13. Amended Complaint at 12, *Generation to Generation, Inc. v. Florida*, No. 2022 CA 000980 (Fla. 2d Cir. Ct. June 16, 2022); Complaint at 16–21, *Pomerantz v. Florida*, No. 2022-014373-CA-01 (Fla. 11th Cir. Ct. Aug. 1, 2022); see also Eliza Fawcett, *Synagogue Sues Florida, Saying Abortion Restrictions Violate Religious Freedoms*, N.Y. TIMES (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/florida-abortion-law-judaism.html>.

14. Yonat Shimron, *Three Jewish Women File Suit Against Kentucky Abortion Bans on Religious Grounds*, RELIGIOUS NEWS SERV. (Oct. 7, 2022), <https://religionnews.com/2022/10/07/3-jewish-women-file-suit-against-kentucky-abortion-bans-on-religious-grounds/> [<https://perma.cc/EW2E-6UVW>].

15. *Anonymous Plaintiff 1 v. Individual Members Med. Licensing Bd. of Indiana*, No. 49D01-2209-PL-031056 (Marion Super. Ct. Dec. 2, 2022); Johnny Magdaleno, *Indiana's New Abortion Law Runs Afoul of Religious Freedom Restoration Act*, LAW SUIT CLAIMS, INDIANAPOLIS STAR, <https://www.indystar.com/story/news/2022/09/08/indiana-abortion-law-runs-afoul-of-religious-freedom-restoration-act-lawsuit-claims/66888195007/> [<https://perma.cc/D4QP-ZYFQ>] (Sept. 8, 2022, 4:19 PM).

The statutes—the federal Religious Freedom and Restoration Act (RFRA)¹⁶ and its state counterparts¹⁷—arose in response to *Employment Division v. Smith*¹⁸ in 1990. In theory, *Smith* made free exercise exemptions harder to come by,¹⁹ though in reality they were scarce to begin with.²⁰ But the Supreme Court has remade the law again such that religious liberty exemptions have become readily available—at least for the conservative Christian litigants in most of the Court’s recent decisions.

The *Smith* Court held that neutral laws of general applicability do not violate the Free Exercise Clause.²¹ As a result, Free Exercise Clause exemptions were available solely from laws that targeted religion, which were few and far between.²² In addition, the challenged law had to substantially burden free exercise and fail strict scrutiny before the Free Exercise Clause mandated an exemption.²³ Even before *Smith* added the

16. RFRA attempted to reinstate the religious regime that existed prior to *Smith*. Stephen M. Feldman, *The Roberts Court’s Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 528 n.144 (2022). Although the Supreme Court held Congress had exceeded its jurisdiction with regard to state laws, RFRA still applies to federal laws. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

17. *See, e.g.*, Becket Fund, *Federal & State RFRA Map*, <https://www.becketlaw.org/research-central/rfra-info-central/map/> [<https://perma.cc/Q59G-ZCBF>] (last visited Feb. 28, 2023) (showing map indicating that roughly half of states, including Florida, Tennessee and Kentucky, have a state Religious Freedom Restoration Act); *see also* FLA. STAT. §§ 761.01–.061; TENN. CODE ANN. § 4-1-407; KY. REV. STAT. ANN. § 446.350 (West).

18. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

19. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (“Congress enacted RFRA in direct response to the Court’s decision in [*Smith*].”).

20. In fact, the Supreme Court had only granted exemptions in two situations. The first arose when religiously observant employees were denied unemployment for refusing to compromise their religious beliefs by working in a factory making arms or working on their Saturday Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 709 (1981); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 138 (1987). The second involved an exemption from mandatory school attendance for Amish students whose parents wanted their children to study at home in the Amish community rather than at public school. *Wisconsin v. Yoder*, 406 U.S. 205, 208–09 (1972). Notably, *Smith* did not overrule these decisions. *Smith*, 494 U.S. at 881–83.

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

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

23. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

extra non-neutral-or-generally-applicable requirement, the Supreme Court more often than not found that a law did not impose a substantial religious burden or that it satisfied strict scrutiny.²⁴ In short, the Court seldom granted religious exemptions.²⁵

The current Supreme Court has completely redrawn the religious liberty landscape.²⁶ Court-ordered religious exemptions, once fairly rare, have now almost become presumed. While there are many ways to organize the Court's immense expansion of religious liberty, I will focus on four changes. First, who can bring claims has been extended beyond individual people to encompass nonprofit social service groups and for-profit businesses. Second, either because of the Religious Freedom Restoration Act or the Court's redefinition of what qualifies as "neutral and generally applicable," claims for religious exemptions are no longer regularly rejected because the challenged law is neutral and generally applicable. Third, what counts as a substantial religious burden on a sincere religious belief warranting accommodation has stretched far beyond its previous bounds. Fourth, laws subject to strict scrutiny are now more likely to fail. Not only is strict scrutiny stricter than it was pre-*Smith*, but the Court tends to discount the government's competing interests, which are often barely acknowledged. And while not an explicit jurisprudential move, I note that it is primarily conservative Christians who have benefited from this expanded right to follow their faith regardless of the impact on others.²⁷

A. Corporations Entitled to Religious Exemptions

Before and during the *Smith* era, the prototypical free-exercise challenge was brought by a religious minority seeking exemption from laws designed for mainstream believers.²⁸ For instance, a member of the

24. RONALD J. KROTOSZYNSKI, JR., CHRISTINA E. WELLS, LYRISSA BARNETT LIDSKY & CAROLINE MALA CORBIN, *THE FIRST AMENDMENT: CASES AND THEORY* 746–49 (2017).

25. *Id.* at 746.

26. *See, e.g.*, Epstein & Posner, *supra* note 1, at 323–24 (“The popular notion that the Roberts Court represents a break in the development of the jurisprudence of the religion clauses is amply supported by the data. . . . Across the Warren, Burger, and Rehnquist Courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 83%.”).

27. *See, e.g., id.* at 338 (“In practice, the Court's rulings have mostly but not exclusively protected the conservative values of mainstream Christian organizations against secular laws, including public health orders to counter the COVID-19 pandemic and laws intended to prevent discrimination against sexual minorities and protect reproductive rights.”).

28. *See, e.g., id.* at 325–26 (“The Warren Court religion cases were notable for protecting minority or non-mainstream religions. . . . We find that in the Warren

Church of Jesus Christ of Latter-day Saints sought an exemption from bigamy laws to take a second wife.²⁹ A Jehovah's Witness challenged her denial of unemployment benefits because she refused to work on her Saturday Sabbath.³⁰ In another case, a Jewish rabbi in the military sought to wear his yarmulke while in uniform despite contrary Air Force regulations.³¹ *Smith* itself involved a member of a Native American church seeking to use peyote for sacramental purposes.³² Sometimes a church brought a challenge.³³ Businesses did not.³⁴

That is no longer the case. In *Burwell v. Hobby Lobby Stores, Inc.*,³⁵ the Supreme Court decided that closely held for-profit businesses were also entitled to assert religious liberty claims,³⁶ including a billion-dollar craft store empire.³⁷ The Christian-owned chain was religiously opposed to abortion, and the Court granted it an exemption from the Affordable Care Act's requirement that employers include FDA-approved contraception in their health insurance plans.³⁸ Although the reasoning in *Hobby Lobby* was based on the Religious Freedom Restoration Act,³⁹ the Court seamlessly imported the conclusion that businesses have religious liberty rights into its free exercise jurisprudence. Consequently, the Court has welcomed claims like

Court, no plaintiff was affiliated with a mainstream Christian religion; thus, all of the pro-religion outcomes benefited minority or dissenting religious groups.”).

29. *Reynolds v. United States*, 98 U.S. 145, 161–62 (1878).

30. *Sherbert v. Verner*, 374 U.S. 398, 400 (1963).

31. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986); see also *Braunfeld v. Brown*, 366 U.S. 599, 600–01 (1961) (considering Orthodox Jewish shop owners who sought exemption from mandatory Sunday closing law).

32. Native Americans were also the plaintiffs in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988) and *Bowen v. Roy*, 476 U.S. 693, 695 (1986).

33. See, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 381 (1990).

34. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 751 (2014) (Ginsburg, J., dissenting) (“There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.”).

35. 573 U.S. 682 (2014).

36. *Id.* at 719 (“[W]e hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”).

37. Scott Wilson, *What You Need to Know About the Hobby Lobby Billionaires*, ABC NEWS (June 30, 2014), <https://abcnews.go.com/blogs/politics/2014/06/what-you-need-to-know-about-the-hobby-lobby-billionaires> [<https://perma.cc/M237-ANTT>] (noting the business’s revenue was \$3.3 billion in 2013 and that the business recently won its Supreme Court case).

38. *Burwell*, 573 U.S. at 734–36.

39. *Id.*; see also Catherine A. Hardee, *Schrödinger’s Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C. L. REV. 1763, 1776 (2020) (“Given the haphazard way the Court has historically bestowed constitutional rights on corporations, however, there is reason to believe future decisions may treat corporate religious free exercise as a fait accompli.”).

Christian-owned Masterpiece Cakeshop’s that, under the Free Exercise Clause, it should be exempt from anti-discrimination laws because creating and selling wedding cakes to same-sex couples facilitates the sin of same-sex marriage.⁴⁰ Today, the Supreme Court is more likely to hear a case from a Christian business than a non-Christian individual.

B. Few Laws Are Neutral and Generally Applicable

Smith holds that neutral laws of general applicability are constitutional and do not trigger heightened scrutiny under the Free Exercise Clause. Accordingly, even though a federal drug law made it impossible for members of a Native American Church to observe their peyote sacrament, they had no constitutional claim because the law did not target religion.⁴¹ Despite this, neutrality and general applicability may no longer serve as gatekeepers to successful religious liberty claims for two reasons: (1) plaintiffs may challenge laws under the federal or a state Religious Freedom Restoration Act; and (2) the Supreme Court has redefined what it means to be “neutral and generally applicable” such that almost no law (federal or state) qualifies.⁴²

1. RELIGIOUS FREEDOM RESTORATION ACT

Almost immediately after *Smith* changed Free Exercise Clause doctrine, Congress passed the Religious Freedom Restoration Act in an attempt to restore the previous rules.⁴³ RFRA grants religious exemptions from any law (even if it was neutral and generally applicable) if the law imposes a substantial burden on religious exercise and fails strict scrutiny—the free exercise test that existed before *Smith*.⁴⁴ Although the Supreme Court held that Congress had exceeded its authority with regard to RFRA’s application to state laws,⁴⁵ Congress could apply its new rule

40. Hardee, *supra* note 39, at 1776; *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018).

41. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

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

43. The law itself explained that its stated purpose was “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . .” 42 U.S.C. § 2000bb(b).

44. *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997).

45. *Id.* at 519 (“Congress’ power under § 5, however, extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment. . . . Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been

to its own laws.⁴⁶ The upshot was that while religious liberty exemptions were less likely to be available under the Constitution (since most laws do not target religion), they would be readily available as a matter of statutory law, at least at the federal level. Meanwhile, many states passed their own Religious Freedom Restoration Acts to apply to their state laws.⁴⁷

2. MOST FAVORED NATION APPROACH TO NEUTRAL AND GENERALLY APPLICABLE

In addition to the availability of statutory law, the Supreme Court has redefined what it means for a law to be neutral and generally applicable in constitutional law. As originally conceived, a law was neutral if it did not target religion, and it was generally applicable if it applied broadly to the relevant population.⁴⁸ The two interrelated inquiries were designed to flush out hostile and discriminatory treatment of religion. However, animus toward religion is no longer the hallmark of a law lacking neutrality and general applicability. Instead, any law that does not accord “most favored nation” status to religion will not meet the neutral and general applicability threshold.⁴⁹

At first, the touchstone of the neutrality inquiry was whether “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.”⁵⁰ Hostile intent may be apparent on its face or inferred if religious activities are penalized in a way secular counterparts are not,⁵¹ such as a ban on killing animals as part of a ritual sacrifice but not killing animals for myriad other reasons, including for sport.⁵²

Along those lines, general applicability was designed to ensure that the government does not accomplish its goals at the expense of religious people or organizations alone: “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct

given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

46. *Id.*

47. *See* BECKET FUND, *supra* note 17.

48. *See infra* note 53 and accompanying text.

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

50. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

51. A neutral law must be neutral both on its face and in its intent. *Id.* at 534 (“The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”).

52. *Id.* at 536–37.

motivated by religious belief.”⁵³ Thus, a law was not generally applicable when religious conduct but not secular conduct must bear the cost, as may occur with a law burdening religion that was grossly underinclusive or riddled with exemptions.⁵⁴

The current reformulated approach, dubbed the “most favored nation” theory of free exercise,⁵⁵ holds that “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.”⁵⁶ While previously meant to ferret out animosity towards religion, neutral and general applicability now ensures that religious activity can never be treated worse than any comparable secular activity.⁵⁷ As a result, a law is not neutral and generally applicable if there is a single exemption for an arguably comparable secular activity, because in that case the exempted secular activity is treated better than its religious analog. This is the result even if one hundred comparable secular activities are treated worse than the religious one so long as one single comparable secular activity is treated better.⁵⁸ The Court will still conclude that the law discriminated against religion.⁵⁹

In fact, laws might not be neutral and generally applicable even if they have no secular exemptions, as the Court will cast its net widely to find secular counterparts. Any secular activity that undermines the law’s goals in the same way as the religious activity can be a secular counterpart: “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.”⁶⁰ For example, during a COVID-19 surge, California temporarily banned gatherings of more than

53. *Id.* at 543.

54. At one point, the Court acknowledged that, “[a]ll laws are selective to some extent,” as a single law could rarely resolve a problem on its own. *Id.* at 542.

55. *See, e.g.*, Greenhouse, *supra* note 49, at 4.

56. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

57. *Cf.* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 729–30 (describing how the *Smith* rule that laws that “bear no indicia of discriminatory intent” are constitutional would be eviscerated by such an approach).

58. R. George Wright, *Free Exercise and the Public Interest After Tandon v. Newsom*, 2021 U. ILL. L. REV. ONLINE 189, 190 (“[S]trict scrutiny would be applied even where the state treats the plaintiff’s activity substantially more favorably than most, but not all, comparable secular activities.”).

59. *See* Feldman, *supra* note 42, at 541 (“[T]he Roberts Court has found the government to be discriminating against religion so frequently that the exception has, in effect, swallowed the *Smith* rational basis test (at least for Christians).”).

60. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see also* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (“A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”).

three households in private homes, full stop.⁶¹ Whether the gatherings were secular or religious did not matter, and the law made no exceptions.⁶² Despite the absence of any secular exemption, the Court still concluded that the government discriminated against religion because it banned religious gatherings of three or more families at private homes while permitting “comparable secular activities,” namely secular gatherings of three or more families at public places like hardware stores and hair salons.⁶³ Although the record, the state’s public health officials, and the lower courts had determined that the former posed a greater risk than the latter, the Court rejected those conclusions.⁶⁴ Apparently, unless the state forbade the gathering of three or more families in every imaginable secular scenario—an impossibility given the existence of hospitals, schools, public transportation terminals, etc.—no limit would be deemed neutral and generally applicable.⁶⁵ As a result, laws that previously would have been found neutral, generally applicable, and constitutional, may now violate the Free Exercise Clause.

C. Substantial Burden Not Required

Doctrinally, the Free Exercise Clause (and the Religious Freedom Restoration Act) requires exemptions only for laws that substantially burden an objector’s sincere religious beliefs. This requires that their belief be religious,⁶⁶ sincere,⁶⁷ and that the law significantly impedes it. Yet, as the Supreme Court applies the requirement today, it veers on a formality. Indeed, it is not altogether clear whether the Supreme Court still requires a separate showing of substantial burden, at least in free

61. *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting).

62. *Id.* (Kagan, J., dissenting).

63. *Id.* at 1297.

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

65. *See id.* at 1296–99.

66. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

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

exercise cases where it has concluded that the law targets religion for disfavor.

1. SINCERE RELIGIOUS BELIEFS ARE RARELY PROBED

The Supreme Court has generally steered clear of probing inquiries into sincerity.⁶⁸ The worry is that courts may deem someone's unorthodox or eccentric religious conviction insincere because they are unfamiliar with it,⁶⁹ thereby passing judgment on religious beliefs in violation of the Establishment Clause.⁷⁰ That concern ought to play less of a role with the Christian litigants today, as their asserted beliefs are well known. Nevertheless, the Court has not questioned sincerity in any of its recent religious liberty decisions.⁷¹

Also rare is the question of religiosity. Religious liberty, whether via RFRA or the Free Exercise Clause, is protection for religious conduct not secular conduct.⁷² The issue seldom arises because most people articulate their objections in terms of religious belief.⁷³ Thus, questions about conduct being religious as opposed to secular are more often framed as an issue of sincerity rather than religiosity. Because the Court rarely scrutinizes sincerity with any rigor and almost never addresses religiosity, its current deferential treatment of both indicates a continuation of (rather than a departure from) prior treatment. The same cannot be said with regard to substantial burden.

68. Courts have, however, scrutinized the sincerity of prisoners' claims as well as those claiming a religious exemption from criminal drug laws. *See, e.g., Burwell*, 573 U.S. at 717 n.28 (pointing to *United States v. Quaintance*, 608 F.3d 717, 718–19 (10th Cir. 2010), which involved “the Church of Cognizance, which teaches that marijuana is a deity and sacrament”).

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

70. *See Chapman*, *supra* note 67, at 1196–97 (“In *United States v. Ballard*, the Court held that the Constitution forbids passing judgment on the accuracy of a religious accommodation claimant's beliefs, but not on the claimant's sincerity.”).

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

72. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (“Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”).

73. In a case of a conscientious objector opposing the draft, the Court had to decide whether beliefs not labelled “religious” should, nonetheless, be considered religious. *Welsh v. United States*, 398 U.S. 333, 340–42 (1970).

2. SUBSTANTIAL BURDEN IS EASILY SATISFIED

What has changed in recent years is the Court's dilution of the substantial burden requirement before a plaintiff is entitled to a religious exemption. Previously satisfied by significant direct burdens, this requirement now seems easily met.⁷⁴ Or perhaps the more accurate summary is that the observers of minority religions who used to bring claims sometimes had their religious burdens recognized and sometimes not,⁷⁵ while the Christians currently bringing claims are all but assumed to suffer significant burdens, even if the burden is indirect and attenuated.⁷⁶

Traditionally, religious observers were not exempted from all laws, only those that would impose a significant burden on their ability to live out their faith. Often their claims involved observance of a sacrament⁷⁷ or honoring the Sabbath.⁷⁸ However, if the law did not directly impact the religious exercise, there is a chance the burden would not be recognized. For example, the Orthodox Jewish shopkeepers in *Braunfeld v. Brown*⁷⁹ sought an exemption from a law mandating that stores close on Sunday.⁸⁰ To do so would force them to choose between observing their Sabbath or losing their business, as they already had to close on Saturday for Sabbath observance.⁸¹ The Court held the burden was too indirect to be viewed as a state-imposed substantial burden.⁸²

74. *Burwell*, 573 U.S. at 758 (Ginsburg, J., dissenting) (“The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial.”); Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 554 (2020) (“The ease with which the *Hobby Lobby* Court found a substantial burden was troubling. The statutory word ‘substantial’ qualifies the term ‘burden’ for a reason.”).

75. Notably, the two plaintiffs that did win free-exercise exemptions prior to *Smith* were both non-mainstream but still Christian: a member of the Jehovah Witnesses and Amish parents. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Yoder*, 406 U.S. at 205.

76. See Sherry Colb, *Free Exercise in the Mirror*, 2 N.C. C.R. L. REV. 67, 68 (2022) (noting that the Supreme Court “exhibited a profound empathy for the [Christian] religious petitioners in each case, *Masterpiece Cakeshop* [and] *Catholic Social Services*” yet little empathy for the same-sex couples they refused to serve).

77. See, e.g., *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (involving a claim brought by a member of a Native American church so that he could observe the peyote sacrament); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that members of a Santeria Church were not able to practice animal sacrifice, a core religious ritual).

78. See, e.g., *Sherbert*, 374 U.S. at 399 (involving a Jehovah’s Witness who brought a claim so she could keep the Sabbath holy).

79. 366 U.S. 599 (1961).

80. *Id.* at 601.

81. *Id.* at 602.

82. *Id.* at 606 (“To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature.”).

The Court has also held that some burdens, even on central religious observances, were too slight to count as substantial. There is no question that for someone who feels called to serve their God, training for the clergy is core to their religion practice.⁸³ Nevertheless, in *Locke v. Davey*⁸⁴ the Supreme Court held that the state's failure to subsidize a devotional theology degree in the same way it funded secular degrees was not a substantial but a "relatively minor" burden on Davey's free exercise.⁸⁵

The Roberts Court seems to have waived these restrictions. Take the Court's conclusion in a challenge to public accommodations law that endorsing or facilitating someone else's same-sex marriage is a substantial religious burden for those Christians who oppose same-sex marriage.⁸⁶ The burden seems quite attenuated.⁸⁷ Even assuming that opposition to same-sex marriage plays a central role in Christianity,⁸⁸ the government-imposed burden on religious conscience created by public accommodations law is not that the government is compelling marriage to someone of the same sex, or preventing their heterosexual marriage, or even compelling them to officiate the wedding of a same-sex couple. Rather, the anti-discrimination law requires that businesses perform a service that they hold out to the public for same-sex couples—*i.e.*, bake a cake for a couple if they sell wedding cakes, take photos of the couple if they provide wedding photography, or arrange bouquets if they are

83. Indeed, one could argue training for the clergy is not just core to their religious practice but core to their being.

84. 540 U.S. 712 (2004).

85. *Id.* at 725 ("[T]he exclusion of such funding places a relatively minor burden on Promise Scholars."). In fact, it was a well-established and commendable means for the state to recognize Establishment Clause strictures against government funding of churches and clergy. *Id.* at 722 ("[T]he interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play.").

86. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.").

87. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 760 (2014) (Ginsburg, J., dissenting) ("[T]he connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.").

88. "Thou shalt not support same-sex marriage" (opposition to same-sex marriage) seems less core to Christianity than the commandment "Thou shalt not kill" (opposition to abortion). The argument may be that the religious commandment at stake is the requirement to marry someone of the opposite sex. If so, it raises the question of whether remaining single violates the commandment as much as marrying someone of the same sex. In any event, while Congress did amend RFRA to make clear that religious belief need not be a central tenet, no such language compels the same conclusion for the Free Exercise Clause.

wedding florists.⁸⁹ (Of course, even if facilitating someone else’s “sin” is a substantial religious burden, providing a service like baking a cake is not what makes a wedding possible.)⁹⁰ In other words, even when the link between the law (prohibiting discrimination against customers based upon sex or sexual orientation) and the religious moral wrong (marrying someone of the same sex) is extremely attenuated, the Court will still hold it to be a substantial burden. Indeed, the Supreme Court emphasized that it will be deferential to claims of substantial burden in RFRA,⁹¹ and it has proven equally deferential in free exercise claims.

In fact, the requirement of substantiality itself appears to have evaporated.⁹² For example, a Christian coach’s assertion that his inability to pray in the middle of the school’s football field immediately after games as opposed to later or off the football field was accepted with no analysis as a substantial religious burden in *Kennedy v. Bremerton School District*.⁹³ To be clear, the school did not ban him from prayer

89. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

90. Christian schoolteachers make similar claims about a right to misgender transgender students. See, e.g., *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 833 (S.D. Ind. 2020). Again, the claim is not that the government violates their religious obligations by forcing them to become transgender, or even to provide transgender medical care. Rather, the argument is that their religious practice is substantially burdened if the government forces them to address transgender people by their proper pronouns on the grounds their religion does not recognize their existence.

91. *Burwell*, 573 U.S. at 725 (“[I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’”). Frederick Gedicks criticizes this deference by pointing out that “[i]t is folly to leave this question in the hands of persons so self-interested in the answer, however sincere their belief. A bedrock principle of Anglo-American due process holds that ‘[n]o man is allowed to be a judge in his own cause.’” Frederick Mark Gedicks, “*Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*,” 85 GEO. WASH. L. REV. 94, 100 (2017).

92. In *Fulton*, for example, the Court talks about the burden on the religious plaintiff but eschews the phrase “substantial burden.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (“As an initial matter, it is plain that the City’s actions have burdened CSS’s religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. . . . Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.”).

93. 991 F.3d 1004, 1013 (9th Cir. 2021) (describing how the school “suggested that ‘a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games.’ Kennedy, of course, could also pray on the fifty-yard line after the stadium had emptied, as he did on September 18.”).

while on the job.⁹⁴ Instead, the school asked him to either relocate his prayers to the sidelines or delay them if he insisted on using the school's football field.⁹⁵ Yet, the Court never acknowledged that the actual burden was a shift in the time or place of his after-game prayers rather than a total prohibition. Instead, the entire substantial burden analysis amounted to two sentences. After noting that the plaintiff must demonstrate a burden (not even a substantial burden)⁹⁶ on his sincere religious beliefs the Court wrote: "That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise."⁹⁷

While *Kennedy's* language raises the question of whether the burden still needs to be substantial, the COVID-19 decisions raise the question of whether plaintiffs need assert any burden at all in cases failing to treat religion as a "most favored nation." *Tandon v. Newsom's*⁹⁸ new "most favored nation" test makes no mention of substantial burdens:⁹⁹ "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."¹⁰⁰ It is not clear whether the Court assumed the inability to gather and worship in person was a substantial burden but did not articulate it,¹⁰¹ or whether it thought that the discrimination against religion was the substantial burden,¹⁰² or both. The bottom line is that the

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

95. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2438 (2022) (Sotomayor, J., dissenting) ("The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion.").

96. *Id.* at 2421–22 ("[A] plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened [versus substantially burdened] his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'").

97. *Id.* at 2422.

98. 141 S. Ct. 1294 (2021).

99. Indeed, the only "burden" *Tandon* mentions is the government's burden of proving the law passes strict scrutiny. 141 S. Ct. 1294, 1296 (2021). The word "burden" appears nowhere in the *per curiam* decision in *Roman Catholic Diocese* either. Instead, the Court holds: "Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

100. *Tandon*, 141 S. Ct. at 1296 (cleaned up).

101. For example, Justice Gorsuch's concurring opinion in *Roman Catholic Diocese* noted that "[n]or may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services." *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

102. A form of this most favored nation test also appears in free exercise funding cases. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017);

substantiality of the burden is no longer a distinct inquiry. Instead, the Court often proceeds directly from the failure to be neutral and generally applicable to strict scrutiny, with at most a brief stop for acknowledging a “burden,” effectively equating it to religious plaintiffs not being able to do exactly what they want.

D. The Strictest of Strict Scrutiny

Prior to *Smith*, strict scrutiny for free-exercise challenges was “strict in theory but feeble in fact.”¹⁰³ It was far from rigorous,¹⁰⁴ and the state regularly prevailed in free exercise challenges.¹⁰⁵ Not so anymore. The Court has ratcheted the strict scrutiny test up to “strict in theory and fatal in fact.”¹⁰⁶

Espinoza v. Montana Dep’t of Revenue, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022). If the government chooses to fund secular organizations (like secular private schools), it is discrimination against religion to refuse to fund comparable religious organizations (like religious private schools). See, e.g., *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”).

Once again, this discrimination is presumably the substantial burden. The idea is that it pressures the church to give up its religious character, and this pressure is burdensome. See *id.* at 2021–22. That this rule completely ignores the Establishment Clause prohibition against state funding of religion is waved away by claiming the discrimination was against the religious identity of the organization rather than the religious use of the money, as though religious schools are not pervasively religious and as though money is not fungible. *Id.* at 2023 (“Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.”).

103. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (“While in other constitutional areas the compelling state interest test is fairly characterized as ‘strict’ in theory and fatal in fact,’ in the religion cases the test is strict in theory but feeble in fact.”) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

104. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (calling free exercise scrutiny “strict in theory, but ever-so-gentle in fact”).

105. Feldman, *supra* note 42, at 526 (noting that prior to *Smith* “the Court consistently concluded that the government had satisfied strict scrutiny or that, in the specific factual circumstances, strict scrutiny was inappropriate”).

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

1. COMPELLING GOVERNMENT INTERESTS

First, the Court has downgraded many government interests that were previously held to be compelling. Promoting Establishment-Clause values is one government interest that used to be compelling but no longer is. In *Locke*,¹⁰⁷ where the state decided against funding scholarships for religious training, the Court held that while such avoidance was not required by the Establishment Clause, it was nonetheless a “historic and substantial state interest.”¹⁰⁸ In recent cases, that historical commitment to Establishment Clause values has been recharacterized as nothing more than a suspect “policy preference.”¹⁰⁹ Another formerly compelling interest is ending discrimination.¹¹⁰ In *Bob Jones University v. United States*,¹¹¹ a school with racist policies¹¹² had its free exercise challenge peremptorily rejected in part because the government’s interest in ending race discrimination was so obviously compelling.¹¹³ Recent Supreme

107. *Locke v. Davey*, 540 U.S. 712, 715 (2004). As mentioned above, in *Locke*, a student brought a free exercise challenge against Washington State for refusing to provide scholarship money to pursue his devotional theology degree. *Id.* at 717–18.

108. *Id.* at 725 (“Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.”); *see also id.* at 722 (“In fact, we can think of few areas in which a State’s antiestablishment interests come more into play.”). In any event, the denial of the scholarship was not a substantial burden. *Id.* at 720–21 (noting that the denial of funding “does not require students to choose between their religious beliefs and receiving a government benefit” and that “[t]he State has merely chosen not to fund a distinct category of instruction”).

109. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (dismissing the state’s decision to avoid direct funding of a church as a policy preference: “Yet the Department offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns.”); *Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022) (“But as we explained in both *Trinity Lutheran* and *Espinoza*, such an ‘interest in separating church and state ‘more fiercely’ than the Federal Constitution . . . ‘cannot qualify as compelling’ in the face of the infringement of free exercise.”).

110. Other government interests that prevailed included the need for uniformity of dress in the military, *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986), and the need for uniform collection of social security taxes. *United States v. Lee*, 455 U.S. 252, 258 (1982) (“This mandatory participation is indispensable to the fiscal vitality of the social security system.”). Granted, the Court gave unusual deference to the military. *Goldman*, 475 U.S. at 507.

111. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

112. The school denied admission to unmarried Black students and barred interracial dating. *Id.* at 580.

113. *Id.* at 604 (“The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history.”). The Court continued: “[t]hat governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.” *Id.*

Court cases, however, are more dismissive about ending discrimination as a compelling government interest, especially discrimination on the basis of sexual orientation.¹¹⁴ For example, while acknowledging that the equal treatment of gay couples was a weighty interest, the Court held that it did not outweigh a foster care agency's religious right to discriminate.¹¹⁵

Furthermore, even if the law furthers a government interest of the highest order in theory—like protecting lives—that does not automatically satisfy the requirement. To start, the precise question is not whether the government has a compelling interest in promoting health or ending discrimination or whatever its purported goal, but whether it has a compelling interest in refusing to grant a religious exemption.¹¹⁶ Consequently, rather than asking whether ending discrimination against same-sex couples is a compelling government interest, the question becomes whether preventing one social-service organization from discriminating is compelling.¹¹⁷ This framing puts a thumb on the scale since it considers only the consequences of one exemption rather than all the exemptions that will follow, and it sympathetically takes the viewpoint of the religious objector over those who are harmed by the religious exemption.

Moreover, the Court may question whether a law truly furthers a compelling government interest if the law is at all underinclusive, as underinclusiveness undermines the government's claim that its policy can admit no religious exemptions.¹¹⁸ If the law has a secular exemption, for example, the Court will likely conclude that the government "offers no compelling reason why it has a particular interest in denying an exception

114. *See* Colb, *supra* note 76, at 68 ("The selective empathy surfaced when the Court deployed an extremely broad definition of 'discrimination' for religious petitioners while, in the very same disputes, applied a far stingier and narrower definition of 'discrimination' for the governmental entities enforcing the laws prohibiting sexual orientation discrimination on behalf of LGBTQ+ persons, whose own rights and interests the Court downplayed.").

115. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) ("That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, . . . [o]n the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise.").

116. *Id.* at 1881 ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'").

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

118. *Id.* at 1882 ("The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures.").

to [the religious objector] while making them available to others.”¹¹⁹ This approach translates into the rule that the government’s interest in having the religious objector comply is not really compelling if the law is a first step to addressing a widespread problem or if it makes any secular exceptions that also undermine its goals. To prove it advances a compelling interest, the law may have to cover every circumstance where the government interest may be at stake, no exceptions allowed.

2. NARROW TAILORING

The narrow tailoring requirement has also become extremely demanding.¹²⁰ Narrow tailoring can be defeated by either a hypothetical alternative, even if difficult or expensive; or by any degree of underinclusiveness.

It has always been the case that an alternative to the challenged law that impinged less on a constitutional right would defeat narrow tailoring, which after all demands that there be no other way for the state to achieve its goals. However, the alternatives generally had to fall within reason. In *Hobby Lobby*, however, the Supreme Court argued that the difficult and expensive alternative of the government creating and funding an entirely new program defeated narrow tailoring.¹²¹ That the government must pay for this alternative was of no matter unless it could prove it was too expensive.¹²²

Moreover, even providing a single secular exception may well lead to a conclusion that a law was not narrowly tailored unless the government proves that the religious activity undermines the government’s goal more than the exempted secular activity. According to the Supreme Court, a state’s COVID-19 regulation failed strict scrutiny because “[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.”¹²³

119. *Id.*

120. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (describing the least-restrictive-means standard as “exceptionally demanding”).

121. *Id.* (“The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue . . . and HHS has not shown . . . that this is not a viable alternative.”).

122. *Id.* at 730 (“We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”).

123. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

In short, providing a single secular exemption while refusing to offer a comparable religious exemption can be fatal for a government resisting a religious exemption for at least three reasons. First, it provides sufficient evidence to conclude that the law is not neutral and generally applicable. Second, it casts doubt on the government's claim that it has a compelling government interest in refusing the religious exemption. Third, it suggests that the law is not narrowly tailored; if it can provide a secular exemption, why not a religious one?¹²⁴

II. RELIGIOUS LIBERTY EXEMPTION FROM ABORTION BANS

Over a dozen states in the United States have banned abortion at fifteen weeks or earlier.¹²⁵ Given the extremely expansive protection for religious liberties described in Part I, a Jewish woman seeking a religious exemption from one of these abortion laws should have a good chance of succeeding.¹²⁶ Judaism is no more monolithic than Christianity, and different strands have different views on the appropriateness and necessity of abortion.¹²⁷ Still, there are well-established Jewish views on abortion that conflict with abortion bans, especially in Reform Judaism. The most relevant is that in certain circumstances, Jewish law requires that a pregnancy be ended.¹²⁸ Abortion bans may make obeying this religious commandment impossible.¹²⁹ Because bans impose a substantial burden, are not neutral and generally applicable, and do not pass strict scrutiny under current doctrine, exemptions ought to be available.

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

125. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/XLY8-7CHK>] (Feb. 1, 2023).

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

127. See Rabbi Emily Langowitz & Rabbi Joshua R.S. Fixler, *Abortion and Reproductive Justice: A Jewish Perspective*, RELIGIOUS ACTION CTR. REFORM JUDAISM (Sept. 2, 2021), <https://rac.org/blog/abortion-and-reproductive-justice-jewish-perspective> [<https://perma.cc/KDG9-MPEG>].

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

129. Langowitz & Fixler, *supra* note 127.

A. *The Religious View*

That life is sacred is a belief shared by most faith groups, including Judaism.¹³⁰ However, unlike proponents of abortion bans, Jews do not share the view that life begins at conception.¹³¹ Not only is a pregnancy described as “mere water” before forty days,¹³² a pregnancy is considered part of the woman’s body until birth.¹³³ As the National Council of Jewish Women explained: “The fetus is not viewed as separate from the parent’s body until birth begins and the first breath of oxygen into the lungs allows the soul to enter the body.”¹³⁴ In fact, the Hebrew word for “soul” is the same as the Hebrew word for “breath.”¹³⁵

130. See, e.g., Rabbi Julie Zupan, *What Is the Reform Jewish Perspective on Abortion*, REFORMJUDAISM.ORG, <https://reformjudaism.org/learning/answers-jewish-questions/what-reform-jewish-perspective-abortion> [<https://perma.cc/889C-E986>] (last visited Mar. 3, 2023) (discussing the Jewish belief “that life is sacred”); see also, e.g., Complaint at *3, *Pomerantz v. Florida*, No. 2022-014373-CA-01 (Fla. Cir. Ct. Aug. 1, 2022) (“The sanctity of human life is *the* core tenet of Judaism.”).

131. NAT’L COUNCIL JEWISH WOMEN, *Judaism and Abortion*, <https://www.ncjw.org/wp-content/uploads/2019/05/Judaism-and-Abortion-FINAL.pdf> [<https://perma.cc/5KEE-MCGP>] (last visited Mar. 4, 2023).

132. Lisa Fishbayn Joffe, *Do Abortion Bans Violate Jews’ Religious Rights?*, BRANDEIS UNIV. (June 16, 2022), <https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-judaismjoffe.html> [<https://perma.cc/R5JG-WZSF>] (“The Talmud, a compendium of rabbinical commentaries and laws written during the first millennium C.E., characterizes a fetus as ‘mere water’ . . . before 40 days gestation.”); NAT’L COUNCIL JEWISH WOMEN, *Abortion and Jewish Values TOOLKIT* 16 (2020) [hereinafter NCIJW], https://www.ncjw.org/wp-content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf [<https://perma.cc/7PMA-F57X>] (“The Talmud (Yevamot 69b) asserts that the fetus is ‘mere fluid’ before 40 days of gestation.”).

133. See NAT’L COUNCIL JEWISH WOMEN, *supra* note 131. The Torah describes how a fight between two men ends up injuring a pregnant woman causing her to miscarry. The Torah then explains that the punishment for ending the pregnancy would be a fine, as compared to the punishment for fatally hurting the women, which is a life for a life. “The common rabbinical interpretation of this verse is that the men did not commit murder and that the fetus is not a person.” *Id.*; see also Joffe, *supra* note 132 (“If the fetus were seen as a full human being, the punishment would again be execution, not financial compensation.”).

134. See NAT’L COUNCIL JEWISH WOMEN, *supra* note 131; see also WOMEN’S RABBINIC NETWORK, *Abortion Care Is Health Care, Forcing Someone to Carry a Pregnancy Violates Jewish Law and Constitutional Rights* (June 24, 2022), <https://womensrabbinicnetwork.org/resources/Documents/WRN%20Statements/WRN%20Statement%20-%20Supreme%20Court%20Decision%20on%20Roe%20VS%20Wade.pdf> [<https://perma.cc/88DR-WAX5>] (“The Torah, the Mishnah, and the Talmud—Judaism’s most sacred and authoritative text—do not view a fetus as a soul until it is born. Rather, the fetus is considered part of the parent’s body until delivery.”).

135. WOMEN’S RABBINIC NETWORK, *supra* note 134.

Moreover, Jewish law commands that if a pregnancy threatens a woman, it must be destroyed.¹³⁶ While there is debate on the requisite level of threat,¹³⁷ there is general agreement that “it is considered a mitvah, a commandment, to save the life of a mother when she is at risk of life-threatening complications.”¹³⁸ Reform Judaism maintains that if the threat is either physical or psychological, the pregnancy must be terminated.¹³⁹ In other words, in certain situations Jewish law requires an abortion—a commandment that may be barred by abortion bans. Consequently, laws outlawing abortion may well deny Jewish women the right to abide by the commands of their faith. Abortion bans may also impede the ability of Jewish clergy to counsel their congregation and Jewish doctors the ability to provide the medical care their faith dictates.¹⁴⁰

B. Elements of the Religious Liberty Challenge to Abortion Bans

Not only is there a solid religious basis for Jewish women to bring a free-exercise claim (or a state Religious Freedom Restoration Act claim if the state has one), but the claim should have a good chance of

136. Zupan, *supra* note 130 (“Centuries ago, the Talmud concluded that the life of the mother always takes precedence over the fetus, teaching, ‘[I]f a woman who was having trouble giving birth . . . her life comes before its life’ (Mishneh Ohalot 7:6).”); see also Shira Silkoff, *What Does Judaism Believe About Abortion?*, JERUSALEM POST (May 28, 2020), <https://www.jpost.com/judaism/article-707738> [<https://perma.cc/W8MK-Y4CC>] (“Jewish views on abortion differ from denomination to denomination, although all agree that if a woman’s life is in danger due to her pregnancy, she can, or even must, undergo an abortion.”).

137. Langowitz & Fixler, *supra* note 127 (“Later commentators debate in great detail the implications of this text, particularly the breadth or narrowness of the definition of a threat to the life of the woman. Some are more permissive of a range of emotional as well as physical impacts . . .”).

138. Joffe, *supra* note 132. Joffe explains there are different justifications for this rule. One is simply that the fetus is not yet a life. The other is that even if a life, the fetus in this situation is a rodef, a pursuer, “a human who is trying to kill another human.” *Id.*

139. NCJW, *supra* note 132, at 16 (“[V]arious Jewish sources explicitly state that abortion is not only permitted but is required should the pregnancy endanger the life or health of the pregnant individual. Furthermore, ‘health’ is interpreted by many rabbis to encompass psychological health as well as physical health.”); WOMEN’S RABBINIC NETWORK, *supra* note 134 (“[F]orcing someone to carry a pregnancy that they do not want or that endangers their life is a violation of Jewish law because it prioritizes a fetus over the living adult who is pregnant.”); Joffe, *supra* note 132 (noting that even in Orthodox Judaism “the definition of when pregnancy jeopardizes the mother’s life has been expanded to include severe pain and suffering, including to her mental health”).

140. One Florida lawsuit was brought on behalf of rabbis complaining that their religious counseling could be viewed as aiding and abetting abortion subject to criminal liability: “Given their general duties and work as Jewish Clergy, Plaintiffs intend to engage in counseling regarding abortion beyond the narrow limits of HB 5 and, therefore, risk incarceration and financial penalties.” Complaint, *supra* note 130, at 6.

succeeding under the current state of religion jurisprudence. In fact, some Catholic Bishops originally opposed the federal RFRA precisely because it would invite religiously based abortion claims.¹⁴¹ Below, I detail how the claims by Jewish women satisfy each of the three requirements for a free exercise claim (or two requirements for a RFRA one): (1) the abortion ban is not neutral and generally applicable, (2) it imposes a substantial religious burden on Jewish women trying to live their faith, and (3) the abortion ban fails strict scrutiny. While I focus on the Jewish faith and Indiana's abortion ban (due to a recent judicial decision), similar claims can be made by women from other religions and in other states.¹⁴²

Under Indiana law, all abortions are illegal from the moment of conception with three exceptions.¹⁴³ The first allows termination if necessary to save the pregnant women's life or if necessary to avert "a serious risk of imminent substantial and irreversible physical impairment of a major bodily function."¹⁴⁴ The second permits abortion if the fetus has a "lethal fetal anomaly."¹⁴⁵ The third allows victims of rape or incest to end their pregnancy during the first ten weeks.¹⁴⁶

141. Marci A. Hamilton, *The Religious Freedom Restoration Act Formula Comes Full Circle in Florida*, VERDICT (June 20, 2022), <https://verdict.justia.com/2022/06/20/the-religious-freedom-restoration-act-formula-comes-full-circle-in-florida> [<https://perma.cc/263T-PVEY>] ("The bishops were the first religious lobbyists who understood that RFRA could be invoked to undermine abortion restrictions, and they lobbied against it.").

142. *See, e.g.*, Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note 128, at 9–10 ("Islam also does not believe that a fetus is ensouled at the moment of fertilization or conception. . . . Muslim scholars indicate that within 40 days of conception, it is proper and appropriate to seek an abortion for any reason Once the fetus reaches 40 days from conception, conservative Muslim scholars believe that an abortion must be available if there is a pressing need that justifies it in the eyes of Islamic law. . . . includ[ing] the physical or mental health of the mother.").

143. *Id.* at 4.

144. *Id.* Almost all bans have similar exemptions except for a handful that allow abortion only to prevent death but not serious permanent physical injury. *See also* GUTTMACHER INST., *supra* note 125.

145. Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note 128. Other state abortion bans with a similar exception include Louisiana, West Virginia, Florida, Utah, South Carolina. GUTTMACHER INST., *supra* note 125. *See also* FLA. STAT. § 390.0111(1)(c) (requiring that "two physicians certify in writing that, in reasonable medical judgment, the fetus has a fatal fetal abnormality").

146. Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note 128, at 5. Bans in Idaho, Mississippi, West Virginia, and Utah also contain an exception for race or for incest. *See* GUTTMACHER INST., *supra* note 125.

1. BANS ARE NOT NEUTRAL AND GENERALLY APPLICABLE

Although a law's neutrality and general applicability is irrelevant for a RFRA claim,¹⁴⁷ laws that are neutral and generally applicable do not violate the Free Exercise Clause. Under *Tandon's* "most favored nation" theory of free exercise, "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."¹⁴⁸ Because Indiana's abortion ban provides exceptions for secular reasons but not comparable religious ones—as is true for most abortion bans—it is therefore not neutral and generally applicable.

This conclusion does assume that the religious and secular exemptions are comparable, and perhaps they are not. One might argue that providing an exception to save a woman's life is not comparable to providing an exception to allow that woman to practice her faith. However, the question is not whether the activities are the same, but whether they undermine the government's interest to the same degree.¹⁴⁹ If the government's interest is protecting the fetus, then allowing abortion for one reason is arguably comparable to allowing abortion for just about any other reason. The pregnancy ends regardless.

But perhaps the goal is preventing the death of a person (a goal that will be discussed in more detail under strict scrutiny); if so, then ending a life to save a life is not comparable to ending a life to allow religious practice. Nor is ending a pregnancy that will be doomed to die—another exception permitted by Indiana—the same as ending one that is not.

However, Indiana's law contains additional exceptions. Like practically all bans, it also allows exceptions to prevent serious physical injury to the pregnant person. Granted, this is a narrow exception—narrower than Jewish law requires—as it excludes psychological injury and serious physical injuries that do not rise to the level of permanent disability of a major bodily function. But if states are willing to provide an exemption to prevent serious physical injury, then under existing doctrine it is religious discrimination to refuse to provide an exemption to prevent serious spiritual injury, which is the result when the law forbids Jewish women from living according to the dictates of their faith.¹⁵⁰

147. All that is necessary for a RFRA exemption is that a law impose a substantial burden on religious exercise and fail strict scrutiny. *See supra* notes 44–46 and accompanying text.

148. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

149. *Id.* ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.").

150. Similarly, if a state is willing to provide an exemption to avoid mental anguish for a secular reason (carrying pregnancy due to rape) it should be willing to

2. BANS IMPOSE A SUBSTANTIAL BURDEN ON A SINCERE RELIGIOUS EXERCISE

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

a. Sincere Religious Belief

Jewish plaintiffs should have little difficulty in establishing that their belief is both sincere and religious. As described in Part I, the Supreme Court rarely challenge a plaintiff’s sincerity.¹⁵¹ Nor should there be any doubt that the belief that the woman’s well-being takes priority over the pregnancy is religious rather than political, given the well-established support for it in the Torah and Talmud.¹⁵² Plus, Judaism is hardly an obscure religion unfamiliar to the Court, especially with Jewish Justices on the bench.¹⁵³ That not all Jews interpret Jewish law the same way should not matter any more than the fact that not all Christians oppose same-sex marriage or abortion: Judaism is not a monolithic religion any more than Christianity is.¹⁵⁴

b. Substantial Burden

Nor should plaintiffs have trouble establishing that abortion bans substantially burden their religious exercise. Indeed, any claim otherwise is untenable given the other burdens that have been deemed substantial. The Court has recognized that when a religion opposes a certain type of marriage, forcing a believer to facilitate or endorse such a marriage is a substantial burden.¹⁵⁵ The case is even stronger if a religion opposes a

provide an exception to avoid mental anguish for a religious reason (carrying a pregnancy against God’s commandments).

151. See *supra* Section I.C.1.

152. See *supra* notes 130–40 and accompanying text.

153. On the contrary three recent justices have been Jewish—Justice Breyer, Justice Ginsburg, and Justice Kagan, who is still on the Court.

154. Sillkoff, *supra* note 136.

155. The Court has also held that providing health insurance coverage for a medicine that may possibly induce an abortion is a substantial burden—a claim the Court accepted on the grounds that the religious objectors believed that they were facilitating sin. In that case, it was not certain an abortion would occur as there was only a possibility that the medicines might terminate a fertilized egg. *Little Sisters Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377 (2020) (“We held that the mandate substantially burdened respondents’ free exercise, explaining that ‘[if] the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price. . . . If these consequences do not amount to a

certain type of pregnancy, and the law forces a believer to actually undergo that pregnancy. The pregnant person is not merely endorsing or facilitating someone else's irreligious conduct; she herself is failing to honor a commandment.¹⁵⁶

This conclusion is stronger still given that it is not clear whether plaintiffs need establish a distinct burden on their religious practice if the law is discriminatory. Neither *Tandon* nor *Roman Catholic Diocese* included a substantial burden analysis.¹⁵⁷ Instead, the Court seemed to hold that all that was required to trigger strict scrutiny was discrimination against religion in the form of refusing the religious exemption while providing comparable secular exceptions.¹⁵⁸ The free exercise funding cases also proceeded directly from finding religious discrimination to applying strict scrutiny, skipping any substantial burden analysis.¹⁵⁹ Thus, religious challenges to abortion bans with a health exception or rape exception should have no trouble meeting the substantial burden requirement.

substantial burden,' we stated, 'it is hard to see what would.'"). If being forced to facilitate a possible religious breach was a substantial burden, then surely being forced to actually and definitely commit one is, too.

156. If it is a substantial burden to end a pregnancy for those who believe that a fetus is more valuable than the woman carrying it, then it must be a substantial burden to fail to end a pregnancy for those who believe that the endangered woman is more valuable than the fetus she is carrying.

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

158. See *supra* note 157 and accompanying text.

159. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022). Take *Trinity Lutheran*, where the Supreme Court applied strict scrutiny to a state's decision not to award a cash grant to a church for its school playground. *Trinity Lutheran*, 137 S. Ct. at 2017, 2022. "[I]t was nothing short of ludicrous to assert that the denial of a playground resurfacing grant would significantly burden the church's free exercise of religion." Erwin Chemerinsky & Barry P. McDonald, *Eviscerating a Healthy Church-State Separation*, 96 WASH. U.L. REV. 1009, 1045 (2019). Indeed, because the Court held the playground was a secular endeavor, the denial has no direct impact at all. *Trinity Lutheran*, 137 S. Ct. at 2023. Instead, the Court suggests that if the state discriminates against churches, it pressures them to give up their religious character. *Id.* at 2024. That claim, too, is hard to take seriously. No church is going to stop being a church to qualify for a playground grant. Instead, what seems to most offend the Court is its assumption that denying taxpayer money to a church amounts to discrimination. See *id.* "It is just the mere fact that religion was treated differently that now seems to matter." Chemerinsky & McDonald, *supra*, at 1047.

3. BANS FAIL STRICT SCRUTINY

Finally, the government should expect an uphill battle in establishing that it has a compelling interest in denying the religious liberty exemptions while allowing others. The law's uunderinclusiveness may also defeat narrow tailoring. In fact, the current six-to-three Supreme Court has not yet held that any law passed strict scrutiny in a free-exercise challenge.¹⁶⁰

a. No Compelling Government Interest

The most established compelling interest the government will proffer is its interest in saving lives. According to Indiana, for example, any abortion “ends the life of an innocent human being” and the state has a compelling interest in protecting the death of these “vulnerable human beings.”¹⁶¹ Few would dispute that avoiding the murder of innocents constitutes a compelling government interest. But, of course, this assertion that a fifteen-week (or six-week) abortion ban saves lives depends on the belief that life begins at conception, something the Jewish lawsuits reveal is not a universal truth but a particular religious viewpoint.¹⁶² As the court that rejected this interest as compelling pointed out, “the State’s interest is based entirely on the legislative determination that ‘human physical life’ begins when sperm meets egg.”¹⁶³ This it cannot do.¹⁶⁴ When life begins is a theological determination beyond the

160. In the past ten years, the Supreme Court has never rejected a free-exercise or RFRA-religious-liberty claim. Even in the prison context, where historically the Supreme Court deferred to prison officials, the Court rejected arguments that the state’s ban on a pastor’s audible prayers and laying hands on a Christian death-row inmate during his execution was the least restrictive means of furthering the government’s interests. *Ramirez v. Collier*, 142 S. Ct. 1264, 1280–81 (2022). Not all the Justices came to the same conclusion in an Establishment Clause case that involved a Buddhist death-row inmate seeking the presence of a Buddhist spiritual advisor at his execution in a prison that made Christian advisors available, *Murphy v. Collier*, 139 S. Ct. 1475, 1478 (2019) (Alito, J., dissenting) (dissenting from stay of the execution along with Thomas and Gorsuch, finding it to be a delay tactic), or a Muslim death-row inmate seeking the presence of a Muslim imam at his execution in a prison that made Christian chaplains available. *Dunn v. Ray*, 139 S. Ct. 661 (2019) (dissolving stay because inmate claim was not timely).

161. Order Granting Plaintiffs’ Motion for Preliminary Injunction, *supra* note 128, at 32 (quoting Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, at 32–33).

162. *See id.* at 35–36.

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

164. As Rabbi Michael Adam Latz explained, “[w]hile I certainly understand that there are people who disagree with me, in a nation for which religious pluralism is a hallmark, to impose one religious tradition on this is not actually how a democracy functions, it’s how a theocracy functions.” Lindsay Schnell, *Jews, Outraged by Restrictive Abortion Laws, Are Invoking the Hebrew Bible in the Debate*, USA TODAY,

Court's competence—and a holding from *Roe* that the Court has not yet overruled.¹⁶⁵

For state law to insist that one theological position on a religiously contested issue is “true” should violate the First Amendment. As an Establishment Clause matter, the Court has repeatedly insisted that the secular government cannot choose sides in theological debates.¹⁶⁶ As a Free Exercise Clause matter, it cannot reject as false the religious belief that life does *not* begin at conception.¹⁶⁷ Because the *Dobbs* Court applied only rational basis scrutiny to the challenged abortion ban, it never squarely addressed whether abortion bans further a compelling government interest and was therefore able to distance itself from its oft-repeated claim that abortion is murder.¹⁶⁸ However, because the Jewish challenges to abortion bans trigger strict scrutiny, they directly present the question: if abortion bans save lives, then they further a compelling government interest. If, however, they further the religious belief of some that abortion bans save lives, then the conclusion is not foregone.

<https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/> [<https://perma.cc/28BT-NE9E>] (July 28, 2019, 4:56 PM).

165. *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”).

166. *Zorach v. Claiborn*, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects.”); *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (“State governments, like the Federal Government, have been required to refrain from favoring the tenets or adherents of any religion [or] from insinuating themselves in ecclesiastical affairs or disputes.”); *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring) (“When the government appropriates religious truth, it transforms rational debate into theological decree.”) (cleaned up).

167. Indeed, “the Court made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

168. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2258 (2022) (“What sharply distinguishes the abortion right [is that] [a]bortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”); *id.* at 2256 (“There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being.”); *id.* at 2250 (“Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be ‘with quick child’—only that she be ‘with child.’”) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 201 (1799)); *cf.* Ken Armstrong, *Draft Overturning Roe v. Wade Quotes Infamous Witch Trial Judge with Long-Discredited Ideas on Rape*, PROPUBLICA (May 6, 2022, 1:50 PM), <https://www.propublica.org/article/abortion-roe-wade-alito-scotus-hale> [<https://perma.cc/9UHM-SFB9>] (recounting more of Hale’s views).

To avoid this problem, the Court may characterize the state's interest as saving potential life or protecting fetal life.¹⁶⁹ Protecting potential life may be legitimate, even important, but nowhere in *Casey*¹⁷⁰ nor in *Dobbs*¹⁷¹ does the Supreme Court proclaim that this interest is compelling before viability.¹⁷² This declaration too should raise Establishment Clause questions. In any event, even if a state had a compelling interest in fetal life generally, it would probably fail to demonstrate that it had a compelling interest in refusing to take steps to avoid serious injury to a pregnant woman's spiritual well-being when it willingly did so to avoid serious injury to her physical well-being. After all, when rejecting the government's interest in ending discrimination against the LGBTQ+ community as compelling, the Supreme Court noted, "[t]he creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures."¹⁷³

A ban with no exceptions whatsoever does not necessarily solve the state's difficulty because¹⁷⁴ unless the state bans abortion from the moment of conception, then the state must explain why it is willing to allow abortion at certain time periods but not for certain religious practices. As a practical matter, however, laws with no exceptions do not exist. Even states that effectively ban abortion for the entire pregnancy

169. *Cf. Dobbs*, 142 S. Ct. at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life.").

170. *Casey* regularly characterizes the state's interest as legitimate and even substantial, but never compelling. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) ("[T]here is a substantial state interest in potential life throughout pregnancy.").

171. Recall that because rational basis scrutiny applied in *Dobbs*, all that was needed to uphold the abortion ban was a legitimate state interest. *Dobbs*, 142 S. Ct. at 2284 ("A law regulating abortion, . . . must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development.") (cleaned up).

172. The *Indiana* decision argues that the *Dobbs* decision failed to overrule *Casey*'s explicit holding that the government's general interest in fetal life does not become compelling until viability. Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note 128, at 35 ("While *Dobbs* determined that the Constitution does not protect a fundamental liberty interest in abortion, *Dobbs* said nothing to suggest that the nature of the State's interest has somehow changed."). To the extent *Casey*'s holding depended on balancing two competing interests, however, the Indiana court's conclusion is less certain.

173. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

174. What if the ban had no exception for women who were raped, no exceptions for women whose fetus had severe or fatal fetal anomalies, no exceptions for women who would suffer serious or permanent disability, or no exception for pregnancies that might kill them?

still allow abortion if the woman's physical life is in danger,¹⁷⁵ almost all allow abortion to forestall serious and permanent disability,¹⁷⁶ and several allow abortion if the pregnancy is the product of rape or incest.¹⁷⁷

b. Not Narrowly Tailored

The same exceptions that throw into question whether the state's interest in enforcing its ban against Jewish women is truly compelling also undermine the state's claim that its law is narrowly tailored. As the Supreme Court repeatedly argued in its COVID-19 decisions, if the government can make an exception for a secular reason, then surely it can make an exception for a religious reason.¹⁷⁸ Only if the government can prove that the religious exception undermines the government's goal more than the secular exception might the law still satisfy narrow tailoring.¹⁷⁹ As discussed earlier, the government's goal of promoting potential life is as undermined by allowing exceptions for physical health (the secular reason) as they are by allowing exceptions for spiritual health (the religious reason).¹⁸⁰ Therefore, the government should fail to make its showing. Instead, according to current doctrine, the refusal to accommodate people's sincere religious beliefs merely reflects hostility towards religion.¹⁸¹

Narrow tailoring can be defeated by secular underinclusiveness even if the law lacks secular exemptions. So long as the law fails to cover some secular counterpart that poses a comparable risk to the government's goal, then the law will not be deemed narrowly tailored.¹⁸² Recall that California's law limiting all gatherings at private homes to three households whether religious or secular was not narrowly tailored because it did not impose similar limits on gatherings outside the home.¹⁸³

175. As of January 1, 2023, states that ban abortion from the moment of conception include Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. See GUTTMACHER INST., *supra* note 125. Those that ban it from six weeks include Georgia, Iowa, Kentucky, Louisiana, North Dakota, and Oklahoma. *Id.*

176. Out of the 18 most restrictive states, all but 5 (Arkansas, Mississippi, Oklahoma, South Dakota, and Texas) create exceptions for their abortion ban when "the individual suffers from a condition that risks 'substantial and irreversible impairment' or 'imminent peril' of a 'major bodily function.'" *Id.*

177. Of the five out of eighteen states that do not have a health exception, one has a rape exception. Thus, only four states with restrictive laws have a sole exception allowing abortion to save the life of the pregnant parent. *Id.*

178. See *supra* notes 116–17 and accompanying text.

179. *Id.*

180. The rape exceptions are even more comparable to the religious exceptions in that they both involve the psychology well-being of the pregnant woman.

181. See *supra* notes 57–61 and accompanying text.

182. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021).

183. *Id.*

Under that logic, even a law barring abortion after fifteen weeks with no exceptions still has to reckon with the fact that it allows abortion that are not even medically necessary at fourteen weeks but fails to allow them when they are religiously necessary after fifteen weeks, and therefore should not be considered narrowly tailored. After all, an earlier abortion ends potential life to the same degree as a later abortion.¹⁸⁴ The government might claim that they are not comparable: a fetus at twelve weeks is less developed than a fetus at sixteen weeks. But if the goal is protecting fetal life, a twelve-week fetus is as much a fetus as a sixteen-week fetus.¹⁸⁵

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

III. THE SUPREME COURT'S RESPONSE AND IMPLICATIONS

Under existing precedent—precedent that the current Justices on the Supreme Court created—the Jewish challenges should succeed. And yet, most religion scholars and commentators doubt that they will.¹⁸⁶ This dissonance suggests that even the Court's own jurisprudence will fail to curtail its outcome determinative rulings, and that it must be reined in by some other means.

The Court should feel compelled to rule in favor of the Jewish claimants. If so, the Jewish victory would make clear that the Court's expansive religious liberty protections are available to everyone, not just those at one end of the political spectrum. Religious progressive could

184. *Id.* at 1297 (“First, California treats some comparable secular activities more favorably than at-home religious exercise Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of transmission than applicants’ proposed religious exercise at home.”) (cleaned up).

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

186. Elizabeth Sepper, *Free Exercise of Abortion*, 48 *BYU L. REV.*, at *20 (forthcoming 2023) (on file with author) (“While some courts may engage in principled application of the doctrine that the Court has created, over time courts seem likely to reject pro-abortion religious claims even as they privilege anti-abortion views.”); David Schraub, *Liberal Jews and Religious Liberty*, 98 *N.Y.U. L. REV.*, at *33 (forthcoming 2023) (predicting that “liberal Jewish claimants” will not “be entitled to the expansive protections offered by the new free exercise jurisprudence”); (Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, *IOWA L. REV.* (forthcoming July 2023) (manuscript at 22), <https://ssrn.com/abstract=4266006> (“[W]e are skeptical that the Supreme Court will ultimately require religious exemptions from restrictions on abortion.”); *cf.* Feldman, *supra* note 42, at 510 (“With a conservative bloc of six justices, the Court seems even less likely to reach progressive conclusions.”)).

then mobilize that protection in ways that further progressive values.¹⁸⁷ Alternatively, if the Jewish litigants lose, their loss should lead to a contraction or at least a freezing of religious rights, whose expansion has come at the expense of the equality of those most vulnerable, whether they be the LGBTQ+ community worrying about discrimination¹⁸⁸ or the immunocompromised population worrying about COVID-19.¹⁸⁹ I am not sure which is preferable,¹⁹⁰ but either ruling would suggest at least some consistency in the Court's decision-making.

However, almost no one expects that the current Supreme Court will hold that devout Jews have a religious liberty right to an exemption from abortion bans.¹⁹¹ It is well known that the conservatives currently wielding power on the Supreme Court share the conservative Christian view of states passing these bans.¹⁹² With regard to abortion, many

187. See, e.g., Elizabeth Reiner Platt, *Breaking the Conservative Monopoly on Religious Liberty*, 20 REV. FAITH & INT'L AFFS. 13, 13–14, 23 (2022); see also ELIZABETH REINER PLATT, KATHERINE FRANKE, KIRA SHEPHERD & LILIA HADJIIVANOVA, WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT 80–85

(2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/W_hose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf

[<https://perma.cc/7FPR-WCTE>]; Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 4–5 (2022) (“In recent years, plaintiffs have argued that the federal RFRA or state RFRAs protect the right to perform same-sex marriage ceremonies, provide food and water to migrants in the desert, open a safe-injection site, protest at nuclear power facilities, halt construction of the border wall on one’s land, challenge the U.S. Food and Drug Administration’s prohibition on blood donations from sexually active men who have sex with men, and provide sanctuary to refugees.”).

188. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723–24 (2018); see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

189. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–69 (2020); see also *Tandon v. Newsom*, 141 S. Ct. 1294 1296–97 (2021).

190. See Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 539 (2020) (“A deep tradition exists among many religious progressives that shares the secular liberal concern over the disadvantages and inequities that can flow from an overzealous accommodation of religion.”).

191. Cf. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1078 (2022) (noting that “[i]n the last five years, judicial partisanship in free exercise cases has crescendoed”); cf. *id.* at 1068 (“[I]n deciding free exercise challenges by religious plaintiffs to COVID-19 lockdown orders, 0% of Democratic-appointed judges sided with religious plaintiffs, 66% of Republican-appointed judges sided with religious plaintiffs, and 82% of Trump-appointed judges sided with religious plaintiffs[.]”).

192. See Epstein & Posner, *supra* note 1, at 338–39 (“The Justices who are largely responsible for this shift are Clarence Thomas, Samuel Alito, Neil Gorsuch, John Roberts, and Brett Kavanaugh. . . . [T]hey are clearly the most pro-religion justices on the Supreme Court going back at least to World War II. They are also all Christian, mostly Catholic, religiously devout (though this variable provides a weaker explanation than the others), and ideologically conservative. Amy Coney Barrett will likely advance

Justices were selected precisely because of their hostility toward abortion rights.¹⁹³

But surely the current Justices support religious rights? After all, they created an incredibly expansive religious liberty protection. Accordingly, they have laid the groundwork for this very type of challenge, and this case should at least be difficult for them. The key to understanding the Supreme Court’s religious liberty jurisprudence is that it is not, in fact, interested in religious liberty for all. If they were, the Court would not have decimated the Establishment Clause, given that one of the main functions of the Establishment Clause is to protect the religious liberty of religious minorities.¹⁹⁴ Instead, the Court upheld the government’s thirty-two-foot Latin cross in the middle of a busy highway and government Christian prayers before town meetings.¹⁹⁵ It has created a presumption of constitutionality for existing religious monuments, symbols, and practices¹⁹⁶—all of which will be Christian as no other religion historically has had the power to create state monuments, symbols or practices.¹⁹⁷ Indeed, its very turn towards a “history and

this trend.”); see also Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/5J7Q-94ZL>].

193. Trump made no secret of the fact that he chose people based on their keenness to eliminate the protections of *Roe v. Wade*. Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/XLQ3-V5MJ>] (Oct. 19, 2016, 9:31 PM).

194. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO STATE L.J. 89, 103 (1990) (“[T]he establishment clause has become a *de facto* substitute for an independent equal protection analysis of the treatment of religious minorities by the state”); Caroline Mala Corbin, *The Supreme Court’s Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 858 (2020) (“[T]he Establishment Clause operates as an Equal Protection Clause for religious minorities and is meant to ensure that no one is treated as a second-class citizen because of their religious beliefs.”).

195. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019); *Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014). The Court has also created a legal regime that requires government money to be funneled to religious schools—the overwhelming majority of which are Christian—if it opts to fund private schools in any way. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (denial of taxpayer money violated Christian church’s free exercise); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2255 (2020) (denial of state benefit violated Christian school’s free exercise); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (denial of taxpayer money violated Christian school’s free exercise). And the beneficiaries in the cases that created these rules were all Christian.

196. *Am. Legion*, 139 S. Ct. at 2082.

197. See, e.g., Epstein & Posner, *supra* note 1, at 337 (“Relaxation of the Establishment Clause has benefited mainstream Christian (including Catholic) organizations because Christianity remains the overwhelmingly dominant religion in the

tradition” approach for Establishment Clause challenges reaffirms Christianity’s hegemony in the United States.¹⁹⁸ As one scholar concluded, “[t]he Roberts Court has transformed Establishment Clause doctrine to protect Christianity while not similarly protecting non-Christian religions.”¹⁹⁹ In short, this is not a Court that cares about everyone’s religious rights, especially if they might step on the toes of Christian believers.²⁰⁰ On the contrary, any attempt to end Christian favoritism is immediately labeled hostility to religion.²⁰¹ Instead, the current Supreme Court is a Court that supports Christian religious rights, particularly those of conservative Christians and Christian nationalists.²⁰²

How will the Court justify this outcome, which seems so contrary to the expansive protection for religious liberty its own doctrine has created? The Court may avoid a substantive ruling altogether by refusing to grant certiorari or finding some procedural defect (like standing) that it would nevertheless waive in another case. If a circuit split compels a

United States, and in many jurisdictions evangelical Christians exercise significant political power.”); see also Feldman, *supra* note 42, at 534 (noting “the nation’s history of de facto Christianity”).

198. In *Kennedy v. Bremerton*, the Supreme Court eliminated both the *Lemon* test and the endorsement test for Establishment Clause challenges, instructing that the Establishment Clause must be interpreted by “reference to historical practices and understandings.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

199. Feldman, *supra* note 42, at 529.

200. Recent religious cases that have helped non-Christians did not in any way affect the rights of Christians. For example, the Court held that a Buddhist on death row had an equal right to a Buddhist advisor—a result that affects Christians not at all. *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019). In sum, “they willingly protect non-Christians when their interests converge with those of Christians. In other words, the justices will protect the religious freedom of non-Christians so long as it harmonizes with de facto Christianity.” Feldman, *supra* note 42, at 557–58.

201. For example, the idea that the government should stop mounting Christian displays is equated to “[a] government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine”—an act that “will strike many [like the current Supreme Court!] as aggressively hostile to religion.” *Am. Legion*, 139 S. Ct. at 2084–85; *id.* at 2087 (“[A] campaign to obliterate items with religious associations may evidence hostility to religion . . .”). Feldman, *supra* note 42, at 514 (“With ominous frequency, the conservative justices have expressed a type of Christian grievance, indignant that the nation’s religiously diverse population does not welcome manifestations of de facto Christianity.”); Chemerinsky & McDonald, *supra* note 159, at 1009 (noting that in *Trinity Lutheran*, “the Court treated the anti-establishment clause of the Missouri Constitution . . . as a form of invidious religious discrimination that warranted strict scrutiny under the Free Exercise Clause”).

202. See Epstein & Posner, *supra* note 1, at 326–27 (“The top five most pro-religion judges sit on the Roberts Court; they are Republican appointees [and] they are ideologically conservative . . .”); Feldman, *supra* note 42, at 514 (“The thesis of this Article is that the Roberts Court, to a great extent, has adopted this conservative approach in religious freedom cases, returning to some supposedly idyllic pre-1937 constitutional jurisprudence—sustaining a white, Christian America.”); see also Corbin, *supra* note 194, at 835–36.

ruling on the merits, the Court will no doubt distinguish these abortion-ban religious-liberty cases from its previous religious-liberty cases. It may argue that rules apply differently when seeking an exemption from criminal law as opposed to civil law.²⁰³ It may argue that despite its deference to claims of burden in this case the objections were insincere or political rather than religious. Or, much like their claim that the substantive due process right to abortion was different from all other rights because it involved potential human life,²⁰⁴ they may argue the exemption from abortion bans sought here is different from all other requests for religious exemptions because it jeopardizes potential human life, conveniently ignoring that the challenges to emergency COVID-19 regulations also raised matters of life and death.²⁰⁵ Or it may simply and brazenly hold that the government's interest in life is compelling at every stage and that it overwhelms rights to the contrary.²⁰⁶

The reality is that the current Supreme Court is unlikely to let itself be cornered into applying its own doctrine to reach results it does not like. This Court will not hesitate to manipulate or change doctrine in order to obtain its desired outcome. And its decision will highlight how not even the Court's own jurisprudence will reign it in. Instead, curtailment will have to come in some other form.

CONCLUSION

The Supreme Court has greatly expanded the availability of religious exemptions, even when doing so denied women fundamental health care and LGBTQ+ families equal access to public accommodations and government-funded social services. With such a generous religious liberty jurisprudence, religious exemptions should be equally available from abortion bans that prevent observance of religiously mandated abortions. Yet despite crafting a doctrine that seems to privilege religion, the Supreme Court is expected to rule against those seeking religious

203. This distinction is less persuasive given that COVID-19 regulations can be civil or criminal. Betsy Pearl, Lea Hunter & Kenny Lo, *The Enforcement of COVID-19 Stay-at-Home Orders*, *CTR. FOR AM. PROGRESS* (Apr. 2, 2020), <https://www.americanprogress.org/article/enforcement-covid-19-stay-home-orders/> [<https://perma.cc/22GU-JRLS>].

204. See *supra* notes 4–7 and accompanying text.

205. When the Supreme Court decided *Roman Catholic Diocese v. Cuomo* in November 2020, vaccines were still not available, and they were not yet widely available when the Court decided *Tandon v. Newsom* in April 2021. See *COVID-19 and Related Vaccine Development and Research*, *MAYO CLINIC*, <https://www.mayoclinic.org/coronavirus-covid-19/history-disease-outbreaks-vaccine-timeline/covid-19> [<https://perma.cc/6WJ4-B7D4>] (last visited Mar. 4, 2023).

206. See *supra* notes 156–58 and accompanying text (discussing why claiming life or potential life as a compelling interest from conception raises Establishment Clause problems).

exemptions from abortion laws. In the end, the Supreme Court has not expanded religious liberty but facilitated conservative Christianity. Its jurisprudence does not create religious liberty for all.

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