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Pro-Life Laws Do Not Threaten Religious Freedom

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KEY TAKEAWAYS

Abortion advocates say having an abortion need only be consistent with one's beliefs or conscience to constitute an "exercise of religion."

Under the Free Exercise Clause and statutes protecting religious exercise, however, conduct must be caused by religious belief to be an exercise of religion.

Properly understood, pro-life laws are in harmony with religious freedom and legal challenges based on religious exercise should fail.

In *Roe v. Wade*,[1] the Supreme Court held that the word "liberty" in the Fourteenth Amendment's Due Process Clause includes a "right of privacy" that is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[2] This constitutional assertion was "[c]ontroversial from the moment it was released."[3] Within months, some of America's leading constitutional scholars, most of whom personally favored abortion rights, became its harshest critics. Professor John Hart Ely, for example, called it a "very bad decision...because it is...not constitutional law and gives almost no sense of an obligation to try to be."[4]

The Supreme Court struggled to maintain what it had created as more than two dozen abortion cases landed on its docket, changing the description of the right it had created and revising the rules for implementing that right. While the Court reaffirmed *Roe*

itself in 1983,[5] it retreated to reaffirming *Roe*'s "general principles" in 1986[6] and could reaffirm only its "essence" in 1992.[7]

Three decades later, in *Dobbs v. Jackson Women's Health Organization*,[8] the Supreme Court overruled *Roe* and *Planned Parenthood v. Casey*,[9] holding that "the Constitution does not confer a right to abortion" and that "the authority to regulate abortion must be returned to the people and their elected representatives."[10] The Court said that *Roe* had been "egregiously wrong and deeply damaging" and that the *Roe* Court had "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.... Together, *Roe* and *Casey* represent an error that cannot be allowed to stand."[11]

As abortion advocates shifted their legal attack on pro-life laws to state courts,[12] which they hope will be a more hospitable venue, they revived the argument that these laws violate the right to freely exercise one's religion. They argue that having an abortion qualifies as an exercise of religion if it is generally consistent with one's beliefs or conscience. Laws prohibiting abortion substantially burden that religious exercise, they claim, and, therefore, are unconstitutional under the appropriate legal standard.

Some say this might be the "sleeper legal strategy that could topple abortion bans."[13] These challenges have been brought primarily under state laws that mirror the federal Religious Freedom Restoration Act (RFRA), which, in turn, mirrors the Supreme Court's traditional interpretation and application of the First Amendment's Free Exercise Clause. This *Legal Memorandum* evaluates the religious exercise argument against pro-life laws in that context.

Abortion and the First Amendment

Principles. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] The historical understanding of the Free Exercise Clause provides several principles that guide this analysis.

First, the Free Exercise Clause protects both belief and conduct. The First Amendment's drafters replaced the phrase "rights of conscience" from early versions with "the free exercise [of religion]"[15] in the final, ratified text. Doing so made clear that the clause "protects religiously motivated conduct as well as belief."[16]

Second, the Free Exercise Clause does not extend to "claims of conscience based on something other than religion."[17] Indeed, the Supreme Court has unanimously held that "'[o]nly beliefs rooted in religion are protected by

the Free Exercise Clause.... Purely secular views do not suffice.'"[18] In a series of speeches in the fall of 2015, Senator Orrin Hatch (R–UT) explained the origin, nature, and significance of religious freedom in America. He started with the "first principles"[19] that led America's Founders to view religious exercise as both a fundamental and inalienable right and to give it "special protection."[20] No decision, Hatch explained, "is more fundamental to human existence than the decision we make regarding our relationship to the Divine."

As a result, "[n]o act of government can be more intrusive or more invasive of individual autonomy and free will than the act of compelling a person to violate his or her sincerely chosen religious beliefs."[21] This is why, James Madison argued in his "Memorial and Remonstrance Against Religious Assessments," that religious exercise is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[22]

The third principle is especially important for this analysis. To constitute an exercise of religion, conduct, or refraining from conduct,[23] must be caused by, or be the product of, religious belief. Oliver Thomas, the General Counsel of the Baptist Joint Committee on Public Affairs and chairman of the grassroots Coalition for the Free Exercise of Religion, made this point during the Senate Judiciary Committee's September 1992 hearing on RFRA. To be an exercise of religion, he explained, "[c]onduct must be caused by religion; it must be the reason for the conduct."[24] The degree of causation can range from compulsion[25] to affirmative motivation or direction, but conduct that is not actually caused by religious belief is not an exercise of religion and, therefore, not protected by the Free Exercise Clause.

Strict Scrutiny. The Supreme Court saw very few Free Exercise Clause cases until the 1940s, when religious adherents began challenging laws that were facially religion-neutral but which nonetheless negatively impacted religious exercise. The principles noted above crystallized into an approach to Free Exercise Clause challenges that had two elements. First, it focused on the "character of the right"[26] to exercise religion, acknowledging with the Founders that this right is in "a preferred position."[27]

Second, the Court examined the effect of government action on this right rather than the form such government action might take. The Court, for example, rejected the distinction between generally applicable laws and those that single out or target religious exercise.[28] A license tax, the Court held, "certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance."[29]

This view of the character of the right to exercise religion and the ways that government can actually burden it led to application of a rigorous legal standard that is often called *strict scrutiny*.[30] Only the "gravest abuses, endangering paramount interests," the Supreme Court held, "give occasion for permissible limitation" of religious exercise.[31] In practice, government can justify an "inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest."[32]

Abortion Advocates' Religious Exercise Argument

Abortion advocates began making constitutional arguments against pro-life laws in the 1960s, including the suggestion that they violate the Free Exercise Clause. The goal of this argument is to subject laws prohibiting abortion to strict scrutiny by treating having an abortion as an exercise of religion. Writing in 1968, for example, Professor Roy Lucas suggested that prohibiting abortion may interfere with a woman's right to act on her belief regarding whether a fetus can "be equated in value with a human being."[33] Three scholars developed the religious exercise argument further four years later, asserting that pro-life laws violate the First Amendment by burdening "individuals who wish to [obtain an abortion] in a manner *consistent with* their religious beliefs."[34]

In *Webster v. Reproductive Health Services*,[35] which challenged a Missouri pro-life law, 36 religious groups filed an *amicus curiae* brief arguing that "each woman should be free to consult with her religious convictions...without government coercion or constraint when exercising religious and personal conscience in making a decision whether to terminate her pregnancy."[36] This assertion is misleading on its face. Government cannot coerce or constrain anyone from consulting his or her convictions, religious or otherwise, about anything. What abortion advocates really mean is that a woman should be free, after any consultation she may conduct, to actually do whatever she decides to do. This is, however, no different than the argument the Supreme Court accepted in *Roe*—and rejected in *Dobbs*—that the Constitution protects a right to abortion. There is nothing distinctively religious about it.

Abortion advocates seek to eliminate two of the Supreme Court's Free Exercise Clause principles: the requirement that belief be religious rather than secular and that it be the cause of conduct deemed to be an exercise of religion. Ignoring those principles, abortion advocates assert that having an abortion is an exercise of religion if it is generally "undertaken with moral responsibility"[37] or results from a decision that is "conscientious"[38] or made "on the basis of conscience."[39] Should that argument succeed, and the burden

shift to the government, abortion advocates then challenge the assertion that a law prohibiting abortion is the least restrictive means of furthering the compelling governmental interest in protecting human life in the womb. This argument is incompatible with either the historical understanding of the Free Exercise Clause or RFRA.

Abortion and Religious Beliefs. The Supreme Court has long held that, to constitute an exercise of religion under the First Amendment, conduct must be, to some degree, caused by religious belief. In a memo dated June 11, 1992,[40] the Congressional Research Service concluded that, while not "limited to any particular verbal formula in describing what constitutes a religious exercise for First Amendment purposes,"[41] the Supreme Court had "frequently [found] the religious practice in question to have been *compelled or commanded* by religious belief."[42] The memo cited many precedents, including those finding that the government had violated the Free Exercise Clause.

- In *Sherbert v. Verner*,[43] the Court held that denying unemployment benefits to a Seventh-Day Adventist who was fired for not working on her Sabbath violated the Free Exercise Clause by "forc[ing] her to choose between following the precepts of her religion and forfeiting benefits...and abandoning one of the precepts of her religion in order to accept work."[44]

- In *Thomas v. Review Board*,[45] the Court held that denying unemployment benefits to a Jehovah's Witness fired for refusing to participate in the production of armaments or war materials violated the Free Exercise Clause. In this case, which involved "conduct proscribed by a religious faith," the government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[46]

- In *Hobbie v. Unemployment Appeals Commission*,[47] the Supreme Court found a Free Exercise Clause violation in denying unemployment benefits to a Seventh-Day Adventist who was fired after refusing to work on Saturday. Citing *Sherbert* and *Thomas*, the Court held that the state "may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits...and abandoning one of the precepts of her religion in order to accept work.'"[48]

The memo also cited precedents in which the Supreme Court upheld government action against a Free Exercise Clause challenge.

- In *Braunfeld v. Brown*,[49] the Supreme Court held that a law requiring businesses to close on Sunday did not violate the Free Exercise Clause even though it restricted business activities of Orthodox Jewish merchants whose faith also "requires the closing of their places of business" on Saturday.[50]

- In *United States v. Lee*,[51] the Supreme Court held that imposition of Social Security taxes on an Old Order Amish employer did not violate the Free Exercise Clause even though participation in the Social Security system was "forbidden by the Amish faith."[52]

- In *Goldman v. Weinberger*,[53] the Supreme Court held that a military dress code did not violate the Free Exercise Code even though it effectively prevented a rabbi from wearing a yarmulke that was "required by his religious faith."[54]

- In *O'Lone v. Estate of Shabazz*,[55] the Supreme Court held that prison regulations did not violate the Free Exercise Clause even though they prevented Muslim inmates from attending a religious service that is "commanded by the Koran."[56]

The Supreme Court directly addressed this caused by-versus-consistent with issue in the abortion context in 1980. In *Harris v. McRae*,[57] the plaintiff raised several constitutional claims, including violation of the Free Exercise Clause, against the Hyde Amendment, which prohibits the use of federal funds to pay for most abortions.[58] She claimed that it violated the freedom of women to decide whether to have an abortion "in accordance with the teaching of their religion and/or the dictates of their conscience."[59] In other words, she wanted the protection of the Free Exercise Clause without any necessary connection to religious beliefs at all. The Supreme Court rejected this argument, dismissing the Free Exercise Clause claim because the plaintiff had not "alleged, much less proved, that she sought an abortion under *compulsion* of religious belief."[60]

Employment Division v. Smith

This was the state of the Supreme Court's Free Exercise Clause jurisprudence in 1990. To constitute an exercise of religion, conduct had to be caused, that is, compelled or at least affirmatively motivated or directed, by sincerely held religious beliefs. Government action burdening that religious

exercise, whether generally applicable or targeted at religion, had to meet the demands of strict scrutiny.

The Supreme Court dramatically changed this approach in *Employment Division v. Smith*.[61] A private drug rehabilitation organization fired two employees for ingesting peyote during Native American Church ceremonies. The state denied their application for unemployment benefits, deeming their religious use of the drug to be work-related "misconduct." They sued in state court, alleging that this action violated their First Amendment right to exercise religion. The Oregon Supreme Court agreed, and the case went to the U.S. Supreme Court.

The parties in *Smith* disagreed about the application of strict scrutiny, but neither had questioned, let alone briefed or argued, whether strict scrutiny should remain the standard in Free Exercise Clause cases.[62] It took everyone by surprise, therefore, when the Supreme Court, in a majority opinion by Justice Antonin Scalia, embraced the distinction it had previously rejected between government action that is "specifically directed at…religious practice"[63] and action that is "generally applicable."[64]

Going forward, the Court held, strict scrutiny would apply only in the small fraction of Free Exercise Clause cases in which the government overtly targets religious exercise or that involve "the Free Exercise Clause in conjunction with other constitutional protections."[65] In all cases in which burdening the exercise of religion is "the incidental effect of a generally applicable and otherwise valid provision," however, the "First Amendment has not been offended."[66]

By placing form over substance, *Smith* guaranteed that the vast majority of government interference with religious practice, no matter how severe, would never violate the First Amendment.[67] In a concurring opinion, Justice Sandra Day O'Connor, who would also have sided with the government but by following the Court's established jurisprudence, observed:

> The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice.[68]

Smith's procedural and substantive problems have been extensively documented[69] and, while agreeing with the result in a 2021 case, *Fulton v. City of Philadelphia*, Justice Samuel Alito presented a comprehensive case for overruling it.[70] Significantly, *Smith* shares two of *Roe v. Wade*'s serious errors.

First, each decision announced a profound constitutional change without attempting to interpret the provision in question.[71] Second, the conclusion in each case was instead motivated by what the Court considered a desirable result. In *Roe*, the Court created a right to abortion to avoid the "detriment" for women from prohibiting abortion.[72] In *Smith*, the Court restricted the First Amendment's protection for religious exercise to avoid "courting anarchy" and "open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[73]

Aside from whether such speculation is a valid basis for interpreting and applying the Constitution, *Smith*'s prediction was particularly ill-founded. The Supreme Court had been applying strict scrutiny to all Free Exercise Clause claims for decades without any jurisprudential anarchy. In fact, although strict scrutiny appears to be a highly protective standard, courts rarely found that the government had crossed the constitutional line. In a 1988 review, for example, then-Professor John Noonan found that federal appeals courts ruled for the government in Free Exercise Clause cases 90 percent of the time.[74] That record cannot be called "anarchy" under any definition of that term.

In *Smith*, Scalia acknowledged that "leaving accommodation [of religious exercise] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[75] Professor Michael McConnell has put it more bluntly: "The Court in *Smith* delivered free exercise rights into the hands of Congress and of every state legislature, city council, and administrative agency in the land. Every lawmaking body is now free to forbid religious exercise with formally neutral rules."[76]

Holding that "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws"[77] was, according to McConnell, "a sweeping disaster for religious liberty."[78] Only two years after *Smith*, a Congressional Research Service report described its already grim impact: "In only one instance subsequent to Smith has a court found the government regulation in question to be a religiously neutral law of general applicability but nonetheless held it to violate the free exercise clause."[79]

Abortion and the Religious Freedom Restoration Act

President Bill Clinton signed RFRA into law on November 16, 1993, following its unanimous passage in the House and 97–3 approval in the Senate. The following review of RFRA's legislative development shows that Congress took deliberate steps to ensure that it would be a "statutory version of

the Free Exercise Clause."[80] Like the Free Exercise Clause had before *Smith*, RFRA requires that, to constitute an exercise of religion, conduct must be caused by religious belief. RFRA's supporters and critics agreed that this includes conduct that is compelled, as well as affirmatively motivated or directed, by religious belief.

101st Congress (1989–1990). Representative Stephen Solarz (D–NY) introduced H.R. 5377 on July 26, 1990, just three months after *Smith*. It would allow the government to "restrict any person's free exercise of religion" only if "application of the restriction to the person is essential to further a compelling government interest; and is the least restrictive means of furthering that compelling government interest."[81] It would apply to all federal and state government restrictions enacted before or after the bill became law.[82]

The parallel between RFRA and the Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence was immediately apparent and grew more explicit as the legislative process continued. Neither this bill nor its Senate counterpart, S. 3254, which was introduced by then-Senator Joseph Biden (D–DE), defined "exercise of religion." They did, however, provide that "[s]tanding to assert a claim or defense...shall be governed by the general rules of standing under article III of the Constitution."[83] Those rules included the Supreme Court's holding in *Harris* that standing for a religious exercise challenge to a pro-life law requires religious compulsion. No one raised the abortion issue during the September 27, 1990, hearing on the bill before the House Judiciary Subcommittee on Civil and Constitutional Rights.[84]

In January 1991, the National Right to Life Committee (NRLC) and the United States Catholic Conference[85] began asserting that abortion advocates' Free Exercise Clause argument in *Webster* could also apply to RFRA. "The argument of the pro-abortion partisans," wrote the NRLC general counsel, "does not require that a woman's religion *compel her* to have an abortion. Rather, her religion need only compel her to make a conscientious decision."[86] RFRA, he argued, "would restore to viability a free exercise claim against abortion legislation which is currently effectively precluded by the *Smith* decision."[87]

Three of the nation's most prominent religious liberty scholars pushed back. In a letter dated February 21, 1991, Professors Michael McConnell and Douglas Laycock, joined by Dean Edward Gaffney, explained that RFRA would restore the Supreme Court's pre-*Smith* understanding that, to constitute an exercise of religion, conduct must be caused by religious belief. In their view, this included conduct that is "*motivated* by religious belief"[88] but excluded "any conduct that one's religion deems *permissible*" or that is merely "consistent with religious belief."[89]

Representative Solarz agreed. Religious motivation and compulsion are different degrees of causation, while being "merely consistent with, or not proscribed [by] one's religion"[90] abandons any causal connection altogether.[91] The Free Exercise Clause required that conduct be caused by religious belief before *Smith*, and RFRA would do so after.

102nd Congress (1991–1992). Solarz re-introduced RFRA as H.R. 2797 on June 26, 1991. It provided: "Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person is essential to further a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[92] While not defining an "exercise of religion," the bill added as a statement of purpose that it would "restor[e] the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is burdened."[93]

Sherbert and *Yoder* were the primary Free Exercise Clause precedents when the Supreme Court held in *Harris* that standing to assert a Free Exercise Clause claim against a pro-life law requires a showing of religious compulsion.[94] Citing *Sherbert* and *Yoder*, therefore, reinforced the retained statutory language that "[s]tanding to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution." This understanding of RFRA's scope and application received additional support after Solarz introduced the new language.

- In the first of two analyses, the Congressional Research Service concluded that "the free exercise clause operates to protect a person who performs an act *required* by his religion to be performed or who declines to perform an act because his religion *forbids* the doing of that act."[95]

- In November 1991, 10 national pro-life organizations[96] issued a letter stating that "[b]ased upon our own independent analysis, we do not believe that this legislation could be used to secure a broad, new right to abortion."[97]

- On April 30, 1992, leaders of national pro-life organizations[98] joined an analysis[99] concluding that RFRA "tracks the language of the free exercise clause and the Supreme Court's traditional interpretations of that provision."[100] The argument that RFRA would make pro-life laws harder to defend than under the Free Exercise Clause, the analysis concluded, "suggests that the right to life and the right to freely exercise religion are mutually exclusive. They are not."[101]

103rd Congress (1993–1994). Then-Representative Charles Schumer (D–NY) introduced H.R. 1308, the bill that would become law later that year, on March 11, 1993. It added "substantial" to "burden" and retained provisions about restoring the Supreme Court's traditional application of strict scrutiny, Article III standing principles, and the focus on addressing religious exercise burdens "to the person." The House Judiciary Committee approved the bill without change, noting in its report the Congressional Research Service's conclusion that RFRA could not be used to overturn pro-life laws.[102] "To be absolutely clear," the report said, "the bill does not expand, contract, or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*."[103]

The report also included a section of additional views by seven pro-life Judiciary Committee Members, including Representative Henry Hyde (R–IL).[104] They acknowledged that their earlier concern that RFRA might make religious exercise challenges to pro-life laws easier has "been resolved either through explicit statutory language or has been addressed in the Committee report."[105] Similarly, during the brief House floor debate, Hyde repeated that his concerns about RFRA's impact on abortion-related claims "have been resolved either through explicit statutory changes or through committee report language."[106]

Senator Edward Kennedy (D–MA) introduced S. 578 on March 11, 1993, with the same language as its House counterpart. The Senate Judiciary Committee approved the bill and its report, issued on July 27, 1993, included language similar to the House report regarding RFRA having no impact on abortion-related cases.[107]

Personal vs. Systemic Beliefs. Understanding which conduct constitutes an exercise of religion under RFRA requires taking account of one additional change to its language. Following RFRA's enactment, lower courts began insisting that, to constitute an exercise of religion, conduct must be motivated by a "*central tenet* of a person's religious belief"[108] or the dogma of an established religious body. Congress unanimously enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 1997,[109] which defines an exercise of religion as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"[110] and applied that definition to RFRA.

This definition mirrored Supreme Court precedents that rejected this limitation. In *Thomas v. Review Board*,[111] a Jehovah's Witness worked at a foundry and machine plant in Indiana and was transferred to a department

that made turrets for military tanks. Asserting that the principles of his religion did not allow him to work on producing weapons and unable to identify another job at the plant that would accommodate his religious beliefs, he quit and applied for unemployment benefits. After a hearing, despite finding that "claimant did quit due to his religious convictions," the state agency denied the application. The Indiana Court of Appeals reversed, and the Supreme Court of Indiana vacated that decision, describing the plaintiff as having "quit work voluntarily for personal reasons."[112]

The U.S. Supreme Court unanimously reversed, holding that while the Free Exercise Clause protects only "beliefs rooted in religion,"[113] courts may not impose additional criteria. "[R]eligious beliefs," the Court held, need not be "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[114] The Indiana Supreme Court had concluded that the plaintiff's beliefs were "philosophical" rather than "religious" because his substantive explanation of those beliefs was less than precise and that other Jehovah's Witnesses working at the plant did not have the same objection. Writing for the majority, however, Chief Justice Warren Burger explained that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[115] It is enough that the plaintiff had "an honest conviction that such work was forbidden by his religion."[116]

In *Frazee v. Illinois Dept. of Employment Security*,[117] the plaintiff refused a temporary retail position because it would require him to work on Sunday. Frazee said he was "a Christian" but was not a member of an established religious sect or church and did not claim that his refusal to work stemmed from a "'tenet, belief or teaching of an established religious body.'"[118] The state agency denied his application for unemployment benefits because his refusal of work was not "based upon some tenets or dogma...of some church, sect, or denomination."[119] Refusal based solely on "an individual's personal belief is personal and noncompelling and does not render the work unsuitable."[120] The Illinois Court of Appeals agreed, distinguishing that case from *Sherbert* or *Thomas v. Review Board*. The U.S. Supreme Court reversed and rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[121]

Rather than eliminate the need for a causal relationship between religious belief and conduct,[122] therefore, RLUIPA simply clarified that the belief causing the conduct in question need not be drawn from a formal body of religious tenets or be "central" to either personal belief or external dogma. Religious belief, however, must still be the cause of the conduct. Like

the Free Exercise Clause had, RFRA requires an honest conviction that an action is required, or at least affirmatively motivated or directed, by one's religious beliefs.

Even if this were not already clear from the text and history of both the Free Exercise Clause and RFRA, requiring this causal connection is especially appropriate in the abortion context. Abortion intentionally ends the life of a human being.[123] In *Dobbs*, the Supreme Court described "an unbroken tradition," extending back more than seven centuries, "of prohibiting abortion on pain of criminal punishment."[124] Even when creating a right to abortion in *Roe v. Wade*, the Supreme Court still emphasized that the presence of a second human being limited that right in important ways. Abortion, the Court has acknowledged, is a "unique act"[125] that is "inherently different" than the conduct at the heart of other privacy rights.[126] In fact, this difference is so significant that the Court in *Roe* questioned whether other privacy precedents were even relevant in the abortion context.[127] The taking of another human being's life, therefore, warrants something more than a vague consistency with personal belief or a "conscientious decision" to be protected as an exercise of the fundamental right to practice religion.

RFRA Supporters' Arguments

Abortion was the most challenging issue disrupting an otherwise smooth legislative process and threatening the virtually unanimous consensus behind RFRA. House pro-life leaders, including Representative Hyde, were concerned that, even with revised language, RFRA would provide an independent statutory basis for abortion if the Supreme Court overruled *Roe v. Wade*.[128] RFRA supporters, including many pro-life organizations, made several arguments against exempting abortion cases from strict scrutiny under RFRA.

First Argument. RFRA advocates argued that RFRA was already abortion-neutral, as the Free Exercise Clause had been. It required applying strict scrutiny to substantial burdens on religious exercise but left application of that standard to the courts in deciding individual cases.

Second Argument. Having an abortion would have to be caused by a woman's religious beliefs to constitute an exercise of religion. Despite Supreme Court precedents like those marshalled by the Congressional Research Service,[129] however, Representative Hyde insisted that being "motivated" by religious belief could mean nothing than someone saying "my religion nudges me" toward abortion or "it is compatible with my religion to have an abortion."[130] Neither he nor other pro-life RFRA critics, however, disputed that, as the Supreme Court would later put it, RFRA "adopts a statutory rule

comparable to the constitutional rule rejected in *Smith*."[131] Nor did they argue that the Supreme Court had ever found conduct to be an exercise of religion that was merely consistent with, rather than compelled or motivated by, religious beliefs or that was merely the result of "moral judgment."

Later in the hearing, Professor Laycock echoed the position that he, Professor McConnell, and Dean Gaffney had expressed in their February 1991 letter. Under RFRA, Laycock argued, a woman would have to show that having an abortion was "compelled by or at least motivated by her religion."[132] The key word "motivated," Laycock testified, means "because of her religion. It is not enough to say permitted by her religion. It is not enough to say abortion is consistent with her religion. Religion has to be the reason for her abortion."[133] In contrast, abortion advocates argue that the decision to have an abortion need only be "informed by religious beliefs."[134]

Third Argument. Even if religious compulsion or motivation could be shown, and the burden shifted to the government, a state would assert that prohibiting abortion is the least restrictive means of furthering its compelling interest in protecting innocent human life in the womb. In its second RFRA analysis, issued in April 1992, the Congressional Research Service concluded that religious exercise claims against pro-life laws would likely fail[135] and could be defeated by states "legislat[ing] abortion restrictions on the express or implied rationale that they have a compelling interest in protecting fetal life."[136]

Some abortion advocates argue that, to meet the demands of strict scrutiny, government can further this compelling interest only by prohibiting every abortion, in every circumstance, from the start of pregnancy. Providing for any exceptions, either during a portion of pregnancy or in specific circumstances, would also make the government's interest less than compelling.[137] These advocates, however, mischaracterize the government's compelling interest. These laws seek to prevent the death by abortion of individual human beings in the womb, and furthering this interest requires prohibiting abortion in individual cases.

The fact that a statute applies to many—but not all—abortions does not diminish the compelling nature of the government's interest regarding those to whom it does apply. In the abortion context, applying that restriction "to the person"[138] results in prohibiting abortions that meet the statute's criteria. By acknowledging that the presence of "the developing young in the human uterus" makes abortion a "unique act,"[139] and by overruling *Roe*, the Supreme Court removed any constitutional obstacle to a state legislature asserting a compelling interest in protecting the life of as many individual human beings in the womb as a particular statute covers.

Professor Josh Blackman and two colleagues, each associated with the Jewish Coalition for Religious Liberty, note that both federal and state courts have upheld laws that included exceptions against a Free Exercise Clause challenge.[140] They also argue that if exceptions in a law prohibiting abortion "prevent it from being the least restrictive means to further a state's compelling interest, then another critical set of statutes would be on the judicial chopping block,"[141] such as laws prohibiting murder.

Other Supreme Court Free Exercise Clause precedents support this conclusion. In *Tandon v. Newsom*[142] and *Fulton v. City of Philadelphia*, for example, the Supreme Court observed that regulations being challenged under the Free Exercise Clause (California's COVID-19 lockdown rules in *Tandon* and Philadelphia's foster care anti-discrimination policy in *Fulton*) included many secular exceptions but no religious parallels. In both cases, this differential treatment triggered, rather than defeated, strict scrutiny because, under *Smith*, the regulations were not generally applicable, "c[oming] into play well before the strict scrutiny analysis... even began."[143] Under RFRA, "the mere existence of exceptions," writes Blackman and colleagues, "is neither necessary nor sufficient to render an abortion ban unlawful."[144]

Other abortion advocates argue that exceptions make a law prohibiting abortion less than "generally applicable" and, therefore, subject to strict scrutiny under *Smith*.[145] This argument simply misreads the plain text of that decision. In *Smith*, Scalia equated "generally applicable" with "religion-neutral,"[146] using those phrases interchangeably. He contrasted laws that are "specifically directed at...religious practice"[147] with those that are "generally applicable."[148] Simply put, "generally" in this context does not mean "universally."

In addition, some abortion advocates insist that "[w]hen life begins is a theological determination" that legislatures are not allowed to make.[149] This question obviously can have theological or philosophical dimensions but is not inherently or unavoidably religious as, for example, the question "Is Jesus Christ the Son of God?" would be. Legislatures can obviously make the factually correct determination that the life of an individual member of the human species begins at conception for purposes of laws prohibiting the unjustified termination of that individual's life.

Fourth Argument. An exception appearing in the text of every law prohibiting abortion covers the only circumstance—a threat to the mother's life—in which religious beliefs might compel or require an abortion. Many witnesses in the House RFRA hearing, including those insisting that an abortion-neutralizing amendment was still necessary, made this point.[150] Representative Chris Smith (R–NJ), another House pro-life leader,

acknowledged that "the chance of any State legislature enacting a law that does not contain a life-of-the-mother exception is absolutely nil."[151] Similarly, the NRLC's general counsel conceded that "it is highly unlikely that any protective abortion statute would be enacted without an exception to preserve the life of the mother, so that religions requiring life saving abortions would have their concerns met even with an abortion-neutral RFRA."[152]

Fifth Argument. Applying strict scrutiny to some free exercise claims but not others would undermine religious freedom rather than strengthen it. Courts applying strict scrutiny in Free Exercise Clause cases may have frequently favored the government,[153] but they did so after actually balancing the right to exercise religion against the government's asserted justification for burdening that right. They did not categorically exclude any religious exercise claims from constitutional protection. Strict scrutiny is consonant with the Founders' view of religious freedom as fundamental and inalienable; applying that standard selectively necessarily degrades the nature and significance of religious freedom itself.

Sixth Argument. Applying strict scrutiny selectively would have made RFRA's passage impossible. In congressional hearings on RFRA, House Members[154] and Senators[155] repeatedly noted the ideological breadth of the grassroots Coalition for the Free Exercise of Religion. Organizations in that coalition opposed each other on many specific issues, including abortion. Opening the door to exemptions or carve-outs for some religious exercises would inevitably bring demands that others also receive special treatment.

The only way to preserve coalition unity and ensure passage of RFRA was to make it clear that it would restore the Supreme Court's pre-*Smith* approach, requiring strict scrutiny in all religious exercise cases and leaving application of that standard to the courts. Professor Laycock explained it this way in the Senate Judiciary Committee's RFRA hearing: "Limiting the bill to enactment of the standard is a principled solution to the practical problem of disagreement over particular claims."[156]

Following the plan to mirror the Supreme Court's pre-*Smith* jurisprudence,[157] the Senate rejected attempts to amend RFRA to exempt any category of cases, even those involving issues far less controversial than abortion. Responding to a group of state legislators and prison administrators, for example, Senator Harry Reid (D–NV) offered an amendment to exempt from RFRA's application religious exercise claims in the prison context. During the floor debate, Senator Hatch, RFRA's primary Republican sponsor and a strong supporter of law enforcement, argued that exempting any category of cases "sets a dangerous precedent."[158] The Senate rejected the Reid Amendment by a vote of 41–58.[159]

As signed into law, RFRA applied to "all Federal and State law, and the implementation of that law…unless such law explicitly excludes such application by reference to this Act."[160] This universal application has invited descriptions of RFRA as a "super statute."[161] In a letter on behalf of the Coalition for the Free Exercise of Religion dated October 20, 1993, less than one week before Congress passed RFRA, its chairman urged passage without any exemptions.[162] Similarly, a group of state attorneys general signed a letter dated October 19, 1993, opposing the Reid Amendment and urging "passage of the Religious Freedom Restoration Act…*without amendment*."[163]

Recent evidence confirms this judgment, showing that political objectives or priorities can displace a professed commitment to religious freedom. No legislation exempted itself from RFRA for more than two decades. Since 2015, however, several far-reaching bills intended to effect dramatic cultural change have attempted to do so. The Equality Act,[164] the Do No Harm Act,[165] and the Women's Health Protection Act[166] would exempt from RFRA statutes such as the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Violence Against Women Act. In other words, the pre-*Smith* record of the government winning 90 percent of religious exercise cases was not enough. Excluding RFRA's application altogether would mean that, in the vast policy areas covered by such statutes, the government need not consider religious freedom at all.

Today, more than a dozen national organizations listed on the letterhead of the Coalition for the Free Exercise of Religion in 1993 have endorsed one or more of these bills.[167] In addition, nine current Senators[168] and 17 current House Members who were serving in Congress in 1993 and supported RFRA's passage have co-sponsored or voted for at least one of them. In other words, they have now endorsed in one form or another what they strongly opposed in 1993.

Amending RFRA to exempt cases challenging pro-life laws, therefore, would not only have been unnecessary, but would have immediately fractured the coalition behind it, split the bill's bipartisan congressional support, and drawn many other demands for exemptions and carve-outs.[169] The goal of universal support for the basic principle that religious exercise is a fundamental and inalienable right, therefore, was served by ensuring that RFRA itself would not favor or oppose any particular religious practice. Exempting abortion-related cases, especially when challenges would be so speculative and unlikely to succeed, RFRA advocates argued, could not justify depriving all Americans of any real legal protection for virtually any religious practice.

Seventh Argument. Finally, many RFRA supporters argued that consistent application of strict scrutiny would actually advance pro-life objectives. Christian Action Council president Thomas Glessner, for example, noted a trend toward overriding the religious convictions of health care workers and requiring them to participate in abortions. "The *Smith* decision," he wrote pro-life leaders in March 1991, "endangers this freedom while RFRA would restore needed protection for this type of religious conviction which is so crucial to our cause."[170]

The same debate over the possible impact of RFRA on challenges to pro-life laws occurred during the September 18, 1992, Senate Judiciary Committee hearing on S. 2969, which Senator Kennedy had introduced two months earlier. As he had in the House hearing, Oliver Thomas argued that the "RFRA protects conduct only when religion is the primary cause or reason for the conduct."[171] Professor Laycock, who helped draft RFRA, explained how amendments creating exemptions or carve-outs from strict scrutiny would "violate the principle of across-the-board neutrality toward all faiths and all Government claims."[172] A "free-exercise right to abortion was rejected in *Harris v. McRae*," he argued, and if the Supreme Court overruled *Roe v. Wade*, "preserving unborn life will be a compelling interest and a compelling interest is a complete defense to any claim under [RFRA]."[173]

Senator Hatch asked whether RFRA could provide a basis for challenging pro-life laws if the Supreme Court "overrules *Roe v. Wade* on the basis that a woman's interest in terminating her pregnancy is simply a liberty interest rather than a fundamental right."[174] Laycock explained that "the compelling interest in saving the life of the unborn" would satisfy any standard necessary for the Court to uphold pro-life laws against a religious exercise challenge.[175] Thomas agreed, adding this advice for state legislators: "All a State legislature would have to do is, in its findings, find that the protection of fetal life, in their opinion, is compelling."[176]

State Religious Freedom Restoration Acts

As signed into law in 1993, RFRA applied to action by "government," which it defined comprehensively.[177] The House and Senate committee reports on RFRA said that Congress had authority to enact it under Section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Supporters asserted that "this article" includes the Free Exercise Clause, which the Supreme Court had incorporated into the Fourteenth Amendment's Due Process Clause.[178] They also argued that RFRA would "enforce"

the Free Exercise Clause by restoring, by statute, the interpretation that the Supreme Court had established prior to *Smith*.

The Supreme Court disagreed. In *City of Boerne v. Flores*,[179] a Catholic diocese alleged that denial of its application to renovate and expand its sanctuary violated RFRA. Writing for the Supreme Court's majority, Justice Anthony Kennedy explained that, rather than merely enforcing the Fourteenth Amendment, RFRA went further and actually "decree[d] its substance."[180] Legislation that "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."[181] In other words, the Free Exercise Clause means what the Supreme Court currently says it means; altering that interpretation, even by returning to the Court's previous rendering, amounts to altering the Free Exercise Clause itself. *Boerne*, therefore, firmly established that "states and localities are no longer bound by RFRA."

Provisions. Since *Boerne*, more than two dozen states have adopted statutory provisions similar to the federal RFRA[182] or provide similar protection for religious exercise through judicial interpretation of existing laws.[183] Just as the federal RFRA mirrors the Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence, these state laws parallel the federal RFRA.[184] They require that government actions imposing substantial burdens,[185] burdens,[186] or restrictions[187] on religious exercise meet the strict scrutiny standard. They express this standard in terms similar to the federal RFRA, requiring that government action be "in furtherance of,"[188] or "essential to furthering,"[189] a compelling governmental interest.

Some state RFRAs make the connection to the federal statute even more obvious by explicitly affirming the intent to "restore the compelling interest test as set forth in *Sherbert*...and *Yoder*"[190] and providing that they should be "interpreted consistent with [the federal RFRA], federal case law, and federal jurisprudence."[191] They also parallel the Free Exercise Clause and the federal RFRA in the understanding that conduct constitutes an exercise of religion if it is caused by religious belief. Some define the exercise of religion as conduct that is "motivated"[192] or "substantially motivated"[193] by religious beliefs. None of these state RFRAs even remotely suggest that they protect conduct that is merely associated with conscience or not prohibited by one's personal beliefs.

Prior to *Smith*, the NRLC's general counsel argued that the Free Exercise Clause would provide "no protection for abortion" should the Supreme Court overrule *Roe*.[194] The final House and Senate committee reports made clear that, as a "statutory version of the Free Exercise Clause,"[195] RFRA

"would not provide a basis for standing in situations where standing to bring a free exercise claim is absent."[196] RFRA incorporated the Supreme Court's pre-*Smith* view of standing, religious exercise, and substantial burden.[197] State RFRAs do the same.

Abortion Advocates' Arguments. Abortion advocates seek to eliminate any requirement that having an abortion is caused by religious belief because, they admit, most women cannot establish that connection.[198] In one example offered by Professor Elizabeth Sepper, for example, a woman who obtained an abortion said she "had to put my strong faith from my childhood behind" and, instead, "make sacrifices...no matter how bad it hurts" for her other children.[199] If exercising religion includes putting religious beliefs entirely aside, the concept of religious exercise has no meaning at all.

Similarly, in a recent article in the *Stanford Law Review*, Ari Berman asserts that Jewish plaintiffs have "a strong argument that they are exempted from an abortion ban." The article, however, simply assumes that plaintiffs have standing,[200] even while conceding that the "*theoretical* basis for exceptions...may not necessarily succeed."[201] Strangely, while acknowledging that the U.S. Supreme Court, in *Harris*, required religious compulsion for standing, the article claims that "standing is by no means insurmountable" without such a showing, citing only a single state appeals court decision as support for that dubious proposition.

Berman conflates the process leading to the decision to have an abortion with actually having one. Simply considering one's own beliefs and conscience in the decision-making process, he argues, is enough to turn the action of effectuating that decision into an exercise of religion protected by a RFRA. This is why he advises would-be plaintiffs in religious exercise challenges to "articulate their religious exercise as *the ability to conduct a pregnancy consistent with one's religious beliefs* to more persuasively assert that [an abortion ban] substantially burdens them."[202] In this view, Berman argues, plaintiffs may argue that "religious exercise [includes]...a *choice*...motivated by religion."[203] The notion of "conducting a pregnancy," he asserts, wraps everything from the initial decision to pursue pregnancy and becoming pregnant to terminating that pregnancy in the mantle of religious exercise.

Pro-life laws, however, regulate conduct, not decision-making. Abortion bans prohibit actually having an abortion, not the process of deciding whether to seek one. Berman claims that "[m]any states have incorporated" the definition of religious exercise as including both choice or decisions and actions.[204] But the very state RFRAs he cites say otherwise. The Arkansas,[205]

Illinois,[206] Missouri,[207] and New Mexico[208] RFRAs, for example, each define religious exercise as an "action" or "act" that is substantially motivated by a sincerely held religious belief. They say nothing about choices or decisions.

Challenging pro-life laws as violating the right to the exercise of religion requires radically redefining what constitutes an exercise of religion. Berman's concession that a plaintiff who is not pregnant "faces more challenges in establishing [that] an abortion ban substantially burdens them"[209] is an understatement. Asserting a "broader definition," he argues, means arguing that an abortion ban "burdens their religious exercise" by forbidding them "from engaging with *all* the religious considerations of a pregnancy."[210] Such a ban, the argument goes, "eliminat[es] the complex religious considerations that factor into *deciding* to become pregnant" or seek an abortion.[211] An abortion ban's "limited exceptions," Berman argues, "do not align with the full panoply of religious considerations in seeking an abortion."[212]

Free Exercise Challenges to Pro-Life Laws

By overruling *Roe* and *Casey* and disclaiming any right to abortion under the U.S. Constitution, the Supreme Court eliminated the argument abortion advocates had been using for decades to challenge state pro-life laws. And the Court's decision in *Boerne* removed the federal RFRA as a possible statutory alternative. Having evaluated abortion advocates' religious exercise argument in light of the Free Exercise Clause's historical understanding of RFRA's development, below is an analysis of some of the lawsuits challenging state pro-life laws under state RFRAs.

***Sobel v. Cameron*.** Kentucky's RFRA, adopted in 2013, provides:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.[213]

In 2019, Kentucky enacted legislation prohibiting abortions unless "necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life sustaining organ of a pregnant woman."[214]

Three Jewish women filed suit,[215] alleging that the abortion ban violated the Kentucky RFRA. Each of these plaintiffs already had one or more

children and none claimed to be pregnant or that she intended to become pregnant in the future. Instead, the plaintiffs argued in their complaint that, if one were to become pregnant, the Kentucky abortion ban might not allow an abortion that, consistent with her religious beliefs or conscience, she might seek.

The plaintiffs undermined their own argument. They acknowledged, consistent with Kentucky Court of Appeals precedent,[216] that the Kentucky RFRA is "equivalent"[217] to the federal RFRA, a "'codification...of the strict scrutiny test,'" and that "cases interpreting [the federal] RFRA are instructive in interpreting the [Kentucky] RFRA."[218] These cases would include the Supreme Court's holding in *Harris* that standing to challenge an abortion prohibition on religious exercise grounds requires showing religious compulsion.

The plaintiffs in *Sobel* could not meet this standing threshold. They did not assert that they had been, or in the future would be, denied an abortion that would have been compelled or substantially motivated by Jewish law or beliefs. Instead, their complaint merely suggested a decision to have an abortion might be generally consistent with various aspects of Jewish law.

Jewish law, for example, defines life as beginning at birth[219] and asserts that "when life begins for a human being" is "a religious and philosophical question."[220] The plaintiffs, however, made no attempt to show how this observation precludes a legislature from prohibiting abortion for purely secular reasons. Nor did they assert that a court may consider only the religious or philosophical dimensions of this question, ignoring all other considerations such as the biological fact that each individual human being's life begins at conception.

The plaintiffs' complaint is replete with claims that the Kentucky abortion ban "violates the religious freedoms of Jewish birth givers,"[221] that their "religious beliefs have been infringed,"[222] and that the abortion ban "has substantially burdened Plaintiffs' freedom of religion."[223] The complaint, however, never identifies the religious exercise or freedom that the government had burdened or how any violation, infringement, or burden on that right had actually occurred.

Anonymous Plaintiffs 1–5 v. Medical Licensing Board of Indiana. Indiana enacted its RFRA in 2015 and also prohibits abortion "in all instances"[224] except under specific circumstances.[225] The plaintiffs in this class action are an organization, Hoosier Jews for Choice, claiming associational standing to assert the rights of its members, and five individual women. Three of the women are Jewish, one is Muslim, and one has undefined spiritual beliefs.

The Indiana Court of Appeals held that "Hoosier Jews for Choice has associational standing to raise its members' RFRA challenges."[226] The Indiana Supreme Court, however, has never actually recognized associational standing but has only "[a]ssum[ed] without deciding" in one case that it is available.[227] Associational standing, "an off-shoot of third-party standing,"[228] allows an organization to bring a suit on behalf of members who "'would otherwise have standing to sue in their own right.'"[229] As the appeals court put it, Indiana challenged "only the standing of Hoosier Jews for Choice, not of its membership."[230] The court characterized this as there being "no disagreement"[231] over the issue, assuming associational standing without further examining whether any of Hoosier Jews for Choice's members would actually have had standing in their own right.

As noted, however, an organization lacks associational standing if its members lack individual standing. The court, therefore, should have ensured that Hoosier Jews for Choice members had the requisite standing because, as the court itself acknowledged, "[t]he standing requirement imposes a limit on the court's jurisdiction."[232] To have standing under Indiana law, a plaintiff must show that she "'has sustained or was in immediate danger of sustaining' a demonstrable injury"[233] that is "personal" and "direct."[234] This includes actions brought under Indiana's RFRA.[235]

Neither the individual plaintiffs, nor any members of Hoosier Jews for Choice, claimed that she had ever been denied an abortion; in fact, none claimed to be pregnant or that she planned to become pregnant in the future. They could not, therefore, claim that Indiana had attempted, or threatened, to enforce the statute they were challenging against them. Instead, they made the hypothetical allegation that the statute prohibits abortion in circumstances that, should any become pregnant, might lead them to seek an abortion "consistent with [their] religious beliefs."[236]

As the plaintiffs had in *Sobel*, the plaintiffs in this case focused entirely on their understanding of Jewish law which, they claimed, "recognizes that abortions *may occur*...under circumstances not allowed by...Indiana law."[237] Similarly, according to the complaint, Islam considers that an abortion can be "proper and appropriate...for any reason" within 40 days of conception and "authorize[s] or direct[s]" women to obtain an abortion under certain circumstances.[238] Another plaintiff believed that a "universal consciousness"[239] or "supernatural force"[240] endows individuals with "bodily autonomy"[241] to decide whether to have an abortion.[242]

The plaintiffs, therefore, did not even claim that they faced an actual or imminent threat of injury from the statute. They could not, because Indiana had never attempted, or threatened, to enforce against them the

statute they challenged. Nor did the plaintiffs argue that, if they did become pregnant in the future, an abortion they might seek would be caused or motivated by their religious beliefs. No plaintiff, therefore, established standing by showing that she "'has sustained or was in immediate danger of sustaining' a demonstrable injury"[243] that is "personal" and "direct."[244] Instead, the gravamen of their complaint is that women should generally be free to obtain an abortion that they believe is consistent with their religious beliefs or conscience. This is a policy argument rather than a legal one.

Hafner v. State of Florida. Florida enacted its RFRA in 1998. It includes the central elements of the federal RFRA: Government may not "substantially burden" a person's religious exercise unless applying that burden "to the person" is the "least restrictive means" of furthering a "compelling governmental interest." The Florida Supreme Court has acknowledged that this statute is "modeled after the federal RFRA."[245]

In 2022, Governor Ron DeSantis signed into law legislation prohibiting abortion after 15 weeks of pregnancy except when "necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible impairment of a bodily function of the pregnant woman."[246] Reverend Laurinda Hafner, a United Church of Christ pastor, challenged this law, but her standing was even farther from meeting the necessary standard than the plaintiffs in *Sobel* or *Anonymous Plaintiffs 1–5*. Like those plaintiffs, Hafner did not claim to be pregnant or that she might, at some unspecified future time, become pregnant and seek an abortion that Florida law does not allow. Rather, she claimed generally that the law prohibits abortion in situations in which it would be "consistent with the beliefs of [her] denomination."[247] The first count in her complaint, filed on August 1, 2022, alleged that this violated the state RFRA because it "prohibit[s] the practice of the [United Church of Christ] ideals related to abortion."[248]

These ideals include congregants' "right to dignity and self-determination"[249] and the "freedom to make their own decisions concerning issues related to pregnancy and abortion procedures."[250] These are not religious beliefs, but the very "claims of conscience based on something other than religion"[251] that the Supreme Court has held do not make resulting conduct an exercise of religion. "'Only beliefs rooted in religion are protected by the Free Exercise Clause.... Purely secular views do not suffice."[252]

Based on her status as a pastor who offers counseling on issues such as abortion, Hafner also tried to establish standing by linking two unrelated Florida statutes. The Florida abortion statute prohibits any person from "actively participat[ing] in an abortion.[253] A separate statute[254] provides that whoever "aids, abets, counsels...or otherwise procures" a criminal

offense is a "principal in the first degree" in that offense. Hafner insisted that "counseling to obtain an abortion" that would violate Florida law would, therefore, itself be a crime and, therefore, the potential for prosecuting her for providing such counseling gave her standing to challenge the statute.

Hafner, however, made no attempt to show that "counsels" in the criminal principal statute includes the kind of pastoral counseling that she provides or that counseling regarding abortion amounts to "actively participat[ing]" in an abortion. Even more importantly, Hafner failed to note that the principal criminal statute requires not only that an individual aid, abet, or counsel that a crime be committed, but that "such offense is committed or is attempted to be committed."[255] Hafner did not even suggest that anyone she had ever counseled to seek an abortion disallowed by Florida law had ever sought or actually obtained one.

Hafner also mischaracterized the Florida RFRA. She claimed, for example, that the Florida RFRA "requires the state to accommodate religious believers and institutions from Florida state laws that substantially burden their religious belief [or] speech."[256] Neither the federal nor any state RFRA, however, mentions belief or speech, but uniformly prohibits burdens on the "exercise of religion" that do not meet the requirements of strict scrutiny. This is more than splitting a semantic hair. It means that Hafner failed to concretely allege, let alone establish, any violation of the Florida RFRA.

On March 3, 2023, the trial court denied Hafner's motion for a temporary injunction against Florida's abortion ban. Judge Michael Hanzman acknowledged the Florida Attorney General's assertion that "no member of the clergy has ever been prosecuted (or threatened with prosecution) for counseling a congregant on the decision of whether to have an abortion" in the nearly 70 years since its enactment.[257] The court concluded that Hafner lacked standing to challenge the abortion law[258] and rejected her argument that "such a theoretical prosecution would be viable."[259]

The court concluded: "It does not require an authoritative disquisition, a string citation of precedent, or a 'study of acute and powerful intellect'...to discern that a member of the clergy, who does no more than offer counsel and support to a congregant on the decision of whether to abort a pregnancy, is not an 'active participant' in an abortion that their congregant may decide to have after thoughtful deliberation."[260] On May 16, 2023, the Florida District Court of Appeal dismissed Hafner's appeal.

Generation to Generation, Inc. v. Florida. Two organizations and a rabbi challenged the same 15-week Florida abortion ban nine days later, filing a complaint with many passages that repeated the *Hafner* arguments verbatim. The complaint alleged that "Judaism would expect...the abortion

decision" to be made by considering various factors.[261] The Florida law violates the state RFRA, the plaintiffs allege, because the right to freely exercise religion "includes the right of women and girls to choose to exercise autonomy over [their] reproductive system and to choose abortion even after 15 weeks under circumstances not permitted under the Act, all free of government interference."[262]

Other Cases. Following a similar pattern, none of the plaintiffs in other challenges to pro-life laws under state RFRAs alleges that she had been denied an abortion caused by her religious beliefs. In *Jane Liberty v. Norman Bangerter*, for example, the plaintiff asserted that she sought an abortion because "I would simply not be able to get my degree" and would have "too little to devote to a newborn." She placed these considerations in the vague context of "my religious faith," explaining that having an abortion under these circumstances would be "consistent with my faith."[263] Such generally secular beliefs, however, could just as easily impress upon an individual the need to consider the financial, educational, or familial impact of having another child. In fact, the concerns expressed by the plaintiff in *Jane Liberty* sound very much like the "detriment" that the Supreme Court in *Roe v. Wade* speculated would result from prohibiting abortion.[264]

One abortion advocate writes that the "core concept" in this religious exercise argument "is the affirmation of [women's] moral agency and right to make the decision that promotes their health, well-being, and safety free from government interference."[265] Nothing in that description, including the word "moral," is distinctively religious or distinguishes this from the argument that prevailed in *Roe v. Wade* that the Fourteenth Amendment's Due Process Clause protects a right to abortion. The First and Fourteenth Amendments are not simply interchangeable vehicles for achieving political objectives such as freely available abortion.

Conclusion

Abortion advocates seek to make abortion as available as possible. Before the Supreme Court in 1973 created a constitutional right to abortion—and since the Court in 2022 held that no such right exists—they have tried to persuade state legislatures to eliminate abortion restrictions or to affirmatively protect abortion access. Their litigation strategy today includes challenging state pro-life laws under state constitutions and statutes such as state RFRAs.

The argument that pro-life laws violate the right to exercise one's religion conflicts with the historical understanding of the Free Exercise Clause of

the U.S. Constitution as well as the federal RFRA and its state counterparts. While the exercise of religion includes both belief and conduct, the beliefs must be religious in nature and the conduct must be caused by such religious beliefs. Only then must government action burdening that religious exercise meet the requirements of strict scrutiny.

Abortion advocates' religious exercise argument fails on all counts. It would dilute religious beliefs to no more than generic conscience, eliminate any causal connection between those beliefs and having an abortion, and attempt to challenge pro-life laws without the proper legal standing. Although cloaked in the language of religious exercise, this argument is no more than a fundamentally political objection to pro-life laws. Properly understood, pro-life laws are in harmony with religious freedom.

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Endnotes

1. 410 U.S. 113 (1973).
2. *Id.* at 153.
3. Planned Parenthood of Sw. and Cent. Florida v. Florida, 2024 WL 1363525 (Fla. Apr. 1, 2024) at *5. *See also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022) ("*Roe* was on a collision course with the Constitution from the day it was decided.").
4. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973). *See also* Sarah Parshall Perry and Thomas Jipping, Dobbs v. Jackson Women's Health Organization*: An Opportunity to Correct a Grave Error*, Heritage Found. Legal Memorandum No. 293, Nov. 27, 2021, at 10.
5. Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 420 (1983).
6. Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747, 759 (1986).
7. Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992).
8. 597 U.S. 215 (2022).
9. 505 U.S. 833 (1992).
10. *Dobbs*, 597 U.S. at 292.
11. *Id.* at 268–69.
12. *See* Thomas Jipping, *The Attack on Legal Protection for the Unborn Moves to State Courts*, Heritage Found. Legal Memorandum No. 322, Jan. 5, 2023.
13. Alicia Miranda Ollstein, *The Sleeper Legal Strategy That Could Topple Abortion Bans*, Politico, June 21, 2023, https://www.politico.com/news/2023/06/21/legal-strategy-that-could-topple-abortion-bans-00102468. *See also* Charles McCrary, *How Religious Freedom Could Help Liberals Win the Abortion Rights War*, New Republic (Apr. 22, 2024), https://newrepublic.com/article/180531/abortion-rights-religious-freedom-law.
14. *See* John Baker, *Establishment of Religion*, *in* The Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/1/essays/138/establishment-of-religion, and Thomas Berg, *Free Exercise of Religion*, *in* The Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/1/essays/139/free-exercise-of-religion.
15. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488 (1990).
16. *Id*.
17. *Id*. at 1491.
18. Frazee v. Ill. Dept. of Emp. Sec., 489 U.S. 829, 833 (1989), quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 713 (1981). *See also* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).
19. 161 Cong. Rec. S6874 (daily ed. Sept. 22, 2015) (statement of Sen. Hatch).
20. *See* Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 William & Mary L.R. 819, 823 (1997); *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 133 (1998) (statement of Cole Durham, Jr.) (The Founding Fathers saw "the principle of religious freedom [as] deeper and more absolute than any constitution.").
21. 161 Cong. Rec. S6874 (daily ed. Sept. 22, 2015) (statement of Sen. Hatch). *See also* Robert P. George, *What Is Religious Freedom?* Public Discourse, July 24, 2013, https://www.thepublicdiscourse.com/2013/07/10622/.
22. National Archives, Founders Online, Memorial and Remonstrance Against Religious Assessments, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last accessed July 1, 2024).
23. While this *Legal Memorandum* focuses the affirmative act of obtaining an abortion, the same principle of causation by religious belief would apply to refraining from taking certain action. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 404 (1963); *Thomas*, 450 U.S. at 717–18; Hobbie v. Unemp. Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).
24. *The Religious Freedom Restoration Act, Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 46 (1992) (testimony of Oliver Thomas) (hereinafter *Senate hearing*).
25. Few situations meet this narrow definition. *See* Brief of Am. Jewish Cong. et al. in Support of Reprod. Health Servs. in Webster v. Reprod. Health Servs., No. 88–605 (1989) at *15 (within Jewish tradition, "abortion…may be…required in situations where the life of the mother is threatened."); Brief of Agudath Israel of Am. as Amicus Curiae in Webster v. Reprod. Health Servs., No. 88–605 (1989) at *11; Ari Berman, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*, 76 Stan. L. Rev. 1129, 1144–45 (2024); *Senate hearing*, *supra* note 24, at 79 (testimony of Douglas Laycock); *id.* at 240 (testimony of Nadine Strossen); *Religious Freedom Restoration Act of 1991, Hearing Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 102nd Cong. 119, 134–36 (1992) (testimony of Rep. Stephen Solarz) (hereinafter *House hearing*).
26. Thomas v. Collins, 323 U.S. 516, 530 (1945).

27. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943). *See also* McConnell, *supra* note 20, at 823 (1997) (the Founders treated the right to freely exercise religion as a "special case.").
28. *See* Steven L. Skahn, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 Val. U. L. Rev. 487 514 (1980) (Free Exercise Clause "protection extends not only to direct interference of government in the beliefs or practices of religion, but may also extend to government schemes which indirectly burden the practice of one's religion.").
29. *Murdock*, 319 U.S. at 115.
30. *See* Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 226 (1994) ("The stringency of the compelling interest test makes sense in light of its origins: it began as a judicially implied exception to an absolute constitutional text.").
31. *Collins*, 323 U.S. at 530.
32. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981).
33. Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. Rev. 730, 762 (1968). *See also* Cyril Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y. L.F. 411 (1968); Cyril Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y. L.F. 335 (1971). Some feminist scholars criticized *Roe*, arguing that the Fourteenth Amendment's Equal Protection Clause would have provided a stronger constitutional basis for a right to abortion than the Due Process Clause that the Supreme Court chose. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992).
34. Joseph S. Oteri *et al.*, *Abortion and the Religious Liberty Clauses*, 7 Harv. C.R.-C.L. L. Rev. 559, 594 (1972) (emphasis added).
35. 492 U.S. 490 (1989).
36. Brief of Am. Jewish Congress et al. in Support of Reprod. Health Servs. in Webster v. Reprod. Health Servs., No. 88–605 (1989) at *3.
37. Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. Rev. 177, 183 (2023). *See also id.* at 186 ("an exercise of moral responsibility").
38. Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. Gender & L. 1, 17.
39. *Id.* at *13.
40. David Ackerman, Cong. Rsch. Serv., Supreme Court Descriptions of Conduct Constituting the Exercise of Religion (1992). *See House hearing*, *supra* note 25, at 131–33.
41. *House hearing*, *supra* note 25, at 131.
42. *Id.* at 1 (emphasis added).
43. 374 U.S. 398 (1963).
44. *Id.* at 404.
45. 450 U.S. 707 (1981).
46. *Id.* at 717. *See also* Cong. Rsch. Serv., R44422, Nonprofit Challenges to the Contraceptive Coverage Requirement: The Meaning of *Substantial Burdens* on Religious Exercise Under the Religious Freedom Restoration Act 5 (2016).
47. 480 U.S. 146 (1987).
48. *Id.* at 146, quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963).
49. 366 U.S. 599 (1961).
50. *Id.* at 601.
51. 455 U.S. 252 (1982).
52. *Id.* at 257.
53. 475 U.S. 503 (1986).
54. *Id.* at 510.
55. 482 U.S. 342 (1987).
56. *Id.* at 345. *See also* Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) (refusal to provide inmate with specific religious activities does not violate RFRA because plaintiff did not "show that they are mandated by his faith."). The Ninth Circuit's brief *per curiam* opinion did not indicate whether RFRA required such evidence of compulsion in all cases or only in cases arising in specialized contexts such as prisons.
57. 448 U.S. 297 (1980).
58. *See* Edward C. Liu and Wen W. Shen, Cong. Rsch. Serv., The Hyde Amendment: An Overview (2022), at 1.
59. *Harris*, 448 U.S. at 320 n.23.

60. *Id.* at 320 (emphasis added).
61. 494 U.S. 872 (1990). *See* Thomas Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 9 (1994) (*Smith* was "shocking for the explicitness and thoroughness with which it undermined free exercise rights.").
62. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *decision*, 57 U. Chi. L. Rev. 1109, 1113–14 (1990) ("The most important decision interpreting the Free Exercise Clause in recent history, then, was rendered in a case in which the question presented was…neither briefed nor argued by the parties.")
63. *Smith*, 494 U.S. at 878.
64. *Id.* at 878–79.
65. *Id*. at 881.
66. *Id.* at 879.
67. *See* Ackerman, *supra* note 40, at 1 ("So long as a law is religiously neutral on its face…the government may uniformly apply it to all persons, regardless of any burden or prohibition that may be placed on particular religious practices.").
68. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment).
69. *See, e.g.*, McConnell, *supra* note 15; McConnell, *supra* note 62; Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the* Amicus *Brief That Was Never Filed*, 8 J. L. & Religion 99 (1990); James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 Wis. L. Rev. 689 (2019).
70. 593 U.S. 522, 544–619 (2021) (Alito, J., concurring in the judgment).
71. *See* Thomas Jipping and Sarah Parshall Perry, *The Religious Freedom Restoration Act: History, Status, and Threats*, Heritage Found. Legal Memorandum No. 284, May 4, 2021, at 12–15; McConnell, *supra* note 62, at 1117 ("It is remarkable that the Court would take so important a step here without so much as referring to the history of the Free Exercise Clause."); *id*. at 1119 ("[T]he Supreme Court should not have rendered a major reinterpretation of the Free Exercise Clause without even glancing in its direction.").
72. Roe v. Wade, 410 U.S. 113, 153 (1973).
73. *Smith*, 494 U.S. at 888.
74. *Senate hearing*, *supra* note 24, at 79 (testimony of Douglas Laycock). *See also* McConnell, *supra* note 15, at 1417 ("What once appeared to be a jurisprudence highly sympathetic to religious claims appears virtually closed to them."); McConnell, *supra* note 62, at 1110 (In the two decades prior to *Smith*, the Supreme Court "rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent."); Robert F. Drinan and Jennifer I. Huffman, *The Religious Freedom Restoration act: A Legislative History*, 10 J. Law & Rel. 531, 535 (1993–94) ("[B]efore Smith, the Court applied [strict scrutiny] in many cases and did not find for the plaintiffs."); Berg, *supra* note 61, at 3 ("While the Court has continued to advert to the 'compelling interest' language before *Smith*, suggesting a highly protective attitude toward religion, its actual decisions had grown more and more deferential to the government."); James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1412 (1992) ("[T]he free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test…. [C]ourts overwhelmingly sided with the government when applying that test.").
75. *Smith*, 494 U.S. at 890.
76. Michael W. McConnell, *An Open Letter to the Religious Community*, First Things (Mar. 1991), https://www.firstthings.com/article/1991/03/an-open-letter-to-the-religious-community. The letter was also signed by Professor Douglas Laycock and Dean Edward Gaffney.
77. Gonzalez v. O Centro Spirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).
78. McConnell, *supra* note 76. *See also* Berg, *supra* note 61, at 7 ("[T]he *Smith* rule destroys most constitutional protection of religious practice.").
79. Ackerman, *supra* note 40, at 20. *See also Senate hearing*, *supra* note 24, at 50–58.
80. *Senate hearing*, *supra* note 24, at 82 (testimony of Michael McConnell).
81. H.R. 5377, 101st Cong., § 2(b).
82. *See id*. at § 5(b) (RFRA would prospectively apply to every federal statute unless Congress "by specific reference to this Act states an intention to exclude such coverage.").
83. *Id*. at § 3(c).
84. *Religious Freedom Restoration Act of 1990, Hearing Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990).
85. In July 2001, the United States Catholic Conference and National Conference of Catholic Bishops were combined to form the United States Conference of Catholic Bishops.
86. James Bopp, Jr., and Richard E. Coleson, Why the Religious Freedom Restoration Act Needs an Abortion-Neutral Amendment, March 27, 1991, at 9 (emphasis in original).

87. *House hearing*, *supra* note 25, at 278 (1992) (statement of James Bopp, Jr.). The NRLC and USCC advocated adding the following language to RFRA: "Nothing in this Act shall be construed to grant, secure, or guarantee any right to abortion, access to abortion services, or funding of abortion." *Id*. at 274.
88. Letter from Michael McConnell, Edward Gaffney, and Douglas Laycock to Reps. Stephen Solarz and Paul Henry, Feb. 21, 1991, at 2 (emphasis in original). *See also Senate hearing*, *supra* note 24, at 238 (testimony of Michael Farris) ("[I]ndividuals have to show that they are compelled or forbidden from obeying their religious beliefs.").
89. *House hearing*, *supra* note 25, at 129 (emphasis in original). *See also* Laycock and Thomas, *supra* note 30, at 231–34.
90. *House hearing*, *supra* note 25, at 128.
91. *See also Senate hearing*, *supra* note 24, at 46 (testimony of Oliver Thomas).
92. H.R. 5377, 101st Cong., § 2(b).
93. H.R. 2797, 102nd Cong., § 3(b). *See also* Religious Freedom Restoration Act of 1993, S. Rep. No. 103–111, at 8 (1993) (Courts should "look to free exercise cases prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened.").
94. *See Senate hearing*, *supra* note 24, at 239 (testimony of Nadine Strossen) (Under *Sherbert* and *Yoder*, "the threshold requirement is that the person show that a religiously compelled belief or practice is prohibited, or the other way around, that one is compelled to do something that violates one's religious belief. That is a threshold showing without which you don't even get you first foot in the door.").
95. Johnny Killian, Cong. Rsch. Serv., Impact of Proposed Free Exercise of Religion Bill on Access to Abortion 2 (1991) (emphasis in original).
96. These organizations were Agudath Israel of America, the Southern Baptist Convention's Christian Life Commission, Coalitions for America, the General Conference of Seventh-Day Adventists, the Home School Legal Defense Association, National Association of Evangelicals, Rabbinical Council of America, Traditional Values Coalition, and Union of Orthodox Jewish Congregations of America.
97. See *Senate hearing*, *supra* note 24, at 154–70.
98. These organizations were the Home School Legal Defense Association, Christian Action Council, American Association of Christian Schools, Christian Legal Society, Coalitions for America, Coral Ridge Ministries, Concerned Women for America, National Association of Evangelicals, Traditional Values Coalition, and the Southern Baptist Convention's Christian Life Commission.
99. *Senate hearing*, *supra* note 24, at 154–70.
100. *Id*. at 166.
101. *Id*. at 170.
102. Religious Freedom Restoration Act of 1993, H.R. Rep. No. 103–88, at 9 (1993) (hereinafter House report).
103. *Id*.
104. *See Id*. at 14–17. These members were Reps. Hyde, F. James Sensenbrenner (R–WI), Bill McCollum (R–FL), Howard Coble (R–NC), Charles Canady (R–FL), Bob Inglis (R–SC), and Robert Goodlatte (R–VA).
105. *Id*. at 14.
106. 139 Cong. Rec. H9682 (daily ed. May 11, 1993) (statement of Rep. Hyde).
107. Religious Freedom Restoration Act of 1993, *supra* note 93, at 12.
108. Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (emphasis added). *See also* Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) ("a tenet or belief that is central to religious doctrine"); Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1995) ("conduct or expression that manifests some central tenet of…[an individual's] beliefs"); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (same).
109. Pub. L. No. 106–274, 114 Stat. 803, codified at 42 U.S.C. § 2000cc.
110. 42 U.S.C. § 2000cc–5(7)(A).
111. 450 U.S. 707 (1981).
112. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 391 N.E. 2d 1127, 1129 (Ind. 1979).
113. *Thomas*, 450 U.S. at 713.
114. *Id*. at 714.
115. *Id*. at 715–16.
116. *Id*. at 716.
117. 489 U.S. 829 (1989).
118. *Id*. at 831 (internal citation omitted).
119. 489 U.S. at 830.

120. *Id*. at 834.
121. *Id*.
122. The House and Senate each held two hearings on the RLUIPA which, at the time, was called the Religious Liberty Protection Act. During the House hearing in mid-1998, Professor Laycock asserted that the RLUIPA's definition "codifies the intended meaning of RFRA as reflected in its legislative history." *Religious Liberty Protection Act of 1998, Hearings Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 16 (1998) (statement of Douglas Laycock). *See also Religious Liberty Protection Act of 1998, Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 62 (1998) (statement of Douglas Laycock); *Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 113 (1999) (statement of Douglas Laycock). The House Judiciary Committee report on the RLUIPA indicates that it merely clarified that "the burdened religious activity need not be compulsory or central to a religious belief system as a condition for the claim." *Religious Liberty Protection Act of 1999*, Report No. 106–219, 106th Cong. 13, 30 (1999).
123. *See Abortion*, Merriam-Webster, https://www.merriam-webster.com/dictionary/abortion.
124. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
125. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
126. Roe v. Wade, 410 U.S. 113, 159 (1973). *See also Dobbs*, 597 U.S. at 257 (The abortion right is "sharply distinguishe[d]" from the rights recognized in the cases on which *Roe* and *Casey* rely."); *Planned Parenthood of Sw. and Cent. Fla.*, 25 WL 1363525 at *5 (Abortion is "an issue that, unlike other privacy matters, directly implicates the interests of both developing human life and the pregnant woman."); Akhil R. Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 778 (1999) ("But as the Court itself admits…the existence of the living fetus makes the case at hand 'inherently different'…from every single one of these earlier-invoked cases.").
127. *Roe*, 410 U.S. at 154.
128. *House hearing*, *supra* note 25, at 8.
129. *See supra* note 40 and accompanying text.
130. *House hearing*, *supra* note 25, at 136.
131. Gonzalez v. O Centro Spirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).
132. *House hearing*, *supra* note 25, at 327
133. *Id*. *See also* Laycock and Thomas, *supra* note 30, at 233–34 (1994); Douglas Laycock, *Congress and the Ratchet*, 56 Mont. L. Rev. 145, 151 (1995). Abortion advocates similarly object to limiting RFRA to "compulsion." *See* Sepper, *supra* note 37, at 200. Like Berg, for example, Sepper argues that a narrow requirement of religious compulsion "mistake[s] the nature of religious practice." *Id*. at 202. *Cf*. Berg, *supra* note 61, at 52. Berg concludes that RFRA should not be read "as including only those claims that rest on coercion against a religious tenet." *Id*. at 57.
134. *See, e.g.*, Loren Jacobson, *Abortion and the Spiritual Imperative: Are the New Abortion Bans Susceptible to Religion Clause Challenges*, 72 DePaul L. Rev. 663, 668 (2023).
135. Ackerman, *supra* note 40, at 28.
136. *Id*. at 29. *See* Berman, *supra* note 25, at 1136 ("Ultimately, a report from the Congressional Research Service (CRS) assuaged fears that RFRA could be used to challenge abortion bans.").
137. *See, e.g.*, Sepper, *supra* note 37, at 221 ("If the state's interest is so important, why are exceptions allowed?"); Berman, *supra* note 25, at 1171–73; Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 Wis. L. Rev. 475, 502–06.
138. 42 U.S.C. § 2000bb–1(b).
139. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).
140. Josh Blackman, Howard Slugh, and Tal Fortgang, *Abortion and Religious Liberty*, 27 Tex. R. L. & Pol. 441, 476–77 (2023).
141. *Id*. at 477.
142. 593 U.S. 61 (2021).
143. Blackman, Slugh, and Fortgang, *supra* note 140, at 479.
144. *Id*. In *Gonzalez*, the Supreme Court found no compelling interest even when the law in question, the Controlled Substances Act, had no exceptions as applied to a substance used by the plaintiffs in religious ceremonies. Gonzalez v. O Centro Spirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432–33 (2006).
145. *See, e.g.*, Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 Iowa L. Rev. 2299, 2321–22 (2023).
146. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 888 n. 3 ("generally applicable, religious-neutral laws").
147. *Id*. at 878.
148. *Id.* at 878–79.
149. *See, e.g.*, Corbin, *supra* note 137, at 502–03.

150. *See, e.g.*, *House hearing*, *supra* note 25, at 11–12 (testimony of Robert Dugan, Jr.).
151. *Id*. at 141 (testimony of Rep. Chris Smith).
152. *Senate hearing*, *supra* note 24, at 236.
153. *See supra* note 74 and accompanying text.
154. *See, e.g.*, *House hearing*, *supra* note 25, at 15 (statement of Robert Dugan, Jr.); *id*. at 119 (testimony of Rep. Stephen Solarz); *id*. at 405 (statement of Wintley A. Phipps).
155. *See, e.g.*, *Senate hearing*, *supra* note 24, at 2 (statement of Sen. Edward Kennedy); *id*. at 8 (statement of Sen. Orrin Hatch); *id*. at 48 (testimony of Oliver Thomas); *id*. at 146 (statement of Forrest Montgomery); *id*. at 152 (statement of Michael P. Farris).
156. *Id*. at 82. See also *House hearing*, *supra* note 25, at 138 (testimony of Douglas Laycock) (exempting categories of religious exercise claims from strict scrutiny would mean that RFRA "wouldn't pass, and the underlying threat to religious freedom which has been posed by the *Smith* decision would have not been dealt with.").
157. *See* Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("[T]he approach that the courts took before *Smith*…is the approach that Congress wanted them to take under the Religious Freedom Restoration Act.").
158. 139 Cong. Rec. S14465 (daily ed. Oct. 27, 1993).
159. *Id*. at S14468.
160. 42 USC § 2000bb–3.
161. *See, e.g.*, Bostock v. Clayton County, Georgia, 590 U.S. 644, 682 (2020).
162. This letter appears in a booklet titled *The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom*, published by the Baptist Joint Committee for RFRA's 20th anniversary in 2013, and available at https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf.
163. 139 Cong. Rec. S14465 (daily ed. Oct. 27, 1993) (emphasis added).
164. In the current 118th Congress, Senator Jeff Merkley (D–OR) introduced S. 5 on June 21, 2023, and it currently has 50 Democrat co-sponsors. Representative Mark Takano (D–CA) introduced the parallel H.R. 15 on the same day, and it currently has 215 Democrat co-sponsors. It would amend seven federal statutes to prohibit discrimination on the basis of sexual orientation and gender identity in areas such employment, places of public accommodation, housing, credit, and jury service.
165. In the current 118th Congress, Senator Cory Booker (D–NJ) introduced S. 1206 on April 19, 2023, and it currently has 30 Democrat co-sponsors. Representative Bobby Scott (D–VA) introduced the parallel H.R. 2725 on the same day, and it currently has 136 Democrat co-sponsors. The Do No Harm Act would amend RFRA itself to block its application to "any provision of law or its implementation that provides for or requires a protection against discrimination or the promotion of equal opportunity." While not defining "promotion of equal opportunity," the bill does identify the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Violence Against Women Act for exemption from RFRA.
166. Senator Tammy Baldwin (D–WI) introduced S. 701 on March 8, 2023, and it currently has 49 Democrat co-sponsors. Representative Judy Chu (D–CA) introduced the parallel H.R. 12 on March 30, 2023, and it currently has 213 Democrat co-sponsors. The Women's Health Protection Act would prohibit any government, down to the level of towns or villages, from imposing 10 specific types of limitations or requirements or taking any other step that might "make abortion services more difficult to access." It would not only prohibit new pro-life legislation or regulation, but "supersedes any inconsistent Federal or State law…whether adopted *prior to* or after the date of enactment of this Act" [emphasis added].
167. These organizations are the American Civil Liberties Union, American Humanist Association, Americans United for Separation of Church and State, Anti-Defamation League, Central Conference of American Rabbis, The Episcopal Church, Evangelical Lutheran Church in America, National Council of Churches, National Council of Jewish Women, People for the American Way, Presbyterian Church (USA), United Methodist Church, Unitarian Universalist Association, United Church of Christ, and United Synagogue of Conservative Judaism.
168. When he served in the Senate, now-President Joseph Biden introduced the first version of RFRA in September 1992 and voted against the Reid Amendment and for final passage of the unamended RFRA. Today, however, he has called for passage of the Equality Act and Women's Health Protection Act. Senator Richard Blumenthal (D–CT), who signed the state attorneys general letter noted above, *supra* note 163, has sponsored or co-sponsored all three bills.
169. *See* Berg, *supra* note 61, at 16 ("[I]nserting the anti-abortion and other amendments would…doom the proposed statute.").
170. *Senate hearing*, *supra* note 24, at 167.
171. *Id*. at 42 (testimony of Oliver Thomas).
172. *Id*. at 64 (testimony of Douglas Laycock).
173. *Id*. at 65.
174. *Id*. at 131.
175. *Id*.

176. *Id*.
177. 42 U.S.C. § 2000bb–2. RFRA covered "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." It further defined "State" to include "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States."
178. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).
179. 521 U.S. 507 (1997).
180. *Id*. at 519.
181. *Id*.
182. Alabama provides this protection in its constitution. ALA. CONST., amend. 622. The state RFRAs are ARIZ. REV. STAT. § 41–1493 to 1493.02; ARK. CODE ANN. § 16–123–401 to 404; CT. GEN. STAT. § 52–571b; FLA. STAT. §761.01 through 05; IDAHO STAT. § 73–401 to 404; 775 ILL. COMP. STAT. ANN. 35/1 to 35/99; IND. CODE ANN. STAT. ANN. § 60–5301 to 5305; KY. REV. STAT. ANN. § 446.350; LA. REV. STAT. ANN. § 13:5231 to 5242; MISS. CODE ANN. § 11–61–1; MO. ANN. STAT. § 1.302 to 307; MT LEGIS. 276 (2021); N.M. STAT. § 28–22–1 to 5; OKLA. STAT. ANN. Title 51 § 251 to 258; PA. CONST. STAT. ANN. Title 71 § 2401 to 2407; R.I. GEN. LAWS § 42–80.1 to 4; S.C. CODE ANN. § 1–32–10 to 60; S.D. SENATE BILL 124 (2021); TENN. CODE ANN. § 4–1–407; TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 to 110.012; VA. CODE ANN. § 57–1 to 2.02. For simplicity, for the examples in the notes below, reference will be made to the state rather than the full statutory citation.
183. *See* Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST., Mar. 1, 2014, https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/ (last accessed Apr. 26, 2021).
184. *See* CONG. RSCH. SERV., *supra* note 46, at 3 ("Almost half of the states have enacted a version of RFRA, many of which follow the federal model."). *See also The History of the Religious Freedom Restoration Act*, BECKET FUND FOR RELIGIOUS LIBERTY, https://s3.amazonaws.com/becketnewsite/RFRA-History-Copy-and-Sources.pdf ("These state RFRAs are generally modeled after the federal RFRA, with minor variations in some states.").
185. Arizona, Arkansas, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia.
186. Alabama and Connecticut.
187. Missouri, New Mexico, and Rhode Island.
188. Pennsylvania, South Carolina, and Texas.
189. Idaho, Missouri, Montana, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, and Virginia.
190. Arkansas, Illinois, and Mississippi.
191. Arkansas. *See* Sepper, *supra* note 37, at 194 (state courts likely to rely on the Supreme Court precedent in interpreting state RFRAs).
192. Kentucky and Virginia.
193. Missouri, New Mexico, and Texas.
194. James Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade*?* 15 J. CONTEMP. L. 131, 156 (1989).
195. *Senate hearing*, *supra* note 24, at 82 (testimony of Michael McConnell).
196. House report, *supra* note 102, at 9; Senate report, *supra* note 93, at 13.
197. *See* McConnell, *supra* note 76 ("The law of standing will not be affected in any way, and the substantive law will at most be restored to the principles of *Sherbert* and *Yoder*. Any claim that could be brought under the Act could be brought under the Free Exercise Clause if *Smith* did not stand in the way."). These scholars, joined by Professor Cole Durham, later argued: "For those who are committed to protecting the unborn and to preserving our traditional moral heritage, it is a mistake to oppose the Religious Freedom Restoration Act—a mistake of both principle and tactics." Michael W. McConnell, *For the Religious Freedom Restoration Act*, FIRST THINGS (Mar. 1992), https://www.firstthings.com/article/1992/03/for-the-religious-freedom-restoration-act.
198. *See, e.g.*, Sepper, *supra* note 37, at 200.
199. *Id*. at 204.
200. Berman, *supra* note 25, at 1132.
201. *Id*. at 1181.
202. *Id*. at 1162 (emphasis in original).
203. *Id*. at 1164 (emphasis in original).
204. *Id*. at 1162.
205. ARK. CODE § 16–123–403(3)(B) ("action").
206. 775 ILL. COMP. STAT. 35/5 § 5 ("act").
207. MO. REV. STAT. § 1.302(2) ("act").

208. N.M. Stat. Ann. § 28–22–2.A. ("act").
209. Berman, *supra* note 25, at 1165. *See also id.* (A non-pregnant plaintiff "can satisfy [a state's] definition of 'substantial burden' if they articulate their 'religious exercise' broadly.").
210. *Id.* at 1165 (emphasis in original).
211. *Id.* (emphasis in original).
212. *Id.*
213. Ky. Rev. Stat. Ann. § 446.350.
214. Ky. Rev. Stat. Ann. § 311.772(4).
215. The complaint can be found at https://www.brennancenter.org/sites/default/files/2022-11/Sobel%20v.%20Cameron%20%5BComplaint%5D%20%281%29.pdf.
216. The Kentucky Court of Appeals held that this statute is "an equivalent provision to the federal RFRA," a "codification by the legislature of the strict scrutiny test applied in case law." Moorish Sci. Temple of Am., Inc. v. Thompson, 2016 WL 1403495, at *4 (Ky. App. 2016).
217. Complaint at ¶ 73, quoting *Moorish Sci. Temple* at *4.
218. *Id.*
219. Complaint at ¶ 34.
220. *Id.* at ¶ 36.
221. *Id.* at ¶ 76.
222. *Id.* at ¶ 78.
223. *Id.* at ¶ 83.
224. Ind. Code Ann. § 16–34–2–1(a).
225. Before 20 weeks of pregnancy, abortion is allowed only when "necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life" or "the fetus is diagnosed with a lethal fetal anomaly." The Indiana abortion ban does not apply to in vitro fertilization. *Id.* at § 16–34–2–1(a)(1)(A). During the first 10 weeks of pregnancy, an abortion is also allowed if "the pregnancy is a result of rape or incest." *Id.* at § 16–34–2–1(a)(2)(A). The Indiana abortion ban does not apply to in vitro fertilization. *Id.* at § 16–34–1–0.5.
226. Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1 et al., 233 N.E. 3d 416, 431 (Ind. App. 2024).
227. Bd. of Comm'ners of Union County v. McGuinness, 80 N.E. 3d 164, 170 (Ind. 2017).
228. *Id.* at 433.
229. *Id.*, quoting Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 433, 343 (1977).
230. *Individual Members*, 233 N.E. 3d at 434.
231. *Id.*
232. *Id.* at 432.
233. Solarize, Ind., Inc. v. S. Ind. Gas & Electric Co., 182 N.E.3d 212, 219 (Ind. 2022), quoting Hammes v. Brumley, 659 N.E.2d 1021, 1030 (Ind. 1995).
234. Holcomb v. Bray, 187 N.E.3d 1268, 1286 (Ind. 2022).
235. *See* Ind. Code Ann. § 34–13–9–9 (requiring that a claimant "has been" or "is likely to be substantially burdened").
236. Complaint at ¶ 76. The complaint can be found at https://www.aclu-in.org/sites/default/files/field_documents/complaint_to_file.pdf.
237. *Id.* at ¶ 24 (emphasis added).
238. *Id.* at ¶ 31.
239. *Id.* at ¶ 82.
240. *Id.* at ¶ 81.
241. *Id.* at ¶ 84.
242. For whatever reason, the complaint also describes beliefs regarding abortion of religious bodies or traditions with which the plaintiffs are not associated. These include Unitarian Universalism, *id.* at ¶ 35; the Episcopal Church, *id.* at ¶ 37; and polytheistic pagans, *id.* at ¶ 43.
243. Solarize, Ind., Inc. v. S. Ind. Gas & Electric Co., 182 N.E.3d 212, 219 (Ind. 2022), quoting Hammes v. Brumley, 659 N.E.2d 1021, 1030 (Ind. 1995).
244. Holcomb v. Bray, 187 N.E.3d 1268, 1286 (Ind. 2022).
245. Warner v. Boca Raton, 887 So.2d 1023, 1031 (Fla. 2004).
246. Fla. Stat. § 390.0111.

247. Complaint at ¶ 49. *See also id*. at ¶ 5 (United Church of Christ "believes in the right of women and girls to have the freedom to make their own decisions" regarding abortion). The complaint can be found at https://clearinghouse.net/doc/136644/.
248. *Id*. at ¶ 78.
249. *Id*. at ¶ 3.
250. *Id*. at ¶ 5.
251. McConnell, *supra* note 15, at 1491.
252. Frazee v. Ill. Dept. of Emp. Sec., 489 U.S. 829, 833 (1989), quoting Thomas v. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 713 (1981). *See also* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).
253. Complaint at ¶ 61.
254. FLA. STAT. §777.011.
255. *Id*.
256. Complaint at ¶ 143.
257. Laurinda Hafner v. State of Florida (Fla. 11th Jud. Cir. Ct., Mar. 3, 2023), at 3.
258. *Id*. at 4.
259. *Id*. at 8.
260. *Id*. at 9, quoting Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925).
261. Complaint at ¶ 51.
262. *Id*. at ¶ 99.
263. *See House hearing*, *supra* note 25, at 455. In *Doe v. Ada*, the plaintiff challenged the constitutionality of a statute signed into law by Governor Joseph Ada on March 19, 1990. While it was originally struck down under *Roe v. Wade*, the plaintiff acknowledged in her complaint that "[f]ree exercise problems can arise whenever government regulation compels conduct which is forbidden by one's religious belief." *Id*. at 458. *See* Guam Soc. Of Obstet. and Gyn. v. Ada, 776 F.Supp. 1422 (D. Guam 1990).
264. Roe v. Wade, 410 U.S. 113, 153(1973) ("Maternity, or additional offspring, may force upon the woman a distressful life and future.... There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable...to care for it.").
265. Roat, *supra* note 38, at 32.