



## NOTE

## The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs

Ari Berman\*

**Abstract.** After *Dobbs*, religion, commonly seen as an argument against abortion, has been used to argue *for* the right to choose. In July 2022, a synagogue sued Florida, asserting that its ban on abortion after fifteen weeks violated Article 1, Section 3 of the Florida Constitution, which prohibits the penalization of free expression of religion. In September 2022, the ACLU argued that the state's abortion ban violated Indiana's Religious Freedom Restoration Act. And in October 2022, three Jewish women sued the state of Kentucky, alleging that its abortion ban violated the Kentucky Religious Freedom Restoration Act. This Note provides a guide to the merits and challenges of the argument that an abortion ban violates a state Religious Freedom Restoration Act (RFRA). Although this Note focuses on how Jewish plaintiffs can raise such claims, the arguments outlined could be raised by individuals of multiple faiths. This Note contributes to a growing debate about religious arguments for the right to an abortion. And it is the first paper to outline how religious freedom claims to obtaining an abortion might fare under state RFRAs. The approach to RFRA outlined in this paper lays the groundwork for a rights-advancing framework of religious exercise.

---

\* J.D. Candidate, Stanford Law School, 2024. I am deeply grateful to Professor Jane Schacter for supervising this research. This Note would not exist without the spectacular scholarship and guidance of Professor Micah Schwartzman, Elizabeth Platt, and Zeba Huq; I am beyond thankful for your generous comments and time. I also have deep gratitude for Matthew Coffin, Ben Welton, Nathan Weiser, and Professor Anne Joseph O'Connell for encouraging me as I wrote this Note and urging me to submit it to *SLR*. Thank you to Ben Potash for assisting me in getting critical documents. And thank you to my peers on *SLR* for their heroic editorial support. Finally, to my family and Aaron: I could not have done this without your support and love.

**Table of Contents**

Introduction .....	1131
I. The Legal Landscape .....	1135
A. The Emergence of State RFRAs .....	1135
B. Post- <i>Dobbs</i> Abortion Bans.....	1139
1. Kentucky .....	1139
2. Indiana .....	1140
3. Florida.....	1141
C. Abortion Bans Create Major Conflicts with Jewish Beliefs .....	1142
II. A Jewish Plaintiff, In Theory, Can Seek an Exception to an Abortion Ban Under a State RFRA .....	1147
A. A Jewish Plaintiff Has a Sincerely Held Religious Belief in Abortion.....	1147
1. Sincerely held religious belief is a deferential, factual inquiry that looks to a plaintiff’s honesty; it does not question a plaintiff’s verity or what their religion should resemble .....	1148
2. If a state challenges a plaintiff’s sincerity, the plaintiff should ensure that the state is not challenging centrality or verity and remind courts of the deference they typically exercise .....	1152
3. If contested, “sincerely held belief” would be resolved in evidentiary hearings.....	1157
B. An Abortion Ban Substantially Burdens a Jewish Plaintiff’s Religious Exercise .....	1158
1. Religious exercise includes abortions that are consistent with—but not mandated by—Judaism .....	1162
2. An abortion ban compels or pressures a Jewish plaintiff to violate their beliefs .....	1164
C. The State Does Not Have a Compelling Interest in Its Abortion Ban.....	1166
1. A state did not articulate a compelling interest “to the person” .....	1167
2. A state’s compelling interest is religious preferentialism.....	1169
3. A state’s interest is not compelling when it makes exceptions.....	1171
D. A State’s Abortion Ban Is Not Narrowly Tailored.....	1174
1. The state draws the wrong balance between compelling interests.....	1174
2. The state cannot make “secular exceptions” without making religious exceptions .....	1178
Conclusion.....	1181

## Introduction

In the hours, days, and weeks after the Supreme Court overturned *Roe v. Wade*,<sup>1</sup> state legislatures enacted restrictions—and even bans—on abortion.<sup>2</sup> Advocates argued that these new bans violated state constitutional provisions, such as the right to privacy and the right to liberty.<sup>3</sup> But advocates have also raised religious arguments: In July 2022, a synagogue sued the state of Florida, asserting that its ban on abortion after fifteen weeks violated Article 1, Section 3 of the Florida Constitution, which prohibits the infringement of free expression of religion.<sup>4</sup> This suit was not an anomaly. In September 2022, the ACLU, on behalf of Jewish and Muslim plaintiffs, argued that Indiana’s abortion ban violated Indiana’s Religious Freedom Restoration Act (IRFRA).<sup>5</sup> And in October 2022, three Jewish women sued Kentucky, alleging that its abortion ban violated the Kentucky Religious Freedom Restoration Act (KRFRA).<sup>6</sup>

Litigation in some of these cases is ongoing,<sup>7</sup> but on April 4, 2024, the plaintiffs in Indiana secured a major victory when the Indiana Court of Appeals upheld a preliminary injunction against Indiana’s abortion ban.<sup>8</sup> The court also affirmed the lower court’s class action certification for individuals whose religious beliefs direct them to obtain abortions in violation of Indiana law and

- 
1. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).
  2. See Danica Jefferies, JoElla Carman & Nigel Chiwaya, *Abortion Law Tracker: See Where the Procedure Is Currently Legal, Banned or Restricted in the U.S.*, NBC NEWS (updated Dec. 29, 2023, 10:54 AM PST), <https://perma.cc/R26T-6W4Z>.
  3. Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (updated Jan. 31, 2023), <https://perma.cc/8FE9-9DE9>.
  4. Complaint at 1, *Generation to Generation, Inc. v. Florida*, No. 2022 CA 000980 (Fla. Cir. Ct. Apr. 10, 2022), <https://perma.cc/Z4HN-NHYT>.
  5. Complaint at 1-2, *Anonymous Plaintiffs 1-5 v. Individual Members of the Med. Licensing Bd.*, No. 49D01-2209-PL-031056 (Ind. Super. Ct. Sept. 8, 2022) [hereinafter *Anonymous Plaintiffs Complaint*], <https://perma.cc/R6XS-R5PN>.
  6. Complaint at 13, *Sobel v. Cameron*, No. 2022cv00570 (Ky. Cir. Ct. Oct. 26, 2022) [hereinafter *Sobel Complaint*], <https://perma.cc/E5WL-QAAH>.
  7. All of the content in this Note is current as of May 2024; future readers should be advised that the legal landscape surrounding abortion is rapidly changing. See, e.g., Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *Sobel v. Cameron*, No. 22-CI-005189 (Ky. Cir. Ct. Apr. 4, 2023) [hereinafter *Sobel Plaintiffs’ Summary Judgment Motion*], <https://perma.cc/7T7Q-9AHD>. The suit in Florida was voluntarily dismissed. See *Generation to Generation, Inc. v. Florida*, 2022-CA-000980 (Fla. Cir. Ct. 2023), <https://perma.cc/BT64-88Z8>. Nonetheless, the arguments discussed in this Note are still valid as pertaining to Florida, and these arguments could be raised by other plaintiffs in the future.
  8. *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489, at \*1 (Ind. Ct. App. Apr. 4, 2024).

found that plaintiffs have associational standing and ripe claims.<sup>9</sup> The court of appeals remanded the case, instructing the trial court to issue a narrower injunction.<sup>10</sup> The state has appealed the decision to the state supreme court.<sup>11</sup>

Although challenges to abortion restrictions by Jewish plaintiffs have risen to the forefront of post-*Dobbs* litigation, religious-based challenges have been raised by members of multiple faiths.<sup>12</sup> After *Dobbs*, religion, commonly seen as an argument against abortion,<sup>13</sup> has been used to argue *for* the right to pursue an abortion.<sup>14</sup>

This Note explores the argument that an abortion ban violates a state Religious Freedom Restoration Act (RFRA). In so doing, this Note contributes to a growing debate about how religious beliefs can play a role in securing the right to an abortion. Micah Schwartzman and Richard Schragger, for example, have explained why abortion bans are constitutionally vulnerable under the Free Exercise and Establishment Clauses.<sup>15</sup> Elizabeth Sepper has argued that stereotypes about women risk “being imported into religious liberty doctrine” alongside preferences for conservative religions.<sup>16</sup> David Schraub has assessed recent Supreme Court jurisprudence and argued that recent doctrine “systematically degrades the validity and legitimacy of liberal Jews as Jews.”<sup>17</sup> Caroline Mala Corbin has also explored the Supreme Court’s recent religious liberty jurisprudence and argues Jewish plaintiffs could satisfy the requirements for free exercise claims.<sup>18</sup> And the Law, Rights, and Religion Project at Columbia University has issued a report providing a history and analysis of

---

9. *Id.*

10. *Id.*

11. See Petition to Transfer, Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, No. 22A-PL-2938 (Ind. May 20, 2024), <https://perma.cc/A38B-YCAM>.

12. Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES (updated July 5, 2023), <https://perma.cc/FSP6-4DJM>.

13. See, e.g., Andrew R. Lewis, *The Fight for Religious Freedom Isn't What It Used to Be*, ATLANTIC (June 17, 2021), <https://perma.cc/234G-WD4T>.

14. See generally Micah Schwartzman & Richard Schragger, Essay, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299 (2023); David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556 (2023); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475 (2023).

15. Schwartzman & Schragger, *supra* note 14, at 2302.

16. Elizabeth Sepper, *Free Exercise of Abortion*, 49 B.Y.U. L. REV. 177, 181 (2023).

17. Schraub, *supra* note 14, at 1560.

18. Corbin, *supra* note 14, at 498.

RFRAs.<sup>19</sup> This Note is the first paper to extensively analyze state RFRAs and evaluate the merits of demanding an exemption for abortion under them.

To assert a RFRA claim, an individual<sup>20</sup> must argue that a state's law substantially burdens their religious exercise and does not further a "compelling governmental interest" through the "least restrictive means."<sup>21</sup> Traditionally, RFRA claims are as applied, which means that a plaintiff challenges a law's applicability to them but does not seek to undermine the law in its entirety.<sup>22</sup> As-applied challenges thus result in an individual exemption from a law.<sup>23</sup> This Note, therefore, analyzes how an individual Jewish plaintiff would seek an exemption from a state abortion ban.

The scope of this Note is limited in two ways. First, it focuses on Jewish plaintiffs. Second, it focuses on Kentucky, Indiana, and Florida's abortion bans—places where notable RFRA challenges occurred or are occurring. This Note's analysis, however, is generalizable across religions and states. RFRA's standards remain the same across religions, which means that plaintiffs from other faiths must meet the same showings and respond to the same counterarguments as Jewish plaintiffs.<sup>24</sup> And because many states have adopted

---

19. See LAW, RTS. & RELIGION PROJECT, COLUM. L. SCH., A RELIGIOUS RIGHT TO ABORTION: LEGAL HISTORY & ANALYSIS 10-14 (2022), <https://perma.cc/F9KX-W2LF> (discussing RFRA).

20. This Note refers to claimants and plaintiffs in gender-neutral terms as much as possible. This linguistic choice reflects the fact that many pregnant individuals do not identify as cisgender women. See AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022), <https://perma.cc/5GEJ-NZ23>.

21. *E.g.*, 42 U.S.C. § 2000bb-1(b).

22. Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018).

23. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014). The state cases mentioned above, which involve multiple plaintiffs, are broader challenges because the plaintiffs raised RFRA claims alongside facial challenges or these claims were raised as class actions. Nonetheless, the analysis under RFRA and relevant case law remains the same. See, e.g., Brief of Appellees at 43, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Mar. 2, 2023) [hereinafter *Anonymous Plaintiff Brief of Appellees*], <https://perma.cc/2VF4-TE4R> (citing *Hobby Lobby*, 573 U.S. at 697).

24. One plaintiff in the Indiana RFRA suit, for example, was Muslim, but was dropped from the suit without prejudice. Brief in Support of Appellees of Amici Curiae National Council of Jewish Women et al. at 12, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Mar. 2, 2023); Acknowledgment of Stipulation of Dismissal Without Prejudice of Anonymous Plaintiff 3 at 1, *Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd.*, No. 49D01-2209-PL-031056 (Ind. Super. Ct. 2023). Other faiths may, however, face varying degrees of difficulty in asserting their claims. See *infra* text accompanying notes 387-91 (explaining potential biases against minority religions).

similar RFRA<sup>25</sup> practitioners can apply this Note's analysis of Indiana, Kentucky, and Florida's RFRA to other states with RFRA and abortion bans.

Assuming standing,<sup>26</sup> a Jewish plaintiff has a strong argument that they are exempted from an abortion ban under IRFRA, KRFRA, or FRFRA (Florida's RFRA). This Note reaches that conclusion by weighing the history, case law, and norms of RFRA and similar religious liberty cases. It proceeds in two parts. Part I provides legal and factual background, documenting the emergence of state RFRA, the enactment of abortion restrictions post-*Dobbs*, and how navigating a pregnancy in a manner consistent with Jewish beliefs is impossible under Indiana, Kentucky, or Florida's abortion ban. Part II explains how a Jewish plaintiff could argue that the abortion ban in Indiana, Kentucky, or Florida violates the state's RFRA. Specifically, a plaintiff could contend that abortion is a religious exercise motivated by a (1) sincerely held belief (2) that is substantially burdened by an abortion ban, (3) which is not justified by a compelling state interest, nor (4) narrowly tailored to a state's compelling interests. The Note addresses potential counterarguments for each element of such a claim, namely that (1) a plaintiff's belief is insincere, (2) the law does not substantially burden their religious exercise, (3) a state has a compelling interest in denying a religious exemption, and (4) a state's abortion law is narrowly tailored to its compelling interest. This Note points to statutory, legal, and normative arguments a Jewish plaintiff could mount to undercut these counterarguments. It concludes by discussing practical challenges to raising state RFRA claims.

---

25. Compare ARK. CODE ANN. § 16-123-404(A) (2023) ("A government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless it is demonstrated that application of the burden to the person in this particular instance is: (1) Essential to further a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest"), TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2023) (using a similar standard), MISS. CODE. ANN. § 11-61-1(5) (2023) (same), MO. REV. STAT. § 1.302 (2023) (same), LA. STAT. ANN. § 13:5233 (2023) (same), and KAN. STAT. ANN. § 60-5303 (2023) (same), with text accompanying notes 46-65 (analyzing the language of Kentucky's, Indiana's, and Florida's RFRA and finding them to be similar to each other and to the federal RFRA).

26. For the purpose of brevity, this Note does not discuss standing. See *infra* text accompanying notes 383-85.

## I. The Legal Landscape

### A. The Emergence of State RFRA

Starting in the 1960s and 1970s, neutral laws of general applicability received heightened review whenever they burdened religious exercise.<sup>27</sup> No matter how incidental a law's burden on religion, courts asked if that law was narrowly tailored to a compelling state interest.<sup>28</sup> In 1990, this approach changed in *Employment Division v. Smith*, in which the Supreme Court declared that generally applicable, neutral laws were not subject to strict scrutiny when they burdened religion.<sup>29</sup> The Court argued that applying strict scrutiny to laws that *only* burdened religious exercise would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," from "compulsory military service" to "child labor laws" to "health and safety regulation."<sup>30</sup> This change, in turn, would "make the professed doctrines of religious belief superior to the law of the land," effectively permitting "every citizen to become a law unto himself."<sup>31</sup>

Despite the Court's warnings, Congress responded to *Smith* by passing the Religious Freedom Restoration Act in 1993.<sup>32</sup> RFRA declared that a federal or state "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."<sup>33</sup> A government could burden an individual's religious exercise only if it could demonstrate that the "application of the burden to the person" furthered a "compelling governmental interest" and did so through the "least restrictive means" to that individual.<sup>34</sup> Because RFRA imposed strict scrutiny, it had a

---

27. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407-09 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972).

28. See Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 57 (2022) (citing *Sherbert*, 374 U.S. at 403-04).

29. 494 U.S. 872, 878, 886-87 (1990).

30. *Id.* at 881-89 (arguing that "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," and declining to apply that standard where only free exercise was an issue).

31. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).

32. 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . .").

33. 42 U.S.C. § 2000bb-1(a).

34. 42 U.S.C. § 2000bb-1(b) (requiring the government to demonstrate the application of the burden "to the person"); see also *infra* text accompanying notes 270-80 (elaborating what "to the person" means).

“constitutional function” of guiding the interpretation of courts, who were tasked with implementing the statute’s demands.<sup>35</sup>

When introduced, RFRA enjoyed broad, bipartisan support.<sup>36</sup> But the most contentious debate around its passage revolved around abortion.<sup>37</sup> Critics argued that if *Roe* was reversed, RFRA could be used to overturn abortion restrictions.<sup>38</sup> This concern was so acute that Representative Chris Smith introduced a version of RFRA that explicitly barred the law’s applicability to abortion restrictions.<sup>39</sup> Ultimately, a report from the Congressional Research Services (CRS) assuaged fears that RFRA could be used to challenge abortion bans. CRS determined that RFRA challenges to abortion bans would not succeed because of a state’s “compelling interest in fetal life before as well as after viability.”<sup>40</sup> CRS asserted that the only situation in which a RFRA claim would prevail was if a state banned abortions to save a pregnant individual’s life, because Judaism requires abortion when a pregnant person’s life is at risk.<sup>41</sup> To support this contention, CRS relied on the views of Orthodox Judaism.<sup>42</sup> As I argue below, CRS’s consideration of *only* Orthodox Judaism ignores the views of non-Orthodox Jews, who have viable claims that an abortion ban like Kentucky’s (which makes an exception for preserving maternal health) substantially burdens their religious exercise.<sup>43</sup> And CRS’s conclusion runs contrary to RFRA’s recognition that religious exercise includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>44</sup>

The RFRA abortion debate never played out in the states—largely because, four years later, the Supreme Court held that Congress’s extension of RFRA to the states was an unconstitutional exercise of power under the Fourteenth

---

35. See 42 U.S.C. § 2000bb(b) (asserting that the purposes of RFRA were to “restore the compelling interest test” of *Sherbert* and “guarantee its application in all cases where free exercise of religion is substantially burdened”); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 218-219 (1994).

36. *Id.* at 210-211.

37. *Id.* at 236.

38. See Roat, *supra* note 28, at 57-67.

39. Laycock & Thomas, *supra* note 35, at 237.

40. DAVID M. ACKERMAN, CONG. RSCH. SERV., 92-366A, THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 28-29 (1992) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989)); Roat, *supra* note 28, at 68-70.

41. ACKERMAN, *supra* note 40, at 28-29.

42. *Id.*

43. See *infra* text accompanying notes 116-30.

44. 42 U.S.C. §§ 2000bb-2(b), 2000cc-5(7).



Amendment.<sup>45</sup> Soon after, however, individual states passed their own RFRA. Kentucky passed KRFRA in 2013.<sup>46</sup>

KRFRA states that the “[g]overnment shall not substantially burden a person’s freedom of religion.”<sup>47</sup> Under this statute, Kentucky can burden religious exercise only when it “proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific [religious exercise] . . . and has used the least restrictive means to further that interest.”<sup>48</sup> Kentucky recognizes that a “burden” can include “indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.”<sup>49</sup>

Indiana passed IRFRA in 2015.<sup>50</sup> IRFRA allows the government to “substantially burden a person’s exercise of religion” only if it demonstrates that its “application of the burden to the person . . . is in furtherance of a compelling governmental interest” and that the state is using “the least restrictive means of furthering that compelling governmental interest.”<sup>51</sup> Indiana has specified that such claimants may also include individuals whose religious exercise is “likely to be substantially burdened,” who may challenge an impending violation.<sup>52</sup>

Florida enacted its RFRA (FRFRA) in 1998.<sup>53</sup> FRFRA more explicitly repudiates *Smith*, stating that “even if” Florida creates a “rule of general applicability,” it may not “substantially burden a person’s exercise of religion.”<sup>54</sup> Like IRFRA and KRFRA, FRFRA allows a state to burden religious exercise if it “demonstrates that application of the burden to the person” is “in furtherance of a compelling governmental interest” and is “the least restrictive means of furthering that compelling governmental interest.”<sup>55</sup>

Although IRFRA, KRFRA, and FRFRA vary in phrasing, each statute prevents the state from “substantially burden[ing]” a person’s religious exercise unless the state can prove a “compelling governmental interest” in imposing a

---

45. *City of Boerne v. Flores*, 521 U.S. 507, 24-536 (1997) (holding that RFRA was not a proper exercise of Congress’s remedial or preventive power under Section 5 of the Fourteenth Amendment).

46. See KY. REV. STAT. ANN. § 446.350 (West 2023).

47. *Id.*

48. *Id.*

49. *Id.*

50. See IND. CODE § 34-13-9-8 (2023).

51. *Id.*

52. IND. CODE § 34-13-9-9 (2023).

53. FLA. STAT. § 761.03(1) (2023).

54. *Id.*

55. *Id.*

law on that person through the “least restrictive means.”<sup>56</sup> IRFRA, KRFRRA, and FRFRA thus echo the central elements of the federal RFRA.<sup>57</sup> In fact, all three states made their RFRAs coextensive with federal standards: Indiana’s courts recognize that IRFRA has a similar effect to the federal law.<sup>58</sup> Florida’s Supreme Court noted that FRFRA was “modeled after the federal RFRA.”<sup>59</sup> And the Court of Appeals of Kentucky held that KRFRRA was “a codification by the legislature of the strict scrutiny test” from federal case law.<sup>60</sup> As a result, a plaintiff should reference favorable state *and federal* decisions in mounting a RFRA challenge to a state abortion ban.<sup>61</sup> Furthermore, because RFRA incorporates definitions and standards from its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>62</sup> litigants may also reference RLUIPA cases.<sup>63</sup>

Ultimately, the most important difference between the three statutes is how KRFRRA defines substantial burden. KRFRRA defines a “burdened” religious exercise as “[t]he right to act or refuse to act in a manner motivated by a sincerely held religious belief.”<sup>64</sup> As argued below, Kentucky’s broader standard

---

56. *Id.*; KY. REV. STAT. ANN. § 446.350 (West 2023); IND. CODE § 34-13-9-8 (2023).

57. See 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

58. *Blatter v. State*, 190 N.E.3d 417, 421 n.1 (Ind. Ct. App. 2022) (explaining that because “relevant statutory language in Indiana’s RFRA largely tracks the language in the federal RFRA statute, . . . federal caselaw provides some useful guidance”). The state of Indiana recognized that IRFRA was almost identical to RFRA in recent oral arguments. Oral Argument at 16:20, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Dec. 6, 2023), <https://perma.cc/HRB2-UPXB>.

59. *Warner v. Boca Raton*, 887 So. 2d 1023, 1031 (Fla. 2004) (noting that the legislature adopted the federal standard).

60. See *Moorish Sci. Temple of Am., Inc. v. Thompson*, No. 2014-CA-001080-MR, 2016 WL 1403495, at \*3-4 (Ky. Ct. App. Apr. 8, 2016) (citing federal cases to support its analysis).

61. See, e.g., *id.* at \*3; *Blatter*, 190 N.E.3d at 423-24 (citing federal cases and state cases); *Warner*, 887 So. 2d at 1032-34 (same).

62. 42 U.S.C. § 2000bb-2(b) (citing 42 U.S.C. § 2000cc-5); see also 42 U.S.C. § 2000cc (“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”).

63. See, e.g., *Blatter*, 190 N.E.3d at 423-24 (citing *Holt v. Hobbs*, 574 U.S. 352 (2015), a RLUIPA case); *Moorish Sci.*, 2016 WL 1403495, at \*3-4 (same); *Westgate Tabernacle, Inc. v. Palm Beach County*, 14 So. 3d 1027, 1031 (Fla. Dist. Ct. App. 2009) (“In light of the above similarities [in the statutes], federal and state courts have applied the same analysis under FRFRA and RLUIPA.”).

64. KY. REV. STAT. ANN. § 446.350 (West 2023).

will help plaintiffs who are not yet pregnant assert that an abortion ban burdens their religious exercise.<sup>65</sup>

## B. Post-*Dobbs* Abortion Bans

Many of the states that passed RFRAs after *Smith* also enacted abortion bans after *Dobbs*. Although this Note focuses on Kentucky's, Indiana's, and Florida's abortion laws because that is where notable RFRA challenges to abortion laws are occurring, its argument that abortion restrictions violate state RFRAs can also extend to states with abortion restrictions and RFRAs, such as Arizona, Alabama, Arkansas, Idaho, Louisiana, Mississippi, Missouri, South Dakota, Tennessee, and Texas.<sup>66</sup>

### 1. Kentucky

Kentucky's trigger ban<sup>67</sup> is one of the most restrictive. Kentucky made it a Class D felony to “[a]dminister to, prescribe for, procure for, or sell . . . any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being.”<sup>68</sup> It also prohibited the “[u]se or employ[ment] [of] any instrument or procedure” with the intent to cause an abortion.<sup>69</sup>

Kentucky exempts only abortions “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.”<sup>70</sup> Kentucky's ban makes no exception for fetal abnormality, rape, or incest.<sup>71</sup> However, Kentucky appears to exempt in vitro

---

65. See *infra* text accompanying notes 224-30.

66. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., <https://perma.cc/X3AT-BVW2> (archived Mar. 28, 2024); *Religious Freedom Restoration Acts*, ATHEISTS, <https://perma.cc/M4RV-AYF4> (archived Mar. 28, 2024); see also *supra* note 25 (comparing the language of state RFRAs).

67. Trigger bans are statutes that are unenforceable when enacted yet contain a provision “deferring the law’s effective date until the substantive provisions actually become constitutional.” *Trigger Law*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Trigger Law*, MERRIAM-WEBSTER, <https://perma.cc/KT9U-76Q2> (archived Mar. 28, 2024) (defining trigger bans as laws that are unenforceable when passed that become enforceable “upon the occurrence of an event (such as court decision)”).

68. KY. REV. STAT. ANN. § 311.772(3) (West 2023).

69. *Id.*

70. *Id.* § 311.772(4)(a).

71. Al Cross, *With No Exceptions for Rape or Incest, Kentucky’s Near-Total Abortion Ban Can Force Children as Young as 9 to Deliver a Baby*, KY. HEALTH NEWS (Sept. 9, 2022), <https://perma.cc/MW5X-E2N3>; Sobel Plaintiffs’ Summary Judgment Motion, *supra* note 7, at 2 (noting that there is no exception for lethal fetal abnormalities).

fertilization (IVF): Kentucky defines an “unborn human being” as embryos from fertilization to childbirth,<sup>72</sup> yet it does not explicitly bar IVF, which often involves the disposal of fertilized embryos; indeed, in a court filing, Kentucky’s Attorney General deemed it “clear that neither IVF nor the disposal of embryos created through IVF . . . are prohibited.”<sup>73</sup> As explained below, the ban’s seeming allowance of IVF is one reason why the law fails strict scrutiny.<sup>74</sup>

## 2. Indiana

Indiana similarly prohibits nearly all abortions. One narrow exception allows abortions “when reasonable medical judgment” dictates that “performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman’s life.”<sup>75</sup> Serious medical risks are conditions that “necessitate[] an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function.”<sup>76</sup> Serious medical risks do *not* include “psychological or emotional conditions.”<sup>77</sup>

Unlike Kentucky, Indiana explicitly exempts abortions within the first ten weeks in cases of rape and incest.<sup>78</sup> Indiana also has a fetal abnormality exception, but only if the abnormality “will with reasonable certainty result in the death of the child not more than three (3) months after the child’s birth.”<sup>79</sup> Indiana’s abortion restrictions explicitly “do[] not apply” to IVF.<sup>80</sup>

---

72. KY. REV. STAT. ANN. § 311.772(1)(c) (West 2023).

73. Compare KY. REV. STAT. ANN. § 311.772 (West 2023) (not explicitly banning IVF), and Attorney General Daniel Cameron’s Combined Response to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment at 12, *Sobel v. Cameron*, No. 22-CI-005189 (Ky. Cir. Ct. Apr. 24, 2023) [hereinafter *Sobel* Defendant’s Cross Motion for Summary Judgment], <https://perma.cc/UHG9-KWY4> (explaining the law did not ban IVF), with Chabeli Carranza & Jennifer Gerson, *IVF May Be in Jeopardy in States Where Embryos Are Granted Personhood*, GUARDIAN (July 16, 2022, 8:00 AM EDT), <https://perma.cc/UJM8-QS38> (raising the risk that embryos could be deemed “people” within Kentucky’s statute), *Sobel* Complaint, *supra* note 6, at 5 (“It is unclear whether under Kentucky law choosing to discard embryos during IVF is a prohibited capital offense.”), and *Sobel* Plaintiffs’ Summary Judgment Motion, *supra* note 7, at 6 (noting that “[b]ecause the excess embryos are perhaps statutorily human, discarding the embryos may be illegal”).

74. See *infra* notes 308-53 and accompanying text.

75. IND. CODE ANN. § 16-34-2-1(a)(3)(A) (West 2023).

76. *Id.* § 16-18-2-327.9.

77. *Id.*

78. *Id.* § 16-34-2-1(a)(2).

79. *Id.* § 16-25-4.5-2.

80. *Id.* § 16-34-1-0.5.

### 3. Florida

Prior to April 2024, Florida's abortion ban was the least restrictive of the three states, allowing abortions up to fifteen weeks of pregnancy.<sup>81</sup> After fifteen weeks, Florida permitted abortions only when two physicians certified that the termination of the pregnancy was "necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman."<sup>82</sup> These impairments did not include psychological conditions.<sup>83</sup> Like Indiana, Florida had a "fatal fetal abnormality" exception,<sup>84</sup> which applied to nonviable fetuses<sup>85</sup> with conditions that are "incompatible with life outside the womb and will result in death upon birth or imminently thereafter."<sup>86</sup> Florida also allowed IVF.<sup>87</sup> But the law made no exception for rape or incest.<sup>88</sup> In 2022, Planned Parenthood sought a temporary injunction against the fifteen-week ban, claiming it violated the right to privacy under Florida's constitution.<sup>89</sup>

In April 2023, however, Florida enacted a new abortion ban.<sup>90</sup> The new law bans abortions at six weeks, but it allows abortions at up to fifteen weeks in cases of rape, incest, and human trafficking—so long as the individual seeking an abortion complies with strict documentation requirements.<sup>91</sup> The law retains the same fatal health exception for the pregnant individual.<sup>92</sup> The

---

81. FLA. STAT. ANN. § 390.0111(1) (West 2023).

82. *Id.* § 390.0111(1)(a).

83. *Id.*

84. *Id.* § 390.0111(1)(c).

85. *Id.* § 390.011(15) (defining viable as "when the life of a fetus is sustainable outside the womb through standard medical measures").

86. *Id.* § 390.011(6).

87. Fiorella Valdesolo, *The Connection Between Fertility Treatments and the Overturning of Roe v. Wade*, VOGUE (Jan. 27, 2023), <https://perma.cc/6HJA-73FQ>.

88. Wynne Davis, *Florida Gov. Ron DeSantis Signs a Bill Banning Abortions After 15 Weeks*, NPR (updated Apr. 14, 2022, 12:25 PM ET), <https://perma.cc/62DC-FS37>.

89. *Planned Parenthood of Sw. & Cent. Fla. v. Florida*, No. 2022-1127, 2024 WL 1363525, at \*1 (Fla. Apr. 1, 2024).

90. Arek Sarkissian, *DeSantis Signs Florida's 6-Week Abortion Ban into Law*, POLITICO (updated Apr. 13, 2023, 11:56 PM EDT), <https://perma.cc/K6LX-256Q>.

91. Heartbeat Protection Act, 2023 Fla. Sess. Law Serv. ch. 2023-21 (West) ("At the time the woman schedules or arrives for her appointment to obtain the abortion, she must provide a copy of a restraining order, police report, medical record, or other court order or documentation providing evidence that she is obtaining the termination of pregnancy because she is a victim of rape, incest, or human trafficking."). Critics note that victims often do not consult law enforcement, and therefore the exception is meaningless. Rachel M. Cohen, *The Astonishing Radicalism of Florida's New Ban on Abortion*, VOX (updated Apr. 2, 2024, 3:35 PM EDT), <https://perma.cc/94KN-6TWL>.

92. Heartbeat Protection Act, 2023 Fla. Sess. Law Serv. ch. 2023-21 (West).

new law also has a fatal fetal abnormality exception, which can be invoked any time before the third trimester.<sup>93</sup> Additionally, the law prevents telehealth abortions, requiring medication abortion to “be dispensed in person.”<sup>94</sup> Again, IVF is not mentioned in the law. Although the new law has drastically different consequences for individuals living in Florida, the legal analysis of the new law, for RFRA purposes, is largely the same as the old law.<sup>95</sup> The six-week ban was enacted as a “trigger” ban, which would come into effect if the Florida Supreme Court found the fifteen-week ban constitutional.<sup>96</sup>

On April 1, 2024, the Florida Supreme Court found that the ban was not facially invalid under the Privacy Clause of the Florida Constitution. The court then determined that “since Planned Parenthood fails on this prong, it is not entitled to a temporary injunction.”<sup>97</sup> As a result, the six-week ban became effective.<sup>98</sup> This ruling effectively makes Florida “one of the most restrictive states in the country to obtain an abortion.”<sup>99</sup> “In practical terms, six weeks is a total ban. Many people do not even know they’re pregnant by then.”<sup>100</sup>

### C. Abortion Bans Create Major Conflicts with Jewish Beliefs

Judaism is a monotheistic religion of about 15 million individuals.<sup>101</sup> Judaism is governed by a central text—the Torah. The Torah contains God’s

---

93. *Id.*

94. *Id.*

95. See generally *infra* Part II.

96. Nadine El-Bawab, *Florida Supreme Court Hears Arguments in Challenge to 15-Week Abortion Ban*, ABC NEWS (Sept. 8, 2023, 1:47 PM), <https://perma.cc/CXZ2-B2BX>; see also *Planned Parenthood of Sw. & Cent. Fla. v. Florida*, No. 2022-1127, 2024 WL 1363525, at \*28 (Labarga, J., dissenting) (Fla. Apr. 1, 2024) (explaining that the six-week ban will take effect thirty days after “(1) a decision by this Court holding that Florida’s constitutional right to privacy does not include a right to abortion” or “(2) a decision by this Court in the present case allowing the fifteen-week ban to remain in effect”).

97. *Planned Parenthood*, 2024 WL 1363525, at \*15.

98. See *id.* at \*28 (Labarga, J., dissenting).

99. Carlos Suarez, Denise Royal & Jack Forrest, *Florida Six-Week Abortion Ban Will Soon Become Law, but Voters Will Consider a Constitutional Amendment This Fall*, CNN (updated Apr. 2, 2024, 11:01 AM EDT), <https://perma.cc/2459-3ZYX>.

100. Cohen, *supra* note 91 (“It can take at least three weeks for a pregnancy hormone to appear on a home pregnancy test, and while blood tests can also confirm pregnancies, Florida health care professionals testified that it can take weeks to months to get an appointment with an OB-GYN, with wait times particularly long for low-income and Black Floridians.”).

101. *Jewish Population Rises to 15.2 Million Worldwide*, JEWISH AGENCY FOR ISR. (Sept. 5, 2021), <https://perma.cc/8FDG-MHWM>.

commands,<sup>102</sup> which can be amended through “judicial interpretation.”<sup>103</sup> Such interpretations are necessary because the Torah’s language is vague and its applicability to certain factual scenarios is uncertain.<sup>104</sup> The Talmud, a record of rabbinic debate compiled between the third and eighth centuries, is the most notable example of Judaism’s interpretive tradition.<sup>105</sup> Currently, new sources of interpretation include authorized bodies called denominations (also called movements),<sup>106</sup> congregations (synagogues), and individuals.<sup>107</sup>

The Hebrew Bible tasks each generation with interpretation and amendment to ensure that “Jewish law . . . gains the necessary flexibility to enable it to work in many different times and places.”<sup>108</sup> As a result, each Jew has a duty to study the Torah and analyze past interpretations to determine what they mean in a new age.<sup>109</sup> Because of Judaism’s constant interpretation and discussion, Jewish practices and beliefs can vary between people, congregations, and denominations.<sup>110</sup> But the presence of disagreement does not undermine an interpretation. Rabbi Lord Jonathan Sacks described Judaism as “perhaps uniquely, a civilisation all of whose canonical texts are anthologies of arguments.”<sup>111</sup> Biblical interpretation “operates on the principle that there are ‘seventy faces’ to Torah and thus that every verse is open to multiple interpretations.”<sup>112</sup> Collections of Jewish oral tradition are “full of paragraphs of the form, ‘Rabbi X says this while Rabbi Y says that.’”<sup>113</sup> And the Talmud itself welcomes disagreement, describing conflicting views as both

---

102. Elliot Dorff, *Judaism as a Religious Legal System*, 29 HASTINGS L.J. 1331, 1334 (1978) (citing *Deuteronomy* 4:2, 13:1).

103. *Id.*

104. *Id.* at 1336.

105. *Talmud*, SEFARIA, <https://perma.cc/T8QD-T3LW>.

106. Major denominations include the Orthodox, Conservative, and Reform Movements. *Denominations*, MY JEWISH LEARNING, <https://perma.cc/9THF-KQPN> (archived Mar. 29, 2024).

107. *See infra* notes 108-09 and accompanying text.

108. Dorff, *supra* note 102, at 1338.

109. *Id.* at 1334, 1338; *see also* Rachel Keren, *Torah Study*, SHALVI/HYMAN ENCYCLOPEDIA JEWISH WOMEN, <https://perma.cc/S8E2-ZUVB> (archived Mar. 29, 2024) (describing the progression of Torah study by women); ELLIOT N. DORFF, MODERN CONSERVATIVE JUDAISM: EVOLVING THOUGHT AND PRACTICE 85-88 (2018) (“[E]ach individual Jew is commanded to be a ben or bat Torah, studying Torah throughout his or her life.”).

110. Jonathan Sacks, *God Loves Those Who Argue*, RABBISACKS, <https://perma.cc/UQK9-XN5V> (archived Mar. 29, 2024).

111. *Id.* (emphasis omitted).

112. *Id.*

113. *Id.*

“the words of the living God.”<sup>114</sup> As this Note demonstrates, differences in interpretation likewise do not undermine a plaintiff’s legal argument.<sup>115</sup>

Many Jews believe that several tenets of Judaism support the right to an abortion. The first is the obligation to save a life, called *pikuach nefesh*.<sup>116</sup> In the abortion context, leaders from all major Jewish denominations have interpreted a verse in the Talmud as mandating abortion when the life of the pregnant person is at risk.<sup>117</sup> Many Jews also believe that abortion is allowed when a woman is in mental distress, because “emotional pain and suffering is to a large extent much greater than physical pain and suffering.”<sup>118</sup> Thus, in the spirit of *pikuach nefesh*, many rabbinic authorities allow abortions to avoid anguish for a fetus with a serious disease,<sup>119</sup> to prevent disgrace from rape or

---

114. *Id.* (quoting Babylonian Talmud, Eruvin 13b); Marc D. Angel, *Commentary on Pirkei Avot*, SEFARIA, <https://perma.cc/U6XV-UKKM> (archived Mar. 29, 2024) (explaining that this phrase in the Talmud can be interpreted as welcoming legitimate differences of opinion).

115. *See infra* text accompanying notes 140-64.

116. *See* Mishnah Oholot 7:6 (explaining that if a woman is having difficulties in giving birth, one is permitted to end the life of the child because “her life” comes before the life of the child). This verse has been interpreted to hold that a fetus’s life only begins once the fetus exits the womb because it commands that “if the greater part of [the fetus] has come out, “one may not touch it, for one may not set aside one person’s life for that of another.” *Id.*; *see also* Danya Ruttenberg, *What Judaism Really Teaches About Abortion*, NAT’L CONF. OF JEWISH WOMEN, <https://perma.cc/XY9F-YZTD>. For other sources discussing the fetus as less than the life, *see* text accompanying note 123 below.

117. Press Release, Cent. Conf. of Am. Rabbis, *Contemporary American Reform Responsa: 16. When is Abortion Permitted?* (Jan. 1985), <https://perma.cc/9ERH-BL4G>; Press Release, Ben Zion Bokser & Kassel Abelson, *A Statement on the Permissibility of Abortion* (Nov. 21, 1983), <https://perma.cc/7B3A-Z93F> (describing a position “for the Conservative movement”); Press Release, Union of Orthodox Jewish Congregation of Am., *US Supreme Court’s Ruling in Dobbs v. Jackson, Overturning Roe v. Wade* (June 24, 2022), <https://perma.cc/53SS-RDSV> (“Jewish law prioritizes the life of the pregnant mother over the life of the fetus such that where the pregnancy critically endangers the physical health or mental health of the mother, an abortion may be authorized, if not mandated, by Halacha . . . . Legislation and court rulings, federally or in any state, that absolutely ban abortion without regard for the health of the mother would literally limit our ability to live our lives in accordance with our responsibility to preserve life.”); *see also* Press Release, Reconstructionist Rabbinical Assoc., *Abortion Rights* (1981), <https://perma.cc/LU7G-BDJK> (“[A]bortion is warranted, indeed required, when the fetus threatens the life of the woman.”).

118. *See* Joshua Kulp, *Judaism and Christianity on Abortion: Why Such Different Views?* SEFARIA, <https://perma.cc/4NGU-QGVF> (archived Mar. 29, 2024) (quoting ELIEZER WALDENBERG, TZITZ ELIEZER, 13:102 (1975)); Elliot Dorff, *Conservative Judaism on Abortion and Related Issues*, in *ABORTION: GLOBAL POSITIONS AND PRACTICES, RELIGIOUS AND LEGAL PERSPECTIVES* 15-16 (Alireza Bagheri ed., 2021).

119. *See* Ari Berger, *Abortion of the Diseased Fetus in Jewish Law*, in *AND YOU SHALL SURELY HEAL: THE ALBERT EINSTEIN COLLEGE OF MEDICINE SYNAGOGUE COMPENDIUM OF TORAH AND MEDICINE* 115, 147 (Jonathan Wiesen ed., 2009); *see also* Sobel Plaintiffs’ Summary Judgment Motion, *supra* note 7, at 2 (noting as much).



adultery,<sup>120</sup> or to protect a woman's mental well-being.<sup>121</sup> The second tenet of Judaism that supports the right to an abortion is the belief that a fetus is less than a life.<sup>122</sup> This tenet draws its support from the Torah<sup>123</sup> and the Talmud, which suggest that life starts only during labor.<sup>124</sup>

Ultimately, for Jews, seeking an abortion can be a religious choice. Y. Michael Barilan explains that "abortion is an act that in Judaism is understood to be guided by a complex set of moral expectations and traditions."<sup>125</sup> A Jewish individual who is pregnant or wants to become pregnant balances the religious importance of procreation<sup>126</sup> with protecting their own life. Thus, an individual's moral and religious judgment is central to decisions regarding pregnancy and abortion.<sup>127</sup> The Reconstructionist Jewish Movement agrees with Barilan, asserting that abortion is a decision to be made "in consultation with . . . doctors, loved ones *and religious advisers*."<sup>128</sup> The Reform Jewish

---

120. See RONIT IRSHAI, *FERTILITY AND JEWISH LAW* 175 (2012).

121. See *id.* 175-76. The State of Indiana improperly characterized abortion to fulfill *pikuach nefesh* as not "religious exercise" because abortion was the *means* to an end (health). Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 28, Anonymous Plaintiffs 1-5 v. Individual Members of the Med. Licensing Bd., No. 49D01-2209-PL-031056 (Ind. Super. Ct. Oct. 3, 2022). *Pikuach Nefesh* is fundamentally about the *means* to an end. See Simon Glustrom, *Saving a Life (Pikuach Nefesh)*, MY JEWISH LEARNING, <https://perma.cc/GMS5-E4WH> (discussing how *pikuach nefesh* involves taking some type of action that would otherwise violate the law—such as breaking Shabbat—to save a life).

122. See IRSHAI, *supra* note 120, at 175-76.

123. Exodus details a situation where two parties fight and push a pregnant woman, resulting in a miscarriage, but "no further harm follows." *Exodus* 21:22. The Torah instructs that "the one responsible shall be fined what the woman's husband demands, paying as much as the judges determine. If any harm follows, then [they] shall give life for life." *Id.* 21:22-23. Scholars note that if the fetus were a "life," the charge would be manslaughter, not a fine. See IRSHAI, *supra* note 120, at 119-21; Danya Ruttenberg, *The Torah of Abortion Justice (Annotated Source Sheet)*, SEFARIA, <https://perma.cc/UX5Y-4QU2> (archived May 10, 2024).

124. The Talmud instructs that a court should not wait for a pregnant woman to give birth if she is sentenced to death; only when she is in the process of giving birth may the court delay the execution. This rule originates from the fact that before the process of giving birth, the fetus is treated as "part of [the woman's] body," but once it "uproots from its place and beings to leave the woman's body," it achieves the status of an independent life. *Mishnah Arakin* 7a:12-15.

125. Y. Michael Barilan, *Her Pain Prevails and Her Judgment Respected—Abortion in Judaism*, 25 J.L. & RELIGION 97, 98 (2009).

126. See *Genesis* 1:28 ("Be fruitful and multiply . . .").

127. See Schraub, *supra* note 14, at 1584 ("[F]or many Jews religious observance comes through a dialogic confrontation in which individual reason and judgment are not just valid but indispensable elements that channel how we relate to religious law and even divinity itself.").

128. Lisa Fishbayn Joffe, *Do Abortion Bans Violate Jews' Religious Rights?*, BRANDEIS UNIV.: THE JEWISH EXPERIENCE (June 16, 2022), <https://perma.cc/4HLC-UCRC> (emphasis added)  
*footnote continued on next page*

Movement also believes abortion is an act of “moral and *religious* conscience,” whereby a pregnant individual balances the sacredness of potential life with the sacredness of their body.<sup>129</sup> And even some of the most observant Jews, Haredi Jews, frame abortion as a religious choice.<sup>130</sup>

Florida’s, Kentucky’s, and Indiana’s abortion bans disrupt the religious considerations of a pregnancy and therefore interfere with religious practice. Imagine, for example, three Jewish people, called Plaintiff A, Plaintiff B, and Plaintiff C. All three plaintiffs unexpectedly become pregnant and are over fifteen weeks along. Carrying the fetus to term will not pose physical health concerns to any of them. But Plaintiff A is undergoing treatment for an anxiety disorder, and their psychiatrist is concerned that continuing with the pregnancy will cause Plaintiff A deep psychological harm. Plaintiff B has discovered their fetus has Tay-Sachs, which places their fetus’s life expectancy at four years. Plaintiff C believes that “life” does not start until a fetus is born. All three plaintiffs have consulted with their rabbis and doctors and concluded that obtaining an abortion is consistent with Judaism.<sup>131</sup> All three would not be able to get abortions in Indiana, Kentucky, or Florida. The abortion laws in those states would not recognize Plaintiff A’s psychological harm as falling within a maternal health exception.<sup>132</sup> The fetal abnormality exception would not cover Plaintiff B, as their fetus’s life expectancy is too long.<sup>133</sup> And all three states’ abortion bans wholly preclude Plaintiff C’s argument for an abortion. Plaintiffs A, B, and C thus demonstrate that Florida’s, Kentucky’s, and Indiana’s abortion laws prevent religiously informed abortions.

---

(quoting *The Reconstructionist Rabbinical Association and Reconstructing Judaism Affirm Their Strong Commitment to Reproductive Justice and Abortion Rights in Light of Leaked SCOTUS Draft*, RECONSTRUCTING JUDAISM (May 3, 2022), <https://perma.cc/9VDD-LSGR>).

129. *Free Choice in Abortion*, UNION FOR REFORM JUDAISM, <https://perma.cc/2XWH-ZEFJ> (archived Mar. 29, 2023) (emphasis added).

130. See MICHAL S. RAUCHER, *CONCEIVING AGENCY: REPRODUCTIVE AUTHORITY AMONG HAREDI WOMEN* 147-49 (2020).

131. See Schraub, *supra* note 14, at 1586-87 (explaining that the “strict constitutional requirement of neutrality as between different religious credos” is sufficient “to establish a genuine *religious* burden on Jews who, based on their religious scruples, believe that they need an abortion under circumstances where it is proscribed by state law”); see also *supra* text accompanying notes 125-30.

132. In fact, in oral arguments for *Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff 1*, Indiana stated that the statute would prevent a woman from getting an abortion even if continuing with the pregnancy would require her to go off her medications for schizophrenia. The Court of Appeals echoed Judaism’s view of the connection between the health of the body and mind by asking what the distinction was between mental and physical health. Oral Argument, *supra* note 58, at 3:10-4:07.

133. See *supra* text accompanying notes 71, 79, 86.

## II. A Jewish Plaintiff, In Theory, Can Seek an Exception to an Abortion Ban Under a State RFRA

This Part outlines the arguments a Jewish plaintiff can make that an abortion ban violates a state's RFRA. In theory, a plaintiff can contend that abortion is a religious exercise motivated by a sincerely held belief, an anti-abortion law substantially burdens their belief, and that the law is not narrowly tailored to a state's compelling interests. Although a plaintiff should expect numerous challenges to their RFRA claim, they have colorable responses to each.

### A. A Jewish Plaintiff Has a Sincerely Held Religious Belief in Abortion

A Jewish plaintiff should theoretically succeed in establishing that they have a sincerely held religious belief in abortion because courts are deferential in recognizing beliefs, treating the standard as primarily an assessment of a plaintiff's honesty in their religious convictions.<sup>134</sup> Nonetheless, the plaintiff should expect states to challenge their sincerity by distorting the standard; ignoring the deference courts typically exercise; or improperly incorporating questions of centrality, verity, or what a religion should resemble.<sup>135</sup>

A Jewish plaintiff can counter this skepticism by explaining that these critiques contort the "sincerity" inquiry. Determining the existence of a sincerely held religious belief does not involve questions of verity, centrality, or what a religion should resemble.<sup>136</sup> Inviting such inquiries risks turning "sincerely held religious belief" into a heresy trial. Rather, a plaintiff can remind judges that sincerity merely involves providing consistent, truthful testimony<sup>137</sup> and demonstrating consistent religious identification.<sup>138</sup>

---

134. Kara Loewentheil & Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in RELIGIOUS EXEMPTIONS 250 (Kevin Vallier & Michael Weber eds., 2018); *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

135. *See infra* text accompanying notes 173-201.

136. *See* Loewentheil & Platt, *supra* note 134, at 267-72 (distinguishing sincerity from verity and centrality); *infra* text accompanying notes 156-64.

137. Loewentheil & Platt, *supra* note 134, at 251, 258-59 (describing consistent testimony and demeanor evidence as relevant to sincerity); *see infra* text accompanying notes 203-04.

138. Loewentheil & Platt, *supra* note 134, at 252-58 (describing inconsistent behavior, ulterior motives, and suspicious timing); *see infra* text accompanying notes 203-04.

1. Sincerely held religious belief is a deferential, factual inquiry that looks to a plaintiff's honesty; it does not question a plaintiff's verity or what their religion should resemble

When an individual seeks a religious exemption under RFRA, they must first establish that their sought exemption (here, an abortion) is motivated by a “truly held” religious belief.<sup>139</sup> Sincerely held belief is a factual inquiry. It is not meant to be an onerous standard, largely because courts cannot interrogate the *substance* of a plaintiff's belief. Federal courts therefore have found that sincerely held beliefs can be “mistaken or insubstantial,”<sup>140</sup> idiosyncratic or unorthodox,<sup>141</sup> and not central to a system of religious beliefs.<sup>142</sup> Courts merely ask if the plaintiff is religiously motivated in the action for which they seek an exception—or, in essence, if the plaintiff is “seeking to perpetrate a fraud on the court.”<sup>143</sup> Florida and Indiana courts also adopt this deferential approach.<sup>144</sup> Kentucky has yet to state this principle outright, but it has incorporated the federal RFRA—which defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief”—into its statute.<sup>145</sup>

To assess honesty, courts look at consistency of testimony;<sup>146</sup> consistency of behavior (particularly while pursuing a religious exemption

---

139. *See* *United States v. Seeger*, 380 U.S. 163, 185 (1965).

140. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *see also* *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) (“Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”).

141. *See* *Jones v. Slade*, 23 F.4th 1124, 1141 (9th Cir. 2022); *see also* *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489, at \*19-20 (Ind. Ct. App. Apr. 4, 2024).

142. *See* *Holt v. Hobbs*, 574 U.S. 352, 360-61; 42 U.S.C. § 2000bb-2(4) (citing 42 U.S.C. § 2000cc-5).

143. *See* *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014).

144. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1034 n.10 (Fla. 2004) (“FRFRA clearly prohibits a reviewing court from conducting a factual inquiry which questions the validity or centrality of a plaintiff's beliefs.”); *Rowe v. Lemon*, 976 N.E.2d 129, 136 (Ind. Ct. App. 2012) (noting that sincerity does not require a belief to be orthodox or central to a system of belief).

145. *Moorish Sci. Temple of Am., Inc. v. Thompson*, No. 2014-CA-001080-MR, 2016 WL 1403495, at \*3-4 (Ky. Ct. App. Apr. 8, 2016); 42 U.S.C. § 2000bb-2(4) (citing 42 U.S.C. § 2000cc-5).

146. *Loewentheil & Platt*, *supra* note 134, at 251 (“A claimant's consistency in describing her religious faith and the particular accommodations she requires is relevant to a finding of religious sincerity.”); *see also* *United States v. Manneh*, 645 F. Supp. 2d 98, 113-14 (E.D.N.Y. 2008) (finding no sincerely held belief because the defendant did not explain why filling out importation forms was against her religion and because she

*footnote continued on next page*

claim);<sup>147</sup> statements, actions, or timing that suggest ulterior motives (such as sudden conversions),<sup>148</sup> and demeanor evidence.<sup>149</sup> The factors courts assess for consistency are lenient and flexible, reflecting the often messy, evolving reality of being religious.<sup>150</sup> A plaintiff therefore is “permitted to demonstrate that their religious beliefs have changed over time.”<sup>151</sup> Many religious practitioners are not consistent or do not strictly adhere to a set of practices,<sup>152</sup> so a plaintiff can “offer an explanation for any apparent inconsistencies.”<sup>153</sup> As a result, a deficit in one factor may not be sufficient to find

---

contradicted herself in testimony); *Witmer v. United States*, 348 U.S. 375, 382-83 (1955) (questioning sincerity where the claimant contradicted himself and changed his rationale for an exemption from participation in the war).

147. Loewentheil & Platt, *supra* note 134, at 252-55; cf. *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 08CV1470, 2009 WL 3517578, at \*1, 3 (E.D. Mo. Oct. 26, 2009) (questioning sincerity because a plaintiff challenging the revealing uniform she was required to wear “appeared for her deposition in this very case wearing clothing that was potentially inconsistent with her alleged faith”).
148. Loewentheil & Platt, *supra* note 134, at 255-57; *Ochs v. Thalacker*, 90 F.3d 293, 295-96 (8th Cir. 1996) (describing a plaintiff who previously lived with non-White inmates who “did not explain why this religion suddenly mandated that he no longer share his cell with an African-American”); *United States v. Quaintance*, 608 F.3d 717, 718, 722-23 (10th Cir. 2010) (finding no sincerely held belief that marijuana is a sacrament because an associate testified that defendants were in the marijuana business, had quickly converted an associate before a marijuana pickup, and bought other recreational drugs).
149. Loewentheil & Platt, *supra* note 134, at 258-60 (noting, however, that “evidence that a claimant has repeatedly altered how he describes his beliefs, or what accommodations he needs, can be suggestive of insincerity”); *Manneh*, 645 F. Supp. 2d at 113 (finding insincerity from “the alarming level of calculation and dissembling displayed by [the claimant] on the witness stand, evident as much in her tone and demeanor as in the actual words recorded on the transcript”).
150. See *infra* notes 151-55 and accompanying text.
151. Loewentheil & Platt, *supra* note 134, at 252; see also *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (per curiam) (raising the possibility that beliefs changed over time).
152. Loewentheil & Platt, *supra* note 134, at 254; *Thomas v. Rev. Bd. of the Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981) (“Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”); see *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (“But the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere. Some religions place unrealistic demands on their adherents; others cater especially to the weak of will. It would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police.”).
153. Loewentheil & Platt, *supra* note 134, at 254.

insincerity.<sup>154</sup> As one court found, “[A] sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?”<sup>155</sup>

It is important to note what the sincerity inquiry is *not*. First, assessing a plaintiff’s sincerity does not involve questioning the verity of their claim.<sup>156</sup> Put simply, courts cannot assess if a plaintiff’s views are correct or similar to others of the same religion.<sup>157</sup> Second, a court cannot assess sincerity by asking if a plaintiff’s belief is central or orthodox to a faith (called a “centrality” inquiry).<sup>158</sup> Imagine, for example, a Reform individual who is motivated by their Jewish faith to get an abortion to preserve their mental health. A state cannot undermine their sincerity by introducing rabbinic testimony to the contrary or by arguing that Jewish texts only support abortion when physical health is at risk.<sup>159</sup> Nor can a state argue that the plaintiff is insincere in their beliefs because they do not attend services or keep kosher.<sup>160</sup> Finally, the sincerity inquiry is theoretically separate from the religiosity element of “sincerely held belief.”<sup>161</sup> Religiosity, one part of the sincerely held belief inquiry, asks whether a plaintiff views their beliefs as religious.<sup>162</sup> The religiosity inquiry is also fact-based, but it unrelated to

---

154. *See Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996) (declining to decide the case on questions of timing because “[c]ourts must be cautious in attempting to separate real from fictitious religious beliefs”).

155. *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012); *see also Corbin*, *supra* note 14, at 486 (“[T]he Court rarely scrutinizes sincerity with any rigor and almost never addresses religiosity . . .”).

156. *Loewentheil & Platt*, *supra* note 134, at 267-68; *Int’l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981); *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981) (“It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy.”).

157. *Thomas*, 450 U.S. at 715 (“Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.”).

158. *See supra* text accompanying notes 139-43.

159. *Cf. Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (“[C]lergy opinion has generally been deemed insufficient to override a prisoner’s sincerely held religious belief.”).

160. LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 11; *supra* note 152; *see also infra* notes 193-96 and accompanying text (explaining that a plaintiff’s other religious practices are not relevant to the inquiry).

161. LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 11-12 (“Determining whether a claimant’s beliefs are ‘religious’ requires courts to consider the mixed question of whether, objectively, the claimant’s beliefs are ‘religious’ and whether, subjectively, the claimant themselves understands their beliefs to be religious.”).

162. *Id.*

the sincerity analysis.<sup>163</sup> Often, however, sincerity and religiosity are analyzed together.<sup>164</sup>

The lines between sincerity, verity, centrality, and religiosity often blur, hence why courts are so cautious and deferential in assessing sincerely held religious beliefs.<sup>165</sup> Because courts are resistant to investigating beliefs, defendants often do not contest sincerity or religiosity.<sup>166</sup> For example, in *Sobel v. Cameron*, Kentucky admitted that the material facts of the case were not disputed—the women expressed “a religiously-motivated desire to expand their families.”<sup>167</sup> And in *Anonymous Plaintiffs*, Indiana did not contest sincerity on appeal, although several amici did.<sup>168</sup> As a result, “sincerely held religious belief” is often satisfied by a plaintiff testifying to their beliefs,<sup>169</sup> providing evidence of their religious practices,<sup>170</sup> or asking a clergy member to submit an affidavit on

- 
163. See Loewentheil & Platt, *supra* note 134, at 271-72 (“When faced with a claimant’s ‘bizarre’ beliefs, courts seem as or more likely to find that the beliefs are not religious rather than finding that the claimant is insincere. While it may be true that courts are less able to recognize unfamiliar customs or beliefs as religious in nature, this problem is unrelated to the sincerity analysis. Rather it speaks to the problem of a court determining what constitutes religious exercise at all, a problem that is inescapable when religious beliefs are singled out for special protections as they are in our constitutional and statutory system.”).
164. This Note attempts to separate these factors in its analysis, but it recognizes that many court cases that it relies on do not. See, e.g., *White v. Linderman*, No. CV 11-8152, 2013 WL 4496364, at \*5 (D. Ariz. Aug. 22, 2013) (combining the sincerity and religiosity analysis); see also *infra* text accompanying notes 186-99 (demonstrating arguments that merge sincerity and religiosity).
165. See, e.g., *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 57 (1st Cir. 2002) (explaining that “at trial the court must be careful in separating the verity and sincerity of an employee’s beliefs in order to prevent the verdict from turning on ‘the factfinder’s own idea of what a religion should resemble’” (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985))); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).
166. See, e.g., *Sprouse v. Ryan*, 346 F. Supp. 3d 1347, 1359 (D. Ariz. 2017) (noting that Defendants did not contest sincerely held religious belief); *Diocese of Cheyenne v. Sebelius*, 21 F. Supp. 3d 1215, 1222 (D. Wyo. 2014) (same).
167. See *Sobel* Defendant’s Cross Motion for Summary Judgment, *supra* note 73, at 2, 7 (accepting that “[t]he women express a religiously-motivated desire” to expand their families and not challenging their sincerity).
168. Oral Argument, *supra* note 58, at 35:30-36:10.
169. See, e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1277-78 (2022) (citing the plaintiff’s grievance as evidence of sincerely held belief); *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015).
170. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703 (2014) (citing Hobby Lobby’s decision to close stores on Sunday, its refusal to promote alcohol use, and its contributions to Christian missions).

their behalf.<sup>171</sup> Florida, Indiana, and Kentucky accept such showings to establish sincerely held belief.<sup>172</sup>

2. If a state challenges a plaintiff's sincerity, the plaintiff should ensure that the state is not challenging centrality or verity and remind courts of the deference they typically exercise

A Jewish plaintiff should expect challenges to the sincerity of their beliefs. Although challenges to sincerity often take acceptable forms of inquiry—consistency of testimony, consistency of behavior, statements, actions, sudden conversions, and demeanor testimony—many do not.<sup>173</sup> This Subpart provides four examples of current counterarguments that distort the acceptable boundaries of questioning a plaintiff's "sincerely held religious belief."<sup>174</sup> A plaintiff can and should respond to these arguments by explaining that they (1) distort the standard, (2) ignore the deference and flexibility in the standard, or (3) improperly incorporate questions of centrality, verity, or what religions should resemble.

One challenge to sincerity points to the timing of a longstanding believer's complaint. The Becket Fund, which submitted an *amicus* brief in Indiana's abortion litigation, made this argument. The Becket Fund argued that the plaintiffs' beliefs were insincere because they challenged Indiana's abortion law only after *Dobbs* was decided.<sup>175</sup> The Becket Fund's counterargument is flawed

---

171. See *Ramirez*, 142 S. Ct. at 1277 (relying on a pastor's statement to support finding the plaintiff had a sincerely held belief); cf. *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 883 (D. Md. 1996) (describing testimony of various church officials).

172. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 54 (Fla. Dist. Ct. App. 2006) (acknowledging that sincerely held belief can be established by plaintiff, partner, and expert witness); see *In re A.C.*, 198 N.E.3d 1, 16 (Ind. Ct. App. 2022), *reh'g denied* (Dec. 22, 2022) (establishing sincere belief through testimony); see *Ruplinger v. Louisville/Jefferson Cnty. Metro Gov't*, 607 S.W.3d 583, 585 (Ky. 2020) (describing a plaintiff's testimony that removing her scarf violated her sincerely held belief, but deciding the case on other grounds); see also *Sobel Plaintiffs' Summary Judgment Motion*, *supra* note 7, at 19 (submitting clergy testimony and arguing "[t]hese rabbinic statements . . . reflect the majority religious opinion of American Jews" and that plaintiffs' "sincerely held beliefs accord with that majority's sincerely held beliefs.").

173. See *infra* text accompanying notes 175-201; Loewentheil & Platt, *supra* note 134, at 263 ("[W]hen the sincerity test is applied haphazardly, there is greater opportunity for religious biases to go unacknowledged and unchecked.").

174. See *infra* text accompanying notes 175-201.

175. Proposed *Amicus Curiae* Brief of The Becket Fund for Religious Liberty in Support of Appellants at 11-16, *Individual Members of the Med. Licensing Bd v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Jan. 18, 2023); see also Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1234-37 (2017) (explaining some of these counterarguments); Josh Blackman, Howard Slugh & Tal Fortgang, *Abortion and Religious Liberty*, 27 TEX. REV. L. & POLS. 441, 465 (2023) ("Some women may have  
*footnote continued on next page*



for two reasons. First, it distorts the timing element of sincerity. Timing concerns are relevant only when an individual suddenly changes their religious identification, not when a long-identifying Jew suddenly brings a claim.<sup>176</sup> For example, the Sixth Circuit rejected one man’s belief in using marijuana because he suddenly converted to a new religion that endorsed drug use.<sup>177</sup> By this logic, a pregnant individual who suddenly converts to Judaism and then asserts a RFRA claim may face some skepticism.<sup>178</sup> But if an individual has maintained a consistent *religious* practice, the fact that they brought a RFRA claim after a major event is not a reason for finding insincerity.<sup>179</sup> Second, the Becket Fund’s argument ignores the deference courts practice when assessing RFRA claims. The court in *Ochs v. Thalacker*, while skeptical of a complaint’s timing, refused to “decide the case” on timing grounds because it believed that courts

---

sincerely held such religious beliefs prior to *Dobbs*. Other women may have developed these religious beliefs after *Dobbs*.”).

176. See e.g., *Mahone v. Pierce Cnty.*, No. C10-5847, 2011 WL 2360354, at \*7-8 (W.D. Wash. May 24, 2011) (finding no sincere religious belief because the plaintiff failed to list any synagogue affiliation or rabbi name, continued to purchase non-kosher items while his request for a Jewish diet was pending, and professed to be Jewish only after his tenth stay at the correctional facility). *But see* *White v. Linderman*, No. 11-CV-8152, 2013 WL 4496364, at \*5 (D. Ariz. Aug. 22, 2013) (“[E]ven if Plaintiff did consume non-kosher items, this establishes that he is imperfect in his religious practice. But this ‘backsliding’ or nonobservance of a religious practice is not sufficient to establish as a matter of law that Plaintiff is insincere in his religious beliefs.”).
177. *United States v. Barnes*, 677 Fed. App’x. 271, 277 (6th Cir. 2017) (“[Barnes’s] long history of marijuana use, his quick epiphany and conversion to the Church of Anyana-Kai, the absence of marijuana from the list of sacraments of the ONAC religion, and Barnes’s admission that marijuana was not a necessary part of his religion and that he was not required to make a donation of marijuana to the church all support a finding that Barnes’s actions were, in fact, based on his own personal belief or philosophy regarding marijuana.”).
178. See *United States v. Quaintance*, 608 F.3d 717, 722-24 (10th Cir. 2010) (finding no sincerely held belief because an associate testified that defendants were in the marijuana business, had quickly converted an associate before a marijuana pickup, bought recreational drugs, and only justified their use of drugs in religious terms after being arrested); *United States v. Messinger*, 413 F.2d 927, 927-31 (2d Cir. 1969) (finding no sincerely held belief in part because Messinger had sought exemptions from military service for over one year without mentioning religion, a “long delay”).
179. See LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 11; *Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd.*, No. 49D01-2209-PL-031056, slip op. at 12 (Ind. Super. Ct. Dec. 2, 2022) (explaining that some plaintiffs were active in their synagogues and observed Jewish tradition); Brief in Support of Appellees of Amicus Curiae National Council of Jewish Women et al. at 16, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Mar. 10, 2023) (“None of the Plaintiffs or Hoosier Jews altered existing claims or raised a new religious claim after filing the lawsuit.”).

should exercise caution in “attempting to separate real from fictitious religious beliefs.”<sup>180</sup>

A second improper inquiry occurs when a state fails to consider contradictions in context. The Becket Fund, for example, stated that one plaintiff in Indiana was not sincere because she contradicted herself in her testimony.<sup>181</sup> Although contradictions in testimony can be indicative of insincerity,<sup>182</sup> the Becket Fund failed to consider the fact that this “contradiction” could be a question of verity—not sincerity. Put another way, the Becket Fund did not consider that the plaintiff’s contradiction could have stemmed from her incorrect views of religious practice—which RFRA protects—rather than from insincerity.<sup>183</sup> Because verity and sincerity can be confused, courts have often been deferential to contradictions in belief and proposed relief.<sup>184</sup> For example, in *Holt v. Hobbs*, the Supreme Court ignored contradictions between the plaintiff’s proposed course of action (maintaining a shorter beard) and his beliefs (that he could not trim his beard).<sup>185</sup>

A third example of an improper inquiry occurs when a state interrogates the substance of a belief as a mechanism by which to assess sincerity. For example, the Becket Fund questioned the sincerity of the Indiana plaintiffs because they stated that their Jewish beliefs directed them to terminate a pregnancy when they encountered dangers to their mental, physical, or emotional well-being—but did not specify the “requisite degree” of impairment.<sup>186</sup> Additional evidence of insincerity, the Fund asserted, was the plaintiffs’ assertion that deciding to abort a fetus is an individual decision, which the Fund thought contradicted the idea that their religion directed abortion.<sup>187</sup> The Becket Fund’s argument distorts questions of sincerity and religiosity. Courts are averse to questioning religiosity because it risks improperly accepting or rejecting religious creeds because of a “perception of

---

180. 90 F.3d 293, 296 (8th Cir. 1996).

181. Proposed Amicus Curiae Brief of The Becket Fund for Religious Liberty in Support of Appellants at 15-16, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Jan. 18, 2023) (discussing one plaintiff’s beliefs that a fetus becomes human only once born and arguing that she contradicted herself by explaining that prior Indiana abortion law was consistent with her religious beliefs).

182. *See id.*

183. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

184. *See supra* text accompanying notes 191-98.

185. 574 U.S. 352, 356, 359 (2015) (“Petitioner sought permission to grow a beard and, although he believes that his faith requires him not to trim his beard at all, he proposed a ‘compromise’ under which he would grow only a ½-inch beard.”).

186. Proposed Amicus Curiae Brief of The Becket Fund for Religious Liberty in Support of Appellants at 12-13, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Jan. 18, 2023).

187. *Id.*

what a religion should resemble.”<sup>188</sup> Plaintiffs can assert that the Becket Fund improperly used elements of Judaism—specifically, the presence of debate, conversation, uncertainty, and choice<sup>189</sup>—as evidence of insincerity. In effect, the Becket Fund did exactly what the *Smith* court warned of: It made an implicit judgment about what Judaism should resemble.<sup>190</sup>

A fourth counterargument improperly questions sincerity by pointing to a plaintiff’s general religious observance. One scholar has argued that because “Reform Jews tend not to treat [religious] rules as binding,” they cannot credibly allege sincere belief.<sup>191</sup> To that scholar, a person’s sincerity can be challenged “if a person treats 99.9% of *halacha* [Jewish law] as non-binding—including far more deeply-rooted rules governing Kosher slaughter and sabbath observance—yet deems as binding the interpretation of *halacha* that affects abortion.”<sup>192</sup> Should a state echo this argument, a plaintiff can raise two responses. First, this argument misconstrues the “consistency of practice” prong of sincerity. Courts generally look to the practice of the belief *at issue*<sup>193</sup>—not at the person’s observance of

---

188. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

189. See *supra* text accompanying notes 125-30. This emphasis on choice is particularly true with liberal Jews. See Schraub, *supra* note 14, at 1583-84.

190. *Emp. Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”).

191. See Josh Blackman, *Tentative Thoughts on the Jewish Claim to a “Religious Abortion,”* REASON: VOLOKH CONSPIRACY (June 20, 2022, 5:04 PM), <https://perma.cc/4ADM-SF99> [hereinafter Blackman, *Tentative Thoughts*] (“A Jew who treats the prohibition on work on the Sabbath as aspirational, and always works on the Sabbath, could not credibly allege a substantial burden—or more precisely, such an allegation could not be sincere. . . . [I]f virtually every other facet of *halacha* is not binding on members of this congregation, how could it be that this one teaching on abortion is binding—so binding, that a state’s prohibition of that teaching actually substantially burdens the free exercise of religion?”). This argument additionally conflates the sincerely held belief and substantial-burden prongs. See *infra* text accompanying notes 224-49 (discussing mandates within the substantial-burden prong). Blackman has since walked back some of his claims. See Josh Blackman, *Some Less-Tentative Thoughts on Abortion and Religious Liberty, One Year Later*, REASON: VOLOKH CONSPIRACY (May 12, 2023, 8:30 AM), <https://perma.cc/YAH4-S8UQ>.

192. Blackman, *Tentative Thoughts*, *supra* note 191.

193. See, e.g., *Lindell v. Casperson*, 360 F. Supp. 2d 932, 952 (W.D. Wis. 2005) (finding lack of sincerity in a proposed diet because the plaintiff made inconsistent requests for diets in the past), *aff’d sub nom.* *Lindell v. Govier*, 169 F. App’x 999 (7th Cir. 2006); *Warren v. Shaw Grp., Inc.*, 825 F. Supp. 2d 1052, 1055 (D. Nev. 2011) (granting summary judgment for defendants because the “Plaintiff’s use of his social security number appears to be inconsistent” with his allegation that “he has a bona fide religious belief that his social security number is the mark of the beast” and therefore could not provide it); *Lute v. Johnson*, No. 08-cv-00234, 2012 WL 913749, at \*7 (D. Idaho Mar. 16, 2012) (“[E]vidence is particularly relevant where, as here, the prisoner’s own actions directly contradict the *core* of [the plaintiff’s] claim. Purchasing nonkosher foods—both before and after  
*footnote continued on next page*

other beliefs within their religion.<sup>194</sup> The Supreme Court did not ask, for example, if the *Hobby Lobby* plaintiffs regularly attended church, had baptisms, or took communion.<sup>195</sup> Nor did the Court ask if the *Holt v. Hobbs* plaintiff ate halal food or prayed five times a day.<sup>196</sup> Some courts will even accept inconsistencies in the past practice of a plaintiff.<sup>197</sup> Second, this scholar's argument impermissibly questions what religions should look like—by assuming proper religion involves following *multiple* mandates and laws<sup>198</sup>—thus privileging a central, “Orthodox” view of Judaism.<sup>199</sup>

RFRA implicitly recognizes that religious beliefs can be as complicated as the people who hold them. The narrowness of the sincerely held religious belief prong recognizes this reality. Judaism, with its inherent flexibility and variety of interpretations, is particularly vulnerable to attacks of insincerity from critics who are less familiar with or even antagonistic to it.<sup>200</sup> A plaintiff should preempt this risk by warning a court that entertaining these counterarguments risks turning the sincerely held belief inquiry into a “[h]eresy trial[.]”<sup>201</sup>

---

his kosher diet request—is completely inconsistent with Plaintiff’s professed religious belief [that he requires a kosher diet].” (emphasis added)).

194. LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 11 (“[W]hether or not a Jewish claimant keeps kosher or uses technology on Shabbat is not relevant to the question of whether they are sincere in their belief that they are religiously obligated to provide abortion care.”); *cf.* *Mosier v. Maynard*, 937 F.2d 1521, 1523 (10th Cir. 1991) (rejecting the idea that a plaintiff was insincere in his belief that he should not cut his hair in accordance with his Native American religion based on evidence that the plaintiff did not participate in a Native American religious group at the prison).

195. 573 U.S. 682, 700 (2014) (mentioning only that “Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church”).

196. 574 U.S. 352 (2015).

197. *See* *United States v. Ali*, 682 F.3d 705, 710-11 (8th Cir. 2012) (refusing to interrogate the claimant’s choice to rise “when doing so facilitated non-ceremonial functions” to assess a plaintiff’s belief in not rising to honor the court); *Enriquez v. Gemini Motor Transp. LP*, No. 19-CV-04759, 2021 WL 5908208, at \*11 (D. Ariz. Dec. 14, 2021) (finding that “a reasonable juror could likewise find that Plaintiff’s past practices” of attending work on Saturdays despite believing it violated his beliefs did not indicate insincerity “due to economic duress or the threat of termination”).

198. Josh Blackman, *Why Protect Religious Conscience?*, REASON: VOLOKH CONSPIRACY (June 22, 2022, 5:01 PM), <https://perma.cc/R3CV-4WY2> (“Those who do not actually think a higher power imposes some obligations on their lives—that religion is only internal, aspirational, cultural, or traditional—do not fit within the paradigm that has historically justified granting exemptions from civil laws.”).

199. *See supra* text accompanying notes 139-45.

200. *See* Schraub, *supra* note 14, at 1599-1600, 1609 (asserting that doubting liberal Jews’ sincerely held beliefs has been assisted by “long-standing antisemitic premises, deeply embedded in Christian relationships with Jews”).

201. *See* *United States v. Ballard*, 322 U.S. 78, 86 (1944).

3. If contested, “sincerely held belief” would be resolved in evidentiary hearings

If the government challenges a Jewish plaintiff’s belief, a court would likely resolve the question in an evidentiary hearing.<sup>202</sup> There, a fact-finder would “observe the claimant’s demeanor during direct and cross-examination.”<sup>203</sup> A plaintiff should prepare to testify that “they have acted on their religious beliefs consistently in the past, [and] that they have previously framed their beliefs and activities related to abortion in religious terms.”<sup>204</sup>

Ultimately, should skepticism of a Jewish plaintiff’s belief remain, that plaintiff’s strongest argument would be to caution the court against delving into impermissible inquiries of verity, centrality, or what a religion should resemble. As one court said, “if there is any doubt about whether a particular set of beliefs [are religious],” a court should “err on the side of freedom and find that the beliefs are [religious].”<sup>205</sup> To do otherwise would equate Jewish beliefs, which are part of a well-established religion, with beliefs deemed “non-religious,” such as “ethical veganism, objectivism, white supremacy, and the Church of the Flying Spaghetti Monster.”<sup>206</sup> This equivalence, a plaintiff should argue, not only insults Judaism but also “ignore[s] a venerable (albeit checkered) history of freedom and tolerance.”<sup>207</sup>

Of course, resorting to a hearing is incredibly difficult for a pregnant plaintiff, who is effectively running against a ticking clock and the state’s incentive to delay litigation until the plaintiff gives birth. That situation is beyond the scope of this Note, but it is a challenge practitioners will face.<sup>208</sup> In that situation, the deference courts exercise in assessing sincerely held beliefs may play an even more important role in ensuring the speedy resolution of the case.

---

202. See, e.g., *Toca v. State*, 834 So. 2d 204, 209 (Fla. Dist. Ct. App. 2002) (“Were we to decide this matter under the RFRA, we likely would appoint a commissioner to take evidence and determine these essential facts [including sincerely held belief], as to which Mr. Toca would bear the burden of proof.”); cf. *Thacker v. Dixon*, 784 F. Supp. 286, 291 (E.D.N.C. 1991) (discussing an evidentiary hearing where sincerity was investigated), *aff’d*, 953 F.2d 639 (4th Cir. 1992).

203. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

204. LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 11.

205. *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996).

206. LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 12 & n.60 (compiling cases).

207. *Meyers*, 906 F. Supp. at 1499; see *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489, at \*23 (Ind. Ct. App. Apr. 4, 2024) (“Hoosiers have a long history of respecting religious diversity.”).

208. Cf. text accompanying note 386.

B. An Abortion Ban Substantially Burdens a  
Jewish Plaintiff's Religious Exercise

In RFRA cases, a plaintiff must demonstrate a law substantially burdens their exercise of religion.<sup>209</sup> A substantial burden is more than a mere inconvenience.<sup>210</sup> But beyond that threshold, States and federal circuits disagree on what a substantial burden *is*, largely because RFRA and many state RFRA are silent on the topic.<sup>211</sup> Florida case law, for example, defines substantial burden as government action that “either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.”<sup>212</sup> Indiana case law, by comparison, defines substantial burden as government action that “put[s] substantial

- 
209. See *Holt v. Hobbs*, 574 U.S. 352, 360 (2015) (requiring a plaintiff to bear the initial burden of proof in RLUIPA, a sister statute to RFRA with the same standards); see also *Blatter v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022) (noting that once a “party establishes a prima facie RFRA defense by showing the disputed governmental action substantially burdens a sincerely held religious belief,” the “burden shifts to the government to establish . . . a compelling governmental interest”); *Sutherland v. Ky. Dep’t of Corr.*, No. 2022-CA-0230-MR, 2022 WL 17365886, at \*3 (Ky. Ct. App. Dec. 2, 2022) (requiring a plaintiff to “demonstrate that the government has placed a substantial burden on the exercise of his religion”); *Toca v. State*, 834 So. 2d 204, 209 (Fla. Dist. Ct. App. 2002) (noting that the plaintiff has the burden of proof).
210. *Sutherland*, 2022 WL 17365886, at \*3-4 (finding that denying an inmate’s request for an MP3 player of the Bible at most inconvenienced his practice of hearing the Bible aloud daily, because there was a viable alternative of checking out a CD player and listening to the Bible on CD); see also *New Doe Child No. 1 v. Cong. of the U.S.*, 891 F.3d 578, 590 (6th Cir. 2018) (explaining that substantial burden exists only if it is more than mere inconvenience); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (requiring substantial burden to place “more than an inconvenience”).
211. Daniel Kazhdan, *How Jewish Laws of Resistance Can Aid Religious Freedom Laws*, 100 CALIF. L. REV. 1069, 1079 (2012) (noting RFRA does not define “substantial burden”); WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER 2 (2020), <https://perma.cc/A229-RWLL> (“The meaning[s] of RFRA, RLUIPA, and the free exercise clause continue to be litigated, including before the Supreme Court. Among those issues being explored are what constitutes a significant burden . . .”). Some states *do* define substantial burden in their RFRA. See, e.g., ARK. CODE ANN. § 16-123-403(7)(A) (West 2023); IDAHO CODE ANN. § 73-402(5) (West 2024); KAN. STAT. ANN. § 60-5302(a) (2023).
212. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004); *Ronchi v. State*, 248 So. 3d 1265, 1269 (Fla. Dist. Ct. App. 2018) (quoting *Warner*, 887 So. 2d at 1033). The Supreme Court partially articulated this standard in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (describing how the law forced the plaintiff to either “follow[] the precepts” of her religion and forfeit a benefit or ignore those “precepts” and take a benefit). The Eleventh Circuit also uses this standard. See *Midrash Sephardi*, 366 F.3d at 1227 (“[A] ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”).

pressure on an adherent to modify his behavior and violate his beliefs.”<sup>213</sup> Crucially, Indiana’s definition makes no mention of an individual being mandated or compelled by their religion to act.<sup>214</sup> Kentucky case law combines Indiana and Florida’s definitions, recognizing a substantial burden where “a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available” or where the government puts “substantial pressure on an adherent to substantially modify his behavior and violate his beliefs.”<sup>215</sup>

Put simply, states disagree on two points. First, states disagree about the kinds of religious exercise they can burden. Florida courts consider only activities that are “forbid[den]” or “require[d]” by a religion.<sup>216</sup> For example, in *Freeman v. Department of Highway Safety & Motor Vehicles*, a plaintiff asserted that complying with Florida’s photo ID requirement would violate her sincerely held belief to remain veiled.<sup>217</sup> The court affirmed that the ID requirement did “not compel Freeman to engage in conduct that her religion forbids—her religion does not forbid all photographs.”<sup>218</sup> By comparison, Kentucky and Indiana contemplate activities that are motivated, but not necessarily mandated, by religious beliefs.<sup>219</sup>

Second, states disagree about what government actions constitute “substantial burden[s].” Florida appears to contemplate government actions that *ban* or *force* activity,<sup>220</sup> while Indiana recognizes that a government may

---

213. *In re A.C.*, 198 N.E.3d 1, 16 (Ind. Ct. App. 2022) (quoting *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)), *reh’g denied* (Dec. 22, 2022). One example of this formulation is a policy that forces a prisoner “to choose between his religious practice and adequate nutrition.” *Rowe v. Lemon*, 976 N.E.2d 129, 135 (Ind. Ct. App. 2012) (quoting *Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009)).

214. *In re A.C.*, 198 N.E.3d at 16.

215. *Sutherland v. Ky. Dep’t of Corr.*, No. 2022-CA-0230-MR, 2022 WL 17365886, at \*3 (Ky. Ct. App. Dec. 2, 2022); *Nelson*, 570 F.3d at 878 (quoting *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008)).

216. *Warner*, 887 So. 2d at 1033. As explained below, this interpretation belies FRFRA. See *infra* text accompanying notes 235-40.

217. 924 So. 2d 48, 51-54 (Fla. Dist. Ct. App. 2006).

218. *Id.* at 57.

219. IND. CODE § 34-13-9-5 (2023) (defining exercise of religion as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief”); KY. REV. STAT. ANN. § 446.350 (West 2023) (protecting actions that are “motivated”—but not necessarily compelled—“by a sincerely held religious belief”).

220. *Warner*, 887 So. 2d at 1033 (“[W]e hold that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.”). Even so, elsewhere in the same opinion, the Florida Supreme Court indicated that “pressuring [someone] to commit an act forbidden by the religion” could suffice as a substantial burden, muddying the governing standard. *Id.* at 1035; see also Jess Zalph, *A footnote continued on next page*

substantially burden religious exercise by *pressuring*—but not forcing—a plaintiff to act contrary to their beliefs.<sup>221</sup> One could argue that Kentucky’s RFRA admits of either interpretation, but the interpretation that mere pressure is required proves stronger.<sup>222</sup> Other states with RFRA’s similarly juggle divergent definitions of substantial burden and religious exercise.<sup>223</sup>

These differences will matter to a Jewish plaintiff. First, consider Florida courts’ definition of religious exercise. The courts’ emphasis on a religious mandate (henceforth called a “mandate requirement”) excludes many forms of religious exercise. After all, not all religious individuals believe they must *follow* mandates. For example, many Jews believe that Judaism permits, but does not require, abortion in several circumstances.<sup>224</sup> And some Jews do not believe that Judaism’s “mandates” are binding.<sup>225</sup> Indiana’s, and arguably Kentucky’s, definitions of religious exercise recognize this reality.<sup>226</sup> By

---

*Weighty Question: Substantial Burden and Free Exercise*, 25 J. CONST. L. 953, 969-70 (2023) (describing that some courts require that pressure effectively rise to compulsion).

221. See, e.g., *In re A.C.*, 198 N.E.3d 1, 16 (Ind. Ct. App. 2022), *reh’g denied* (Dec. 22, 2022).
222. See KY. REV. STAT. ANN. § 446.350 (West 2023) (recognizing the *right* to act in a manner motivated by religious belief, as opposed to the right to not be *forced* to act or not act); *infra* text accompanying note 263.
223. See, e.g., LA. STAT. ANN. § 13:5234(2) (2023) (finding substantial burden where a government (1) constrains conduct “mandated” by a sincerely held belief, significantly curtailing a person’s “ability to express adherence” to their faith, (2) compels “conduct or expression which violates a tenet or belief of a person’s religious faith,” (3) “[d]enies a person a reasonable opportunity to engage in activities which are fundamental to the person’s religion,” or (4) “[c]onstrains or inhibits conduct or expression mandated by a person’s sincerely held religious tenet or belief”); ARK. CODE ANN. § 16-123-403(7)(A) (2023) (defining substantial burden as something that “constrains, inhibits, curtails, or denies the exercise of religion”); IDAHO CODE § 73-401 (2023) (defining one form of substantial burden as “inhibit[ing] or curtail[ing] religiously motivated practices”); 71 PA. CONS. STAT. § 2403 (2023) (defining substantial burden as constraining conduct “mandated” by a religious practice, denying “a reasonable opportunity to engage in activities which are fundamental to a person’s religion,” curtailing a person’s ability to “express adherence to the person’s religious faith,” or compelling a conduct or expression “which violates a specific tenet of a person’s religious faith”); KAN. STAT. ANN. § 60-5302(a) (2023) (defining substantial burden as any “government action that directly or indirectly constrains, inhibits, curtails or denies the exercise of religion by any person or compels any action contrary to a person’s exercise of religion”).
224. See *supra* text accompanying notes 116-30.
225. See Complaint at 14, *Pomeratz v. State*, No. 154464609 (Fla. Cir. Ct. Aug. 1, 2022), <https://perma.cc/87RY-AJU8> (“As Reform and post-denominational rabbis, Jewish laws inform Plaintiffs’ religious beliefs, practices, and congregational leadership, but do not dictate or mandate their practices.”). *But see* Julie Zupan, *What Is the Reform Jewish Perspective on Abortion?*, UNION FOR REFORM JUDAISM, <https://perma.cc/4QYA-ZMKJ> (archived Apr. 3, 2024) (asserting that many Reform Jews *do* sincerely believe that their religion requires abortion).
226. See, e.g., *In re A.C.*, 198 N.E.3d at 16; KY. REV. STAT. ANN. § 446.350 (West 2023). Even so, the state of Kentucky ignored the best reading of its statute when it asserted in *Sobel*
- footnote continued on next page*



comparison, Florida's courts' definition of religious exercise does not. Some litigants have already attempted to dismiss the claims of Jewish plaintiffs under a mandate theory of religious exercise.<sup>227</sup>

Second, consider Florida courts' definition of substantial burden. A pregnant individual can easily meet this burden—the state bans them from getting an abortion. But what about an individual who *wants* to become pregnant but is worried that they will need to pursue a religiously motivated abortion, in contravention of an abortion ban? This non-pregnant plaintiff (“NPP”) is in a similar position to the litigants in *Anonymous Plaintiff 1*.<sup>228</sup> The NPP has a challenging argument that an abortion ban substantially burdens them. A state like Florida will assert that its ban does not compel the NPP to become pregnant and then forbid them from getting an abortion. And because of the availability of prenatal screening and IVF, an NPP who, say, wants to avoid passing Tay-Sachs to their child can still become pregnant without worrying about needing an abortion.<sup>229</sup> By comparison, an NPP can more easily establish they are burdened under definitions of substantial burden adopted by Indiana and Kentucky because they only need to be pressured into violating their beliefs.<sup>230</sup> Indeed, the Indiana Court of Appeals recently found that the NPPs in the RFRA suit established substantial burden because the plaintiffs were pressured to take on restricted intimacy measures for risk of needing to terminate their pregnancy.<sup>231</sup>

---

that the plaintiffs had not experienced an injury because the plaintiffs “cannot . . . produce evidence showing that Judaism commands them to abort their children . . . such that Kentucky’s prohibition on abortion is a per se mandate.” See *Sobel Defendant’s Cross Motion for Summary Judgment*, *supra* note 73, at 7-8.

227. See *Sobel Defendant’s Cross Motion for Summary Judgment*, *supra* note 73, at 7-8 (“[T]here can be no injury because Kentucky law would not prohibit any religiously-required behavior.”); see also Blackman, *Tentative Thoughts*, *supra* note 191 (“But to claim that their religious exercise is substantially burdened, I think there has to be some broader showing that the religious belief is obligatory in nature.”).
228. *Anonymous Plaintiffs Complaint*, *supra* note 5, at 14, 23 (describing plaintiffs who want to have children but are not currently pregnant).
229. See *infra* Part II.B.2. The Indiana Attorney General made this argument on appeal. See Reply of Appellants at 19, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Mar. 31, 2023) [hereinafter *Anonymous Plaintiff Reply of Appellants*], <https://perma.cc/YG4Y-T8DX> (“Plaintiffs here, however, may never need an abortion for religious reasons . . .”). This argument ignores the state’s own standard that substantial burden constitutes pressuring an individual into violating their beliefs. See *supra* text accompanying note 221.
230. See *supra* text accompanying notes 221-22; see also *infra* text accompanying notes 258-63. The extent to which the substantial burden inquiry overlaps with standing is beyond the scope of this Note. See *infra* text accompanying notes 383-86 (pointing to scholarship suggesting that standing can likely be asserted).
231. *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489, at \*1 (Ind. Ct. App. Apr. 4, 2024).

In the next two Subparts, this Note explains how a Jewish plaintiff can argue that an abortion ban substantially burdens their religious exercise. First, a plaintiff can assert that a mandate definition of religious exercise is inconsistent with state and federal law. Second, the Note outlines how a pregnant plaintiff and an NPP should assert that an abortion law substantially burdens their religious exercise. Specifically, it suggests that a Jewish plaintiff articulate their religious exercise as *the ability to conduct a pregnancy consistent with one's religious beliefs* to more persuasively assert that Florida, Indiana, or Kentucky's abortion law substantially burdens them.

1. Religious exercise includes abortions that are consistent with—but not mandated by—Judaism

If a state argues that its abortion law does not burden a Jewish plaintiff because it does not implicate a religious mandate,<sup>232</sup> a plaintiff should respond that a mandate requirement violates state law, federal law, and Supreme Court precedent.<sup>233</sup> Once a plaintiff establishes that religious exercise *cannot exclusively* entail actions mandated or prohibited by religion, a plaintiff should explain that the correct definition of religious exercise is similar to that endorsed by the Supreme Court in *Hobby Lobby*.<sup>234</sup>

First, a mandate requirement contradicts the federal definition of religious exercise. As of 2000, the federal RFRA defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>235</sup> Under the federal RFRA's definition, even Jews who believe getting an abortion is motivated by, but *not* compelled by, Jewish law are engaged in religious exercise. Many states have incorporated this federal definition.<sup>236</sup>

---

232. *Id.* at \*21 (“According to the State, abortion is not the type of mandatory ritual, such as eating only kosher food or Sabbath requirements for some, that has been found to be a religious exercise.”).

233. Again, federal law and precedents are applicable because state RFRA's and state courts rely on them. *See supra* text accompanying notes 56-63; *see also* *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 919 (Ariz. 2019) (“Because the text and requirements of FERA and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA.”); *Johnson v. Levy*, No. M2009-02596-COA-R3-CV, 2010 WL 119288, at \*5 (Tenn. Ct. App. Jan. 14, 2010) (making a similar argument); *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) (same).

234. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (“[T]he question that RFRA presents . . . [is] whether the HHS mandate imposes a substantial burden on the ability of objecting parties to conduct business in accordance with *their religious beliefs* . . .”).

235. 42 U.S.C. § 2000bb-2(b) (defining religious exercise by cross-reference to the definition in 42 U.S.C. § 2000cc-5(7)(A)).

236. *See* ARK. CODE ANN. § 16-123-403(3)(B) (2023) (defining religious exercise as “an action that is motivated by a sincerely held religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief”); 775 ILL. COMP. STAT. 35/5  
*footnote continued on next page*

Indeed, the Indiana Court of Appeals recently rejected a mandate requirement for this very reason.<sup>237</sup>

Second, a mandate requirement contradicts Florida's own definition of religious exercise in FRFRA. FRFRA, like KRFRA and IRFRA,<sup>238</sup> defines religious exercise as action or inaction "substantially motivated by a religious belief, *whether or not the religious exercise is compulsory* or central to a larger system of religious belief."<sup>239</sup> Florida's insistence that it can substantially burden only religious exercise mandated by a religious belief belies its own statute.<sup>240</sup>

Finally, Supreme Court precedent suggests that religious exercise need not be mandated to receive RFRA protection. In *Hobby Lobby*, the Mennonite Christian plaintiffs believed in the immorality of destroying an embryo and of helping others secure contraception.<sup>241</sup> But the Court did not discuss whether the plaintiffs' religion *mandated* them to exclude contraception from their employees' health care plans.<sup>242</sup> Nor did the Court rely on an explicit statement by the Mennonite Church that providing contraception to employees was sinful or prohibited.<sup>243</sup> "If a corporation can engage in a religious exercise by refusing to provide . . . contraceptives that essentially abort a pregnancy after fertilization . . . it stands to reason that a pregnant person can engage in a religious exercise by pursuing an abortion."<sup>244</sup>

---

(2023) (adopting a similar standard); MO. REV. STAT. § 1.302(2) (2023) (similar language); N.M. STAT. ANN. § 28-22-2(A) (2023) (same).

237. *Anonymous Plaintiff*, 2024 WL 1452489, at \*22 (citing 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)); and IND. CODE § 34-13-9-5).

238. See KY. REV. STAT. ANN. § 446.350 (West 2023) (protecting actions that are "motivated"—but not compelled—"by a sincerely held religious belief"); IND. CODE § 34-13-9-5 (2023) (copying the federal RFRA definition of religious exercise).

239. FLA. STAT. § 761.02(3) (2023) (emphasis added).

240. This argument could apply in other states that have adopted RFRA's definition of religious exercise but deny a claim on mandate grounds. Compare LA. STAT. ANN. § 13:5234(2) (2023) (recognizing a mandate view of substantial burden), with LA. STAT. ANN. § 13:5234(5) (2023) (recognizing religious exercise to include "the ability to act or refuse to act in a manner substantially motivated by a sincerely-held religious belief, whether or not the exercise is compulsory or a central part or central requirement of the person's religious belief").

241. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700-02 (2014).

242. See *id.* at 720.

243. In fact, the Court cited a general statement by the Mennonite Church about *abortion*, not contraception. See *id.* at 700 n.12 (quoting *Statement on Abortion — 2003*, MENNONITE CHURCH USA, <https://perma.cc/5ALK-GXAK> (archived Apr. 3, 2024)).

244. *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 22A-PL-2938, 2024 WL 1452489, at \*22-23 (Ind. Ct. App. Apr. 4, 2024) ("The procurement of health insurance is not a mandatory religious ritual, either, but it was at the core of a RFRA violation in *Burwell v. Hobby Lobby*.").

If religious exercise cannot require compulsion,<sup>245</sup> what, then, is religious exercise? A Jewish plaintiff can argue that the Supreme Court—as well as Indiana and Kentucky—has suggested that religious exercise is a *choice* or activity motivated by religion.<sup>246</sup> In *Hobby Lobby*, the religious exercise at issue was the plaintiffs’ refusal to provide contraception coverage for their employees.<sup>247</sup> The Court defined the plaintiffs’ religious exercise as the ability to “conduct business in accordance with [one’s] *religious beliefs*.”<sup>248</sup>

A Jewish plaintiff should thus frame their religious exercise as the *ability to conduct a pregnancy in accordance with one’s religious beliefs*. Because RFRA’s sincerely held belief and religious exercise prongs are related, a plaintiff can draw support for this definition by discussing how Judaism values choice in pregnancy-related decisions.<sup>249</sup> As this Note argues in the next Subpart, this framing will help a plaintiff establish that an abortion ban substantially burdens their religious exercise.

2. An abortion ban compels or pressures a Jewish plaintiff to violate their beliefs

At face value, a pregnant plaintiff has a more colorable argument than does an NPP that an abortion ban substantially burdens their religious exercise. Florida’s abortion ban substantially burdens a pregnant plaintiff because it forbids abortions after fifteen weeks.<sup>250</sup> Indiana and Kentucky’s abortion bans substantially burden a pregnant plaintiff’s religious exercise because they pressure a plaintiff to abandon a religious precept (obtaining an abortion when consistent with their beliefs) by threatening legal sanctions.<sup>251</sup>

---

245. *Cf. Gladson v. Iowa Dep’t of Corr.*, 551 F.3d 825, 832-33 (8th Cir. 2009) (explaining that RLUIPA’s definition of religious exercise requires reading out part of the substantial burden test).

246. *See* KY. REV. STAT. ANN. § 446.350 (West 2023) (recognizing “[t]he right to act or refuse to act in a manner motivated by a sincerely held religious belief”); *Rowe v. Lemon*, 976 N.E.2d 129, 135-36 (Ind. Ct. App. 2012) (recognizing religiously motivated decision about dietary restrictions as a religious exercise). Several other state RFRA recognize the “right” or “ability” to act. *See, e.g.*, KAN. STAT. ANN. § 60-5302(c) (2023); ARIZ. REV. STAT. ANN. § 41-1493(2) (2023).

247. *See* Oral Argument, *supra* note 58, at 38:00-40:00 (making this point to dispute the compulsion requirement).

248. *Hobby Lobby*, 573 U.S. at 701, 724.

249. *See supra* text accompanying notes 125-30. David Schraub has articulated a similar view of religious exercise, and he has assessed substantial burden under principles of neutrality to religion. *See* Schraub, *supra* note 14, at 1585-86.

250. *See Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004); FLA. STAT. ANN. § 390.0111(1) (West 2023); *see also supra* note 212 (explaining how Florida case law defines substantial burden as government action that bans religious exercise).

251. *See supra* text accompanying note 221-222.

An NPP faces more challenges in establishing an abortion ban substantially burdens them.<sup>252</sup> Consider, for example, a Jewish plaintiff who asserts that their religious exercise is aborting a fetus with Tay-Sachs to avoid emotional anguish.<sup>253</sup> Florida could argue that it is not compelling the NPP to violate their beliefs because (1) the NPP's future fetus may not even have Tay-Sachs and (2) the NPP can pre-screen for Tay-Sachs. Indiana and Kentucky would similarly argue that their abortion bans do not pressure an NPP to violate their beliefs because both states do not restrict genetic screening or IVF.

But an NPP can satisfy Florida's definition of "substantial burden" if they articulate their "religious exercise" broadly. Imagine an NPP who argues that their religious exercise is *the ability to conduct a pregnancy consistent with one's religious beliefs*. This broad definition encompasses two aspects of pregnancy that involve Jewish values: (1) the decision to become pregnant, in fulfillment of the Jewish belief in being fruitful and multiplying, and (2) the decision to terminate a pregnancy when consistent with Judaism.<sup>254</sup> An NPP asserting this broader definition has a stronger argument that Florida's law burdens their religious exercise because Florida forbids them from engaging with *all* the religious considerations of a pregnancy.<sup>255</sup> Florida's abortion ban acknowledges narrow exceptions, which do not align with the full panoply of religious considerations in seeking an abortion.<sup>256</sup> Even if a plaintiff is not yet pregnant (and may not even need an abortion), Florida's restrictions also ban the NPP from pursuing a pregnancy consistent with their religion by eliminating the complex religious considerations that factor into *deciding* to become pregnant.<sup>257</sup>

Adopting this broader articulation of religious exercise can also help an NPP establish that Indiana or Kentucky's abortion ban substantially burdens

---

252. See *supra* text accompanying note 229.

253. See *supra* text accompanying notes 116-24.

254. See *supra* text accompanying notes 125-27; see also *Genesis* 1:28 ("God blessed them, and God said to them, 'Be fruitful and multiply' . . .").

255. See *supra* text accompanying notes 216-18. This claim is likely colorable in other states with RFRAs that recognize substantial burden where the government "[s]ignificantly curtails a person's ability to express adherence to the person's religious faith." See, e.g., 71 PA. CONS. STAT. § 2403(2) (2023); LA. STAT. ANN. § 13:5234(2)(b) (2023). By eliminating the option to pursue an abortion whenever consistent with one's religion, abortion bans prevent *expression* of religious adherences.

256. See FLA. STAT. ANN. § 390.0111(1) (West 2023).

257. See *supra* text accompanying notes 127-30. The claim is likely also valid in states that define substantial burden as inhibiting or constraining religiously motivated practices—here, the choice, agency, and religious consultation involved in deciding to get an abortion. See OKLA. STAT. tit. 51, § 252(7) (2023); IDAHO CODE § 73-402(5) (2023). Eliminating one option that a plaintiff could discuss with their rabbi restricts the scope of that religious consideration.

them.<sup>258</sup> Kentucky and Indiana’s laws pressure an NPP to refrain from becoming pregnant because the NPP fears that, if they become pregnant, they may need to violate the ban because of their religious beliefs.<sup>259</sup> But *refraining* from having children could also violate an NPP’s belief in being fruitful and multiplying.<sup>260</sup> The plaintiffs in *Sobel v. Cameron* made this exact point.<sup>261</sup> Thus, Indiana or Kentucky’s abortion ban constrains an NPP’s religious exercise by presenting a false choice: Either have a child in a manner that violates your beliefs or have no child at all, which would also violate your beliefs.<sup>262</sup> This false-choice argument is strongest in Kentucky, since KRFRA recognizes that the government may not burden “[t]he right” to act in a manner consistent with one’s religious beliefs, even if one has not yet acted on them.<sup>263</sup> But Indiana, too, recognizes a RFRA claim for someone who is “likely” to be substantially burdened.<sup>264</sup>

In sum, because having a child and deciding when to terminate a pregnancy are religiously informed choices for Jews, an abortion ban, which bans or pressures that choice, substantially burdens religious exercise. A Jewish plaintiff who articulates religious exercise as the ability to conduct a pregnancy consistent with one’s religious beliefs can therefore assert that Florida, Indiana, or Kentucky’s abortion ban substantially burdens them.

### C. The State Does Not Have a Compelling Interest in Its Abortion Ban

In abortion litigation, the government typically articulates a compelling interest in “respect for and preservation of prenatal life at all stages of

---

258. This conception of religious exercise responds to the Indiana government’s contention that “[p]laintiffs have taken the novel position that religious significance attaches to the mere hypothetical availability of that religious exercise, rather than the actual abortion itself.” Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 121, at 28.

259. See *Anonymous Plaintiffs* Complaint, *supra* note 5, at 15; see also *supra* text accompanying note 231.

260. See *supra* text accompanying note 254.

261. See *Sobel* Plaintiffs’ Summary Judgment Motion, *supra* note 7, at 1 (“In Judaism, having children is considered a blessing. Like many other religious traditions, the commandment to be fruitful and multiply is paramount. . . . However, Kentucky’s Abortion Laws pose significant challenges to the religious practice of procreation and substantially interfere with the Plaintiffs’ sincerely held religious beliefs and their desire to expand their families.”).

262. *Id.* at 14 (“Kentucky’s Abortion Laws effectively force Plaintiffs to choose between foregoing more children in violation of their faith and potentially going to prison.”).

263. KY. REV. STAT. ANN. § 446.350 (West 2023) (emphasis added); see also *supra* note 246 and accompanying text (recognizing states with similar standards).

264. IND. CODE § 34-13-9-9 (2023).

development.”<sup>265</sup> A state will likely reiterate these compelling interests in RFRA suits.<sup>266</sup> In response, a plaintiff should assert that a state’s general interest in prenatal life is insufficient under state RFRA for three reasons: First, RFRA requires a state to establish a compelling interest over a *specific* plaintiff.<sup>267</sup> Second, under the Establishment Clause, a state cannot prefer one conception of life over another.<sup>268</sup> Third, a state’s interest in preserving prenatal life is not compelling because it subverts that interest by making exceptions for fetal abnormalities, IVF, and maternal health.<sup>269</sup> This Note addresses the potential and limits of all three arguments below.

1. A state did not articulate a compelling interest “to the person”

It bears repeating that RFRA challenges are as applied, raised plaintiff by plaintiff. As the Supreme Court articulated in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, RFRA’s focus on the individual plaintiff means that the government cannot assert “broadly formulated interests.”<sup>270</sup> Instead, the government must establish that its compelling interest is satisfied “through [the] application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”<sup>271</sup> KRFRRA, IRFRRA, and FRFRRA, like the federal RFRA, require a “to the person” focus.<sup>272</sup> As do other states with RFRA.<sup>273</sup>

---

265. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022). The Attorney General of Indiana has articulated similar interests in recent abortion litigation. Brief of Appellants at 48, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Jan. 17, 2023), <https://perma.cc/3BWB-AQNH> [hereinafter *Anonymous Plaintiff* Brief of Appellants]; *Anonymous Plaintiff* Reply of Appellants, *supra* note 229, at 21 (quoting *Dobbs*, 142 S. Ct. at 2284).

266. *See, e.g., Anonymous Plaintiff* Brief of Appellants, *supra* note 265, at 48 (articulating a state interest in human life); *see also Sobel* Defendant’s Cross Motion for Summary Judgment, *supra* note 73, at 25 n.16 (“Kentucky can show it has a compelling interest in protecting potential life.”).

267. *See infra* text accompanying notes 270-87.

268. *See infra* text accompanying notes 288-306.

269. *See infra* text accompanying notes 308-24.

270. 546 U.S. 418, 431 (2006); *see also* Wesley A. Prichard, *Compelling Interest Cacodoxy: Why the Contraception Mandate Fails RFRA’s Compelling Interest Analysis*, 78 U. PITT. L. REV. 245, 257 (2016) (describing that “the government must substantiate their compelling interest to the specific religious objectors”).

271. *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 200bb-1(b)).

272. *See* KY. REV. STAT. ANN. § 446.350 (West 2023) (requiring compelling interest in “the specific act”) (emphasis added); FLA. STAT. § 761.03(1) (2023) (requiring a similar “to the person” standard); IND. CODE § 34-13-9-8 (2023) (same).

273. *See, e.g.,* LA. STAT. ANN. § 13:5233 (2023) (requiring a demonstration that the “burden to the person” meets strict scrutiny); IDAHO CODE § 73-402(3) (2023) (same); KAN. STAT.

*footnote continued on next page*

RFRA’s “to the person” requirement adds a heightened standard to strict scrutiny.<sup>274</sup> For example, in *Fulton v. City of Philadelphia*, the City of Philadelphia asserted three compelling interests for refusing to renew Catholic Social Services’s foster care contract.<sup>275</sup> The Court rejected the city’s interests as too general and held that a “more precise analysis” was required.<sup>276</sup> “The question,” the Court held, “is not whether the City has a compelling interest . . . generally, but whether it has such an interest in denying an exception to [the plaintiff].”<sup>277</sup> In *Doster v. Kendall*, the Sixth Circuit noted that asserting a compelling interest in the abstract does not create an interest “in each marginal percentage point by which” a state achieves it.<sup>278</sup> Instead, a state must explain why “refusing a ‘specific’ exemption” to Jane Doe furthers its compelling interests.<sup>279</sup> Thus, in RFRA challenges, a plaintiff should argue that the state cannot articulate a general interest in protecting fetal life; the state must instead argue that it has a compelling interest in denying an abortion to, say, a Conservative Jewish plaintiff whose amniocentesis revealed a fatal fetal condition.<sup>280</sup>

The “to the person” argument is formalistic. And it seems as though proper pleading by a state—by specifically naming the plaintiff—could bypass it. Nonetheless, Indiana’s current litigation over abortion exemplifies how states are vulnerable to a “to the person” attack.<sup>281</sup> To defend its abortion ban, Indiana relied on constitutional precedents that recognized it had a compelling interest in fetal life.<sup>282</sup> Indiana’s articulation of compelling state interests was likely insufficient under RFRA because it was not sufficiently particularized to

---

ANN. § 60-5304 (2023) (requiring a demonstration “that such standard is satisfied through application of the asserted violation of this act to the particular claimant”).

274. See *Singh v. McHugh*, 185 F. Supp. 3d 201, 223 (D.D.C. 2016) (“[D]efendants cannot simply invoke general principles here—they must make the necessary heightened showing to justify the specific refusal to grant an exception to plaintiff.”).

275. 141 S. Ct. 1868, 1881 (2021) (explaining such interests included “maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children”).

276. *Id.*

277. *Id.* (emphasis added).

278. 54 F.4th 398, 422 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023) (Mem.) (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 803 n.9 (2011)).

279. *Id.* at 421-22 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014)).

280. *Cf. Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015) (“The Defendants offer little more than a conclusory assertion that if they grant Mr. Davila’s request, there will be a significant impact on security interests and cost concerns.”).

281. See Brief of Appellees at 45, *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938 (Ind. Ct. App. Mar. 2, 2022) (discussing the “to the person” standard).

282. See *Anonymous Plaintiff* Brief of Appellants, *supra* note 265, at 48-50 (citing *Cheaney v. State*, 285 N.E.2d 265, 270 (Ind. 1972)).



the plaintiff seeking an exemption.<sup>283</sup> As *Fulton* and *Doster* suggest, Indiana would need to assert that it has a particular interest in the life of Plaintiff *I*'s fetus and explain why that interest overrides granting the plaintiff's exemption.<sup>284</sup> Other states must make a similar showing as well.<sup>285</sup>

An omission of the to-the person articulation can prove fatal to a state's case: In the Indiana Court of Appeal's recent RFRA decision, it found that the state did not show "distinct harm from granting specific exemptions to particular religious claimants."<sup>286</sup> Thus, as an initial matter, a plaintiff can argue that a state has not articulated a compelling interest to *them*.<sup>287</sup>

## 2. A state's compelling interest is religious preferentialism

A Jewish plaintiff can also try to invalidate a state's compelling interest in prenatal life by arguing that the state impermissibly endorsed a religious view.<sup>288</sup> This argument is not untrodden ground. The religious preferentialism argument was instrumental in early litigation in *Anonymous Plaintiff 1*.<sup>289</sup> In that case, one plaintiff had asserted that, under Jewish law, she believed life begins at birth.<sup>290</sup> Indiana responded by arguing it had an interest in protecting

---

283. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881-82 (2021) (rejecting compelling interests because they were not articulated to the person—or, in this case, to CSS). Importantly, however, Indiana's case is a broader challenge to the abortion law because Plaintiffs asserted facial challenges alongside RFRA claims. See *supra* text accompanying notes 22-23.

284. See *Fulton*, 141 S. Ct. at 1881-82; *Doster v. Kendall*, 54 F.4th 398, 422 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023) (Mem.); see also Oral Argument, *supra* note 58, at 35:00 (asserting that Indiana articulated a general interest and not one specific to the individual).

285. See *supra* notes 270-73 (requiring a "to the person" standard).

286. See *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*21 (Ind. Ct. App. Apr. 4, 2024) ("The State's explanation does not meet this standard. The State has not shown that its claimed compelling interest in protecting the potential for life is satisfied by denying Plaintiffs' religious-based exception that prioritizes a mother's health over potential life . . .").

287. See LAW, RTS. & RELIGION PROJECT, *supra* note 19, at 13 (proposing this argument).

288. Cf. *Sobel* Complaint, *supra* note 6, at 16 (alleging Kentucky's abortion laws gave preference to Christian faiths); *Sobel* Plaintiffs' Summary Judgment Motion, *supra* note 7, at 21-22 ("The result of the half century process of drafting Kentucky's farrago of abortion laws has been to privilege Evangelical Christianity and Evangelical Christians at the expense of religions and religious adherents that, like Judaism and Jews, are not predicated on the political project of eradicating the reproductive and religious rights of others.").

289. *Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056, slip op. at 33, 43 (Ind. Super. Ct. Dec. 2, 2022).

290. *Id.* at 12.

vulnerable human beings upon conception.<sup>291</sup> In granting a temporary injunction, Trial Judge Welch determined that the state's interest effectively established a different perspective on when life starts: Because the Establishment Clause<sup>292</sup> "forbids an official purpose to disapprove of a particular religion or of religion in general," the court could not entertain protecting fetal life as a valid state interest.<sup>293</sup>

It is unclear how persuasive this Establishment Clause argument will be.<sup>294</sup> The Establishment Clause prohibits a state from using religious justifications to support its policy stance.<sup>295</sup> In an attempt to grasp at Indiana's intent to endorse a religious view, Judge Welch relied heavily on the language of "life" and "human being" that the state used.<sup>296</sup> But Judge Welch's argument faces obstacles under current Supreme Court doctrine.<sup>297</sup> In *Harris v. McRae*, the Supreme Court rejected the view that the Hyde Amendment, which denied federal funding for certain abortions, violated the Establishment Clause.<sup>298</sup> Just because a law happened to align with religious values, the Court asserted, did not mean the law was inconsistent with the Establishment Clause.<sup>299</sup> *Kennedy v. Bremerton School District*<sup>300</sup> poses a more recent challenge to Judge Welch's reasoning. In that case, the Supreme Court altered its analysis under the Establishment Clause to privilege historical practice.<sup>301</sup> Then again, state

---

291. *Id.* at 32.

292. U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion . . .").

293. Anonymous Plaintiff 1, No. 49D01-2209-PL-031056, slip op. at 33 (Ind. Super. Ct. Dec. 2, 2022) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

294. *See, e.g., Doe v. Rokita*, 54 F.4th 518, 520 (7th Cir. 2022) (asserting that units of governments may act on "their own views about contestable subjects"), *reh'g denied*, No. 22-2748, 2022 WL 17980064 (7th Cir. Dec. 28, 2022), *cert. denied*, 143 S. Ct. 2437 (2023) (Mem). *But see id.* (also implying that the challenged law "leaves people free to put their own religious beliefs into practice").

295. Schwartzman & Schragger, *supra* note 14, at 2305 ("Whether abortion bans could, in theory, have secular justifications, an Establishment Clause objection can also be framed in terms of improper government motivation. The basic principle is that the state cannot have as its actual purpose religious reasons for legislation.").

296. Anonymous Plaintiff 1, No. 49D01-2209-PL-031056, slip op. at 32-35.

297. *See* Schwartzman & Schragger, *supra* note 14, at 2306.

298. 448 U.S. 297, 301, 319-20 (1980).

299. *Id.* at 319 ("That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.").

300. 142 S. Ct. 2407 (2022).

301. *See* Schwartzman & Schragger, *supra* note 14, at 2306 (citing *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427-28 (2022)); *see also* Sobel Defendant's Cross Motion for Summary Judgment, *supra* note 73, at 22 (invoking *Kennedy's* historical emphasis).

courts, which interpret *state* establishment clauses, are “not bound by *McRae*, and . . . could apply a more searching standard of review.”<sup>302</sup> One judge on the Indiana Court of Appeals, at least, found that the ban implicated concerns of religious preferentialism.<sup>303</sup> These Supreme Court cases and principles of federalism thus leave Establishment Clause challenges in uncharted water.<sup>304</sup>

Further, introducing an Establishment Clause argument could undermine *all* kinds of legislation by shoehorning Establishment Clause principles into the strict scrutiny analysis. After all, many state abortion bans are justified, at least by some legislators, as consistent with a particular faith.<sup>305</sup> Other essential laws, too, require the state to set boundaries on when life begins and ends, such as the laws establishing brain death.<sup>306</sup> The implications of this argument potentially limit its persuasiveness. Indeed, the limits of this argument may be why the majority of the Indiana Court of Appeals did not engage with it on appeal.<sup>307</sup>

### 3. A state’s interest is not compelling when it makes exceptions

Finally, a plaintiff can assert that the state’s interest in protecting fetal life is not “compelling” because the state has made exceptions that undermine its interest.<sup>308</sup> In *O Centro*, the Supreme Court rejected the government’s

---

302. See Schwartzman & Schragger, *supra* note 14, at 2307 (explaining that “Courts considering Establishment Clause challenges—under either the First Amendment or state analogs—cannot simply cite *McRae* and move on. A state court interpreting its own disestablishment provision is not bound by *McRae*, and it could apply a more searching standard of review to religiously motivated laws”); see also Reply to Plaintiffs’ Motion for Summary Judgment & Response to Defendant’s Motion for Summary Judgment at 3-4, *Sobel v. Cameron*, No. 22-CI-005189 (Ky. Cir. Ct. May 4, 2023) [hereinafter *Sobel* Plaintiffs’ Reply in Support of Summary Judgment], <https://perma.cc/4WLQ-WQQD> (explaining that *Harris* has not been adopted by Kentucky law).

303. See *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*31 (Ind. Ct. App. Apr. 4, 2024) (noting that Indiana’s constitution prevents religious preferentialism, “[y]et in this post-*Dobbs* world, our Legislature has done just that—preferred one creed over another” (Bailey, J., concurring)).

304. See Schwartzman & Schragger, *supra* note 14, at 2306-16 (analyzing the viability of Establishment Clause challenges to abortion bans post-*Kennedy*).

305. See, e.g., Rudi Keller, *Lawsuit Seeks to Overturn Missouri Abortion Ban as Violation of Religious Rights*, MO. INDEP. (Jan. 19, 2023, 7:49 PM), <https://perma.cc/DN7B-VCZX> (noting that Missouri stated that “Almighty God is the author of life” in an abortion regulation (quoting MO. ANN. STAT. § 188.010 (West 2023))).

306. See Thaddeus Mason Pope, *Brain Death Rejected: Expanding Legal Duties to Accommodate Religious Objections*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 293, 295-302 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (describing brain death laws and religious objections to them).

307. See *Anonymous Plaintiff*, 2024 WL 1452489, at \*25-27 (not mentioning the religious preferentialism argument).

308. See *LAW, RTS. & RELIGION PROJECT*, *supra* note 19, at 13 (proposing this argument).

compelling interest in the uniform enforcement of drug laws because the government exempted the Native American Church's use of peyote.<sup>309</sup> Similarly, in *Fulton v. City of Philadelphia*, the Supreme Court held that the city undermined its compelling interest by creating a "system of exceptions."<sup>310</sup> *O Centro* and *Fulton* thus suggest that a government undermines its compelling interests by creating exceptions within the statute it seeks to enforce.

A plaintiff should thus argue that Indiana, Kentucky, or Florida's interest in protecting fetal life<sup>311</sup> is not compelling because the state exempts IVF, a process that may involve the disposal of embryos.<sup>312</sup> If a state's abortion ban recognizes life as beginning at fertilization,<sup>313</sup> then disposing of embryos, which are fertilized, directly undercuts that interest.<sup>314</sup> And some states exempt abortions for rape, incest, or maternal health, again undermining the state's interest in fetal life by allowing certain interests—such as wellness—to override it.<sup>315</sup> As the Supreme Court has repeatedly noted, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."<sup>316</sup> An

---

309. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006).

310. 141 S. Ct. 1868, 1882 (2021); *see also supra* text accompanying notes 275-77 (discussing the case at greater depth).

311. *See supra* text accompanying notes 265-69.

312. *See Sepper, supra* note 16, at 221 ("[C]onsider that virtually all bans allow the disposal of embryos created through in vitro fertilization. This dramatic underinclusion indicates that the government authorizes some significant destruction of embryonic life."); *supra* notes 72-73 and accompanying text.

313. *See, e.g., KY. REV. STAT. ANN. § 311.772(1)(c)* (West 2023) (defining unborn human being as "an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth").

314. *See Schwartzman & Schragger, supra* note 14, at 2328 ("[S]ome bans appear to exempt the disposal of fertilized embryos created through in vitro fertilization ('IVF'). These secular exemptions seem to undermine the state's asserted interest in protecting fetal life from conception . . .").

315. The Indiana Attorney General attempted to argue that permitting abortions for saving a mother's life "do[es] not contradict" the State's interest in protecting fetal life. *See Anonymous Plaintiff Reply of Appellants, supra* note 229, at 28. But allowing vindication of other interests, such as maternal health, *does* undercut the interest in fetal life. Schwartzman & Schragger, *supra* note 14, at 2326 (calling this conflict between fetal life and maternal health "obvious"). Further, this preference for life-sustaining exceptions over soul-sustaining exceptions has been rejected by the Court. *See infra* note 367.

316. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment)); *see also Douglas Laycock & Thomas C. Berg, Protecting Free Exercise Under Smith and After Smith*, 2020-2021 CATO SUP. CT. REV. 33, 44 ("A pattern of exceptions undercuts the government's asserted interest and causes it to fail strict scrutiny." (citing *Lukumi*, 508 U.S. at 547)); Corbin, *supra* note 14, at 493-94 ("If the law has a secular exemption, for example, the Court will likely conclude that the

*footnote continued on next page*

abortion ban's "dramatic underinclusion[]" of IVF, fetal abnormality, rape, and incest does exactly this—it leaves appreciable damage to the state's compelling interest in fetal life.<sup>317</sup> By this logic, a state's compelling interests for its abortion law are not compelling at all.<sup>318</sup>

This exception-based argument is strong: The Indiana Court of Appeals found that Indiana did not have a compelling interest in its abortion ban because it made these exceptions.<sup>319</sup>

A state, however, may try to distinguish its abortion ban from the laws in *O Centro* and *Fulton* by asserting that its exceptions arise from separate compelling state interests.<sup>320</sup> For example, a state may argue that exceptions for fetal fatality further a compelling state interest in mitigating "fetal pain" and that exceptions for rape, incest, and preserving a pregnant person's life further a compelling state interest in protecting "maternal health and safety."<sup>321</sup>

Notably, states have yet to assert that a ban's exceptions arise from separate compelling interests. The Indiana Attorney General did discuss the law's exceptions as "other important interests," but not as separate "compelling interests."<sup>322</sup> The Kentucky Attorney General did not raise any alternate compelling interests for the ban's exceptions.<sup>323</sup> Yet should a state advance a "separate compelling interests" argument, a plaintiff's best approach is to argue that the state has not narrowly tailored the abortion law to *all* of its interests.<sup>324</sup> This Note explores that argument in the next Subpart.

---

government 'offers no compelling reason why it has a particular interest in denying an exception to [the religious objector] while making them available to others.'" (quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021)) (alteration in original)).

317. See *Sepper*, *supra* note 16, at 226.

318. *Id.* at 42-43.

319. See *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*26 (Ind. Ct. App. Apr. 4, 2024) ("Underinclusiveness may 'reveal that a law does not actually advance a compelling interest.'" (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015))).

320. *But see Sepper*, *supra* note 16, at 221 ("States have failed to articulate any plausible explanation for permitting loss of fetal life for these reasons but not when religion instructs. In all cases, the state interest in potential life is impeded.").

321. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

322. See *Anonymous Plaintiff* Brief of Appellants, *supra* note 265, at 53-54 (mentioning the charge of underinclusivity but not discussing justifications); *Anonymous Plaintiff* Reply of Appellants, *supra* note 229, at 25-26 (discussing justifications only at narrow tailoring, not in response to compelling interest).

323. *Sobel* Defendant's Cross Motion for Summary Judgment, *supra* note 73, at 25 n.25.

324. See *infra* Part II.D.

D. A State's Abortion Ban Is Not Narrowly Tailored

RFRAs impose strict scrutiny, requiring a law to be narrowly tailored to a compelling state interest. This standard is “exceptionally demanding.”<sup>325</sup> A state must show that it “lacks other means of achieving its desired goal without imposing a substantial burden” on a plaintiff’s religious exercise.<sup>326</sup>

A plaintiff has two strong arguments that Indiana, Kentucky, or Florida’s abortion ban is not narrowly tailored. First, a plaintiff should argue that the ban is not narrowly tailored because the state makes exceptions that undermine its interests.<sup>327</sup> A state may encounter that *other* compelling interests support the exceptions to its ban.<sup>328</sup> In response, a plaintiff should assert that an abortion ban fails strict scrutiny because it does not correctly narrowly tailor the law to *all* of its compelling interests<sup>329</sup>—the ban and its exceptions are underinclusive. Second, the plaintiff should assert the abortion ban fails strict scrutiny because it devalues religious exceptions compared to secular exceptions.<sup>330</sup>

1. The state draws the wrong balance between compelling interests

A Jewish plaintiff should first contend that an abortion ban fails strict scrutiny because it permits “other conduct that undercuts [the state’s] interests in the same way.”<sup>331</sup> As mentioned, litigants have used this argument repeatedly—and successfully—in RLUIPA and RFRA cases.<sup>332</sup> As an initial matter, a plaintiff should assert that a state’s abortion ban is not narrowly tailored because it makes exceptions that undermine its interest in protecting fetal life.<sup>333</sup>

A state, however, can retort that other equally compelling interests support the law’s exceptions.<sup>334</sup> A state may try to argue that allowing abortions for maternal health furthers the state’s interest in protecting

---

325. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

326. *Id.*

327. *See infra* text accompanying notes 331-33.

328. *See infra* text accompanying notes 334-36. *But see supra* text accompanying notes 322-23.

329. *See infra* text accompanying notes 338-50.

330. *See infra* Part II.D.2.

331. *Doster v. Kendall*, 54 F.4th 398, 423 (6th Cir. 2022).

332. *See supra* text accompanying notes 308-10.

333. *See supra* text accompanying notes 308-10; *see also* Schraub, *supra* note 14, at 1590 (making a similar argument). Unless IVF embryos are frozen indefinitely, the potential disposal of such embryos undermines the life of a fetus at any stage of development.

334. It is unclear if the State will be allowed to do so under recent Supreme Court precedent. *See infra* Part II.D.2.

maternal safety.<sup>335</sup> Exceptions for rape and incest, a state could argue, further a compelling interest in preventing trauma. And exceptions for IVF further the state's interests in expanding fertility. (Importantly, Kentucky and Indiana have yet to fully advance this argument in RFRA litigation.<sup>336</sup>)

Should the state advance this argument,<sup>337</sup> a plaintiff should respond that a law can still fail strict scrutiny when its exceptions are underinclusive.<sup>338</sup> In *Maryville Baptist Church, Inc. v. Beshear*, for example, the Sixth Circuit recognized that Kentucky's COVID-19 orders—which banned all mass gatherings—were supported by a compelling state interest in “preventing the spread of a novel, highly contagious, sometimes fatal virus.”<sup>339</sup> Kentucky argued that the exceptions to this ban, which allowed gatherings at offices and airports, were justified as “life-sustaining” and required social distancing.<sup>340</sup> The Sixth Circuit held that Kentucky's “exceptions” category was too narrow because it prohibited religious gatherings consistent with the compelling interests for the exceptions.<sup>341</sup> Religious gatherings *were* life-sustaining (by being “soul-sustaining”),<sup>342</sup> and such gatherings could also abide by the health

---

335. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

336. Kentucky asserted its law was the least restrictive means despite its exceptions. *Sobel* Defendant's Cross Motion for Summary Judgment, *supra* note 73, at 25 n.25; *Sobel* Plaintiffs' Reply in Support of Summary Judgment, *supra* note 302, at 20 (“Where Defendant attempts any form of strict scrutiny analysis, Defendant merely informs the Court that the state has a compelling interest in potential life, a proposition that Plaintiffs never argued against.”). Indiana argued that “least restrictive means” “does not forbid the State from exempting some conduct from a statute to further other important interests.” *Anonymous Plaintiff* Reply of Appellants, *supra* note 229, at 25-26 (“The reasons for the exceptions permitting some abortions—preserving the mother's life and allowing for precedence of a different moral imperative where the fetus was conceived through rape or incest—do not contradict the view that abortion results in a grave loss of fetal life. They instead enable vindication of other weighty interests in very narrow circumstances.”). It did not, however, address other interests supporting IVF or fetal abnormality. *Id.*; *Anonymous Plaintiff* Brief of Appellants, *supra* note 265, at 27, 48.

337. *See supra* note 336.

338. Elizabeth Sepper has articulated that abortion bans are underinclusive *and* overinclusive. *See supra* note 16, at 226-27.

339. 957 F.3d 610, 611-13 (6th Cir. 2020) (per curiam).

340. *See id.* at 611, 614-15 (quoting Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal and to Expedite Appeal Exh. 4 at 1, *Maryville Baptist*, 957 F.3d 610 (6th Cir. 2020)). The Sixth Circuit did not explicitly recognize “life-sustaining” as a compelling state interest, but its argument about the *balance* of those exceptions ultimately maps onto what plaintiffs should argue. *See id.*

341. *See id.* at 614-15.

342. *See id.* at 614 (critiquing Kentucky for distinguishing “life-sustaining” and “soul-sustaining” activities).

requirements of the “exceptions.”<sup>343</sup> In other words, the state did not strike the right *balance* between its compelling interests. Because the state’s exceptions were underinclusive, its pandemic restrictions failed strict scrutiny.<sup>344</sup>

A plaintiff should apply *Maryville Baptist’s* reasoning to the challenged abortion ban.<sup>345</sup> For example, Indiana may argue that its fatal fetal abnormality exception furthers a compelling interest in “mitigati[ng]” fetal pain.<sup>346</sup> If a state makes such an argument,<sup>347</sup> a plaintiff can assert that such an exception is underinclusive because it exempts fatal conditions only when abortion occurs within twenty weeks of birth.<sup>348</sup> What about a Jewish plaintiff who discovers after that date that their fetus has a genetic condition that leads to death? Aborting fetuses with these latter conditions *also* avoids fetal pain, yet a state like Indiana would not permit these abortions.<sup>349</sup> A Jewish plaintiff can therefore assert that a state has not narrowly tailored its compelling interests to the ban (preserving fetal life) *and* its exceptions (preventing fetal pain). As a result, under *Maryville Baptist*, the abortion ban fails strict scrutiny.<sup>350</sup>

A plaintiff can similarly challenge Florida and Kentucky’s exceptions as underinclusive. As the *Sobel* plaintiffs noted, Kentucky (and Florida) exempts

---

343. See *id.* (“The exception for ‘life-sustaining’ businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors.” (citing Plaintiffs-Appellants’ Emergency Motion for Injunction Pending Appeal and to Expedite Appeal Exh. 4 at 2-6, *Maryville Baptist*, 957 F.3d 610 (6th Cir. 2020))).

344. *Id.* at 615 (“[R]estrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.”).

345. See *id.*; Schwartzman & Schragger, *supra* note 14, at 2322-23 (advancing this argument); see also Schraub, *supra* note 14, at 1589-91 (making a similar argument with different case law).

346. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022). On appeal, the Attorney General of Indiana argued its exemptions “further[ed] other important interests.” *Anonymous Plaintiff Reply of Appellants*, *supra* note 229, at 25.

347. See *supra* text accompanying notes 322-23, 336.

348. IND. CODE ANN. § 16-34-2-1(a)(1) (West 2023).

349. See, e.g., *Anonymous Plaintiff Brief of Appellees*, *supra* note 23, at 46, 53 (“Here the State continues to allow abortions under certain non-religious circumstances yet it prohibits them when they are compelled by sincere religious belief.”). Kentucky plaintiffs raised a similar argument about exemptions for IVF. *Sobel Complaint*, *supra* note 6, at 14 (“Assuming *arguendo* that there is a compelling governmental interest in preserving a fetal life or more broadly life itself, it neither follows that there is a compelling governmental interest in the broad prohibitions on reproductive technologies found in a plain reading of Kentucky’s Abortion Law, nor that Kentucky has imposed the least restrictive means to protect that interest.”).

350. See *Maryville Baptist*, 957 F.3d at 616 (granting a preliminary injunction against a ban on religious services because “the Governor’s orders do not seem to survive strict scrutiny”).



abortions necessary to save a pregnant person's life or prevent physical impairment, and therefore the exemption is not narrowly tailored to protecting fetal life.<sup>351</sup> Florida and Kentucky may argue that their exemptions further a compelling state interest in protecting maternal safety.<sup>352</sup> But providing an exception for only irreversible or deadly conditions ignores plaintiffs who have other health concerns, such as depression, hypertension, or diabetes. Aborting a fetus to prevent gestational diabetes could be consistent with a compelling interest in protecting maternal health. And obtaining an abortion to prevent trauma could be consistent with allowing abortions to preserve mental health. Yet neither Kentucky nor Florida's abortion law would entertain these exceptions.<sup>353</sup> Because Kentucky and Florida's exceptions are underinclusive, their abortion bans, too, fail strict scrutiny.

The Indiana Court of Appeal's recent decision in *Anonymous Plaintiff 1* demonstrate the persuasiveness of these underinclusivity arguments. The Court found the abortion ban was not narrowly tailored because, although the state had an interest in protecting fetal life, the "existing exceptions in the Abortion Law"—of IVF, rape, fetal abnormality, and maternal health—"also result in the loss of that potential for life. Thus, the Abortion Law is underinclusive."<sup>354</sup> In so doing, it echoed the reasoning of *Maryville Baptist* in attacking the underinclusivity of the exceptions. For example, it noted that: the plaintiffs' religious exception had "the same foundation as the narrower exceptions already existing in the Abortion Law: all are based on the interests of the mother outweighing the interests of the zygote, embryo, or fetus."<sup>355</sup> The sought religious exemption was "based on [the plaintiffs'] sincere religious beliefs, [which] merely expands the circumstances in which the pregnant woman's health dictates an abortion."<sup>356</sup>

---

351. The *Sobel* plaintiffs made this exact argument. See *Sobel* Plaintiffs' Reply in Support of Summary Judgment, *supra* note 302, at 21 ("Kentucky's Abortion Law prevents the termination of a non-viable fetus, which violates Jewish law and seems at odds with the state's interest in potential life. There are less restrictive means available to promote the state's interest. And given the opportunity to prove otherwise, the state has failed to provide clear and convincing evidence that Kentucky's Abortion Law provides the least restrictive means, which is their burden, not Plaintiffs'.")

352. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) ("These legitimate interests include . . . the protection of maternal health and safety . . . ." (citation omitted)).

353. See KY. REV. STAT. ANN. § 311.772(4) (West 2023); FLA. STAT. ANN. § 390.0111(1) (West 2023).

354. *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*27 (Ind. Ct. App. Apr. 4, 2024).

355. *Id.* at \*26.

356. *Id.*

2. The state cannot make “secular exceptions” without making religious exceptions

In the alternative, a plaintiff should argue that a state’s abortion ban fails strict scrutiny because it does not provide *religious* exceptions. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, for example, the Third Circuit found that the police department’s no-beard policy failed strict scrutiny because it granted medical exceptions but not religious ones.<sup>357</sup> Because the department recognized *some* exceptions, its denial of a religious exception impermissibly “devalued” it.<sup>358</sup> *Fraternal Order* has been called the “secular exception” argument.<sup>359</sup> A plaintiff can assert that because an abortion law exempts health-related abortions but not religiously motivated abortions, the ban fails strict scrutiny by devaluing religious exceptions.

A plaintiff should expect a state to counter that medical abortions or abortions for rape and incest victims are not comparable to religious abortions, and therefore the “secular exception” argument is inapplicable.<sup>360</sup> This counterargument relies on the logic of *South Bay United Pentecostal Church v. Newsom*, in which the Supreme Court considered a challenge to California’s pandemic restrictions.<sup>361</sup> California restricted religious gatherings but allowed essential activities to proceed.<sup>362</sup> Although only Chief Justice Roberts provided a rationale, he voted to uphold California’s restrictions on religious gatherings because the state exempted only “dissimilar” activities.<sup>363</sup>

A state may use *South Bay* to assert that the secular exception argument does not apply because medical exemptions further a separate compelling governmental interest (protecting health), while religious exemptions do not. Put another way, medical exceptions and religious exemptions are not comparable because they undermine a state’s interest in preserving fetal life to

---

357. 170 F.3d 359, 365, 367 (3d Cir. 1999).

358. *Id.* at 365.

359. *See, e.g.*, Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Symposium: Religious Privilege in Fulton and Beyond*, SCOTUSBLOG (Nov. 2, 2020, 9:29 AM), <https://perma.cc/7AJZ-PBKZ>.

360. Indiana did not make this argument. The Indiana Attorney General acknowledged that “exceptions can be problematic if they suggest the adequacy of more narrowly tailored alternatives.” However, the State ignored the “secular exception” argument’s takeaway: that a lack of religious exceptions itself suggests a more tailored alternative. Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 121, at 34; *see also infra* notes 367-79.

361. 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

362. *Id.*

363. *Id.*

different degrees.<sup>364</sup> Governor Andrew Cuomo raised this comparability argument in *Roman Catholic Diocese v. Cuomo*.<sup>365</sup> Governor Cuomo defended New York’s gathering restrictions by arguing that its exceptions were for “essential” activities, and “traditional religious exercises [were] not” essential.<sup>366</sup>

Recent Supreme Court precedent dispels *South Bay’s* view on comparability. In *Tandon v. Newsom*, the U.S. Supreme Court revisited California’s COVID-19 restrictions on religious gatherings.<sup>367</sup> It found that at-home religious gatherings were comparable to secular gatherings at hair salons and retail stores.<sup>368</sup> Because California exempted secular gatherings but not religious gatherings, its pandemic restrictions failed strict scrutiny.<sup>369</sup> The *Tandon* Court departed from *South Bay’s* embrace of a high threshold for comparable activities,<sup>370</sup> denying that comparability hinged on “*why people gather*”<sup>371</sup> —in other words, whether some exceptions were justified by a compelling interest. Instead, *Tandon* supports that secular exceptions are comparable to religious exceptions if they both undermine the interests of the law they are exempt from, even if they do so to different degrees.<sup>372</sup> Put another way, a plaintiff can assert that even if the overall “risk” to fetal life posed by maternal health

---

364. See *infra* note 371. But see *Fraternal Order*, 170 F.3d at 367 (asserting that there was no reason why “religious exemptions threaten important city interests but medical exceptions do not”).

365. 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

366. *Id.*

367. 141 S. Ct. 1294, 1296-97 (2021) (per curiam).

368. *Id.*

369. *Id.* at 1297-98.

370. See *S. Bay United Pentecostal Church v. Newsom*, 149 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

371. *Tandon*, 141 S. Ct. at 1296-97 (emphasis added) (citing *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring)) (“The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all ‘essential’ while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.”).

372. *Id.* (“Comparability is concerned with the risks various activities pose, not the reasons why people gather.”). The degree to which each exception undermined the state’s interest in reducing the spread of COVID-19 differed. Justice Kagan asserted that short visits to secular businesses posed less of a risk than at-home gatherings, *id.* at 1298 (Kagan, J., dissenting), but “by holding that secular gatherings at hair salons and retail stores were comparable to at-home religious gatherings, *Tandon* suggested that the comparability requirement should be interpreted loosely to encompass any activities that might also pose some risk to the government’s asserted interest, even if that risk is not comparable.” Note, *Pandora’s Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1185 (2023).

exceptions to the law is lower (because of the state’s countervailing interest in preserving health), *Tandon* still requires a religious exception.<sup>373</sup>

A plaintiff should thus use *Tandon* to argue that religiously motivated abortions are comparable to abortions to save a pregnant person’s life and therefore must also be exempted. *Tandon* suggests that when an abortion ban allows secular (“life-sustaining”) exceptions but not religious (“soul-sustaining”) exceptions, it fails strict scrutiny,<sup>374</sup> even if the life-sustaining exceptions are justified by a compelling state interest.<sup>375</sup> *Tandon* would find that, in the abortion context, both exceptions pose the same detriment to fetal life “whether a patient decides to terminate a pregnancy for powerful secular reasons or to act in accordance with their religious convictions.”<sup>376</sup> The same is true for abortion bans that exempt IVF, fetal abnormalities, incest, or rape.<sup>377</sup> As a result, Kentucky, Florida, or Indiana’s differential treatment of religious exceptions or fails strict scrutiny.

*Tandon*’s “secular exception” argument is revolutionary because of its scope. *Tandon* established that once a secular exception exists, a state must allow religious exemptions, too.<sup>378</sup> To deny an exception otherwise would “suggest[] that the regulations are targeted at religious conduct alone” because they aim “to stamp out religiously motivated [exceptions] while allowing [exceptions] for secular reasons.”<sup>379</sup>

---

373. See Note, *supra* note 372, at 1185.

374. See *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020); see also Note, *supra* note 372, at 1187.

375. See *supra* text accompanying notes 364–73.

376. Schwartzman & Schragger, *supra* note 14, at 2322; see also Mark Joseph Stern (@mjs\_DC), X (May 20, 2021, 5:59 AM), <https://perma.cc/3CTD-8A54> (arguing that “if an abortion ban has exemptions for, say, rape and incest, . . . *Tandon* require[s] exemptions for people whose religion counsels in favor of abortion, too”).

377. Cf. Sepper, *supra* note 16, at 219 (“[T]he any-secular-exemption approach of *Tandon* leads rather straightforwardly to religious exemption under the Constitution because bans permit abortions for secular reasons like life, rape, incest, or IVF—but not religion.”).

378. See Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 733 (2022) (arguing that the court ignored a tailoring argument and instead struck down “a facially neutral government regulation entirely because it made no exception for—and therefore burdened—religious practice”); see also Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court’s COVID-Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 573 (2021) (“*Tandon* suggests that the very fact that a comparable secular activity faces less stringent restrictions can serve to establish that the state has less restrictive means of protecting the public’s health.”).

379. *Stormans, Inc. v. Wiesman*, 597 U.S. 942, 952–53 (2016) (Alito, J., dissenting from the denial of certiorari); see also *Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (“We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.”).

*Tandon*—and its basic premise—is already making waves in lower courts.<sup>380</sup> In *Anonymous Plaintiff 1*, for example, the Indiana Court of Appeals echoed *Tandon*'s reasoning when it held that “[a] law is underinclusive when it provides exceptions for secular conduct that contravene the State’s asserted compelling interest to a similar or greater degree than religious conduct not subject to an exception.”<sup>381</sup> Even the Kentucky AG in *Sobel* engaged with elements of the secular exception theory in its motion for summary judgment; however, the AG failed to fully explain how the exceptions to Kentucky’s abortion ban thus pass muster.<sup>382</sup> A plaintiff should therefore use *Tandon* to assert that an abortion ban fails strict scrutiny.

### Conclusion

This Note surveyed how a Jewish plaintiff can seek an exemption to an abortion ban under a state RFRA. It argued that, in theory, state and federal law, as well as state and federal precedent, provide a colorable argument that a Jewish plaintiff should be exempted from an abortion law. It explained that these laws substantially burden a plaintiff’s ability to conduct a pregnancy in accordance with their religious beliefs and are not narrowly tailored to compelling governmental interests. This Note outlined the legal counterarguments a plaintiff should expect as well as potentially successful responses they can raise. Because most states have adopted similar language to Indiana, Kentucky, and Florida’s RFRA, a plaintiff can apply this Note’s analysis to other states with RFRA and abortion bans.

Although this Note argued that state and federal RFRA provide a *theoretical* basis for exceptions, it is cognizant of the fact that, in practice, its arguments may not necessarily succeed. For example, this Note did not discuss standing or timing, which could serve as impediments to a non-pregnant plaintiff raising a RFRA claim in the first place. *Harris v. McRae*, most notably, rejected a Free Exercise challenge to the Hyde Amendment, because appellees “failed to allege either that they are or expect to be pregnant” and therefore “lack[ed] the personal stake in the controversy needed to confer standing to

---

380. See, e.g., *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 612-13 (N.D. Tex. 2021) (using the case to argue for religious exemptions to Title VII).

381. *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*26 (Ind. Ct. App. Apr. 4, 2024).

382. See *Sobel* Defendant’s Cross Motion for Summary Judgment, *supra* note 73, at 24-25 (noting that government policies that “prohibit[] religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way” are of dubious constitutionality (quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021))). The Attorney General did not discuss *Tandon* and limited his discussion of narrow tailoring to only one sentence—in a footnote. *Id.* at 25. n.16.

raise such a challenge.”<sup>383</sup> But standing is by no means insurmountable—the Indiana Court of Appeals recently accepted non-pregnant plaintiffs’ standing.<sup>384</sup> Scholars have also asserted that recent Supreme Court precedent weighs in favor of finding standing—even for individuals who are not yet pregnant.<sup>385</sup> Furthermore, the completion of a pregnancy is not sufficient to find mootness, as it is “capable of repetition yet evading review.”<sup>386</sup>

Similarly, although this Note focused on Jewish plaintiffs, its analysis may be used by plaintiffs of different religions because RFRA’s standards apply across religions. However, some plaintiffs may struggle, in practice, to raise these claims. Scholars have documented that plaintiffs from minority religions have lower success rates in RFRA suits.<sup>387</sup> This disadvantage may owe itself to the fact that the religious right, “through strategic legislative, administrative, and litigation campaigns,” has “come to dominate the ways in which we talk about, and enshrine into law, religious liberty protections.”<sup>388</sup> Such dominance falsely reinforces the assumption that “socially conservative religious traditions are more deserving of constitutional and statutory religious freedom protections.”<sup>389</sup> And they incorrectly suggest religious beliefs that may align with progressive values are *not* religious.<sup>390</sup> Ultimately, plaintiffs may find that the success of their RFRA claims may not boil down to the merits.<sup>391</sup>

---

383. 448 U.S. 297, 320 (1980).

384. *Anonymous Plaintiff*, 2024 WL 1452489, at \*8-15 (distinguishing the case from *Harris* and addressing potential future harm in a discussion about ripeness); see also Courtney M. Cox, *Risky Standing: Deciding on Injury*, 8 NE. U. L.J. 75, 78-84 (2016) (outlining standing for probabilistic injuries).

385. See Elizabeth Reiner Platt, *The Abortion Exception: A Response to ‘Abortion and Religious Liberty,’* 124 COLUM. L. REV. F. (forthcoming 2024) (manuscript at 3-4), <https://perma.cc/MBG7-9KVV> (“The designer [in *303 Creative v. Elenis*] claimed that she has a First Amendment right . . . to refuse services to any same-sex customers who may come to her seeking a customized wedding website—an event that had not yet, and may never, occur.”).

386. *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (quoting *Roe v. Wade*, 410 U.S. 113, 124-25 (1973)).

387. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 235 (2012); cf. Susannah P. Mroz, Note, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 175 (2005) (“The problem with [questioning sincerity] is that it seems to favor majoritarian religions and work to the disadvantage of more ‘non-traditional’ religions . . .”).

388. LAW, RTS. & RELIGION PROJECT, COLUM. L. SCH., *WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT* 66 (2019), <https://perma.cc/5LK5-HMUT>.

389. *Id.*

390. *Id.*

391. Cf. James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 714-15 (“[T]rue strict scrutiny, if applied faithfully to government denials of religious exemptions, *footnote continued on next page*”)

Indeed, states have already pushed back against RFRA challenges to abortion laws. Some parties are challenging plaintiffs' sincerity.<sup>392</sup> Oklahoma and West Virginia amended their abortion and RFRA laws to prevent challenges to their abortion bans.<sup>393</sup> And other states may amend their abortion bans to allow for no exceptions to avoid vulnerability to a *Tandon*-like argument. These revisions, at least, may be challenged under the Establishment Clause.<sup>394</sup> Constitutional amendments serve as another way to combat these laws and are becoming possibilities in several states, including Florida.<sup>395</sup>

Despite anticipated challenges ahead, the suits in Florida, Kentucky, Indiana give cause for optimism. The Indiana Court of Appeal's recent decision affirming a temporary injunction of Indiana's abortion ban—though remanding for an injunction of narrower scope—suggests that RFRA plaintiffs may have some chance of success.<sup>396</sup> Indeed, the Court's affirmance of class-

---

would lead to far more exemptions than society would be willing to tolerate. To mitigate that problem, judges working with precedents or statutes calling for strict scrutiny in exemptions cases often have an incentive to 'apply some undefined level of lesser scrutiny while writing decisions in the language of strict scrutiny.'" (quoting James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1326 (2017)).

392. See *supra* Part II.A.

393. Belluck, *supra* note 12; Schwartzman & Schragger, *supra* note 14, at 2338; see also OKLA. STAT. tit. 63, § 1-745.39(J) (2022) (preventing civil actions under the Heartbeat Act from being "subject to any provision of the Oklahoma Religious Freedom Act"), held unconstitutional on other grounds by Okla. Call for Reprod. Just. v. State, 513 P.3d 117 (2023); W. VA. CODE ANN. § 35-1A-1 (West 2023) ("[N]or may anything in this article be construed to protect actions or decisions to end the life of any human being, born or unborn . . .").

394. Schwartzman & Schragger, *supra* note 14, at 2329 ("Without health exceptions, and with vague exceptions to save the pregnant person's life, categorical abortion bans will seem more like expressions of religious doctrine than a balanced pursuit of secular ends."); see also Sobel Plaintiffs' Summary Judgment Motion, *supra* note 7, at 2 (arguing that "Kentucky's laws are Christian in origin and design and impugn the faith of Jewish Kentuckians").

395. In April 2024, the Florida Supreme Court allowed a ballot measure, which would amend the state constitution to secure a right to abortion, to go forward. Annabelle Timsit, Victoria Bisset & Caroline Kitchener, *What to Know About Florida Abortion-Ban Rulings and How Voters Will Have a Say*, WASH. POST (Apr. 2, 2024, 10:35 AM EDT), <https://perma.cc/UUS2-R6MM>.

396. *Individual Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1*, No. 22A-PL-02938, 2024 WL 1452489, at \*1, \*30 (Ind. Ct. App. Apr. 4, 2024) (remanding for a narrower injunction because "the injunction would bar the State from preventing Plaintiffs from obtaining abortions that are outlawed by the Abortion Law but that are not directed by Plaintiffs' sincere religious beliefs").

action certification to the Indiana plaintiffs' RFRA suit suggests that RFRA suits can have far-ranging consequences beyond individual plaintiffs.<sup>397</sup>

More broadly, the current RFRA challenges promise restoring religious liberty litigation to its original, pluralistic aims. Since the 1960s, religious-exemption litigation has been used by various faiths to protect work for migrants,<sup>398</sup> allow churches to distribute food to indigent individuals,<sup>399</sup> challenge government surveillance of Muslim individuals,<sup>400</sup> and refuse military service.<sup>401</sup> And prior to abortion's legalization in 1973, the Clergy Consultation Service, an "underground network of ministers, rabbis, and other faith leaders," assisted individuals in seeking abortions.<sup>402</sup> The Indiana, Kentucky, and Florida suits are continuations of that tradition—not aberrations, not novelties. The current abortion suits remind us that, in the United States, religious liberty can be guaranteed to everyone—rich or poor, white or Black, Christian or Sikh, right or left. And they set the pathway for a post-*Dobbs* rights-restoring movement.

---

397. See *Court of Appeals Upholds Injunction for those Whose Religious Beliefs Are Burdened by Indiana's Abortion Ban*, ACLU (Apr. 4, 2024), <https://perma.cc/RR4C-SECH>.

398. See LAW, RTS. & RELIGION PROJECT, *supra* note 388, at 26-31 (describing the religious liberty claims raised by the sanctuary movement, the No More Deaths movement, and religious organizations assisting refugees).

399. *Id.* at 42-44.

400. *Id.* at 48-49.

401. *Id.* at 54-55.

402. *Id.* at 37.