THE FREE EXERCISE RIGHT TO LIFE

DAVID A. CARRILLO[*], ALLISON G. MACBETH[**] & DANIEL BOGARD[***]

ABSTRACT

The federal constitution's free exercise of religion clause can protect abortion rights by requiring states to allow abortion access for those with a sincerely held belief that their religion requires it, even when state law otherwise bans or restricts abortion. In at least one religion — Modern American Judaism, for example — abortion can be a religious requirement. That person's sincerely held religious belief requires an abortion. A state statute that bars the faithful's abortion must bend to the federal constitution's free exercise right and accommodate the religious exercise.

This approach exploits the fact that states with abortion restrictions likely have state versions of the Religious Freedom Restoration Act (RFRA), where any attempt by the state to rebuff a religious exercise claim would be subject to strict scrutiny. This approach applies even in states with state constitutional "no aid" provisions that require strict state neutrality in religious matters; those provisions are all now likely dead letters. To support religious exemptions from state abortion restrictions, advocates can leverage the current focus on history and tradition in constitutional interpretation by federal courts, and they can rely on the many historical examples of those courts permitting or requiring religious accommodations.

In context this idea is a one-way ratchet. A person's religious belief that an abortion is necessary can require the government to grant an accommodation. But a person whose religious belief prevents them from having an abortion requires no accommodation since the state has no hand in such a decision. And a person whose religious belief is that no one should have an abortion is entitled to no relief, because their religious belief has no impact on another's free exercise rights. Religion can permit a person to seek an abortion, but religion cannot prevent others from obtaining them.

On a macro level this concept cuts two ways. If government must grant exemptions based on religious belief from generally applicable laws that ban abortion, that principle should apply to other laws. Expanding exemption

[*] David A. Carrillo is a Lecturer in Residence and the Executive Director of the California Constitution Center at the UC Berkeley School of Law.

[**] Allison Macbeth is a California attorney in public service and a senior research fellow at the California Constitution Center.

[***] Daniel Bogard is a Senior Rabbinic Fellow of the Shalom Hartman Institute and is adjunct faculty at Eden Theological Seminary.

requirements naturally leads to reconsidering Smith — perhaps necessarily abrogating its rule that neutral laws of general applicability can burden free exercise. Thus, both abortion rights proponents and those who would abrogate Smith must accept broader consequences here. Abandoning the Smith rule that general-and-neutral laws do not burden free exercise means that religious exemptions will become broadly available — including to those whose religions require abortions. Barring those abortion-as-free-exercise claims requires maintaining Smith. Deploying this idea requires accepting its consequences.

CONTENTS

INTRODUCTION

Federal free exercise rights can require states to allow access to abortion for those with a sincerely held belief that their religion requires it. When *Dobbs* removed the right to an abortion from the federal constitution's purview and made it a question for the states, that decision did not entirely remove federal constitutional law from the analysis.[1] Instead, the federal free exercise clause remains available to grant religious adherents access to contraception and abortion even when state law otherwise bans or restricts them. Because the federal constitution requires states to accommodate religious exercise, any state statute that bars an abortion when religious doctrine compels it must bend to that free exercise right.

That argument follows from the high court's decision in *Espinoza*, which expanded the federal free exercise right to override state constitutional "no aid" clauses and rejected strict state neutrality in religious matters.[2] And the Court's ongoing expansion of its history-and-tradition focus, from Second Amendment issues in *Bruen* to establishment clause claims in *Kennedy*, enables advocates to rely on the many historical examples of federal courts permitting or requiring religious accommodations to support religious exemptions from state abortion restrictions.[3] The states with abortion bans are those most likely to have both a state RFRA copy and a lockstep doctrine.[4] Consequently, in those states there are three reasons to override statutory abortion bans: the supremacy of federal religion doctrine, a lockstep doctrine that requires the same result under the state constitution as under the federal constitution, and the state-law RFRA claim.

I. *DOBBS* OPENED THE DOOR TO USING FEDERAL FREE EXERCISE DOCTRINE AGAINST STATE ABORTION BANS.

In *Dobbs* the U.S. Supreme Court returned control over reproductive health to the states.[5] State-court litigants can now use state and federal protection for

[1] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[2] Espinoza v. Montana Department of Revenue, 140 S.Ct. 2246 (2020).

[3] New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 597 U.S. 1 (2022); Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022).

[4] After the U.S. Supreme Court held in City of Boerne v. Flores, 521 U.S. 507 (1997) that RFRA exceeded Congress's enforcement powers under section v of the Fourteenth Amendment, at least twenty-one states enacted versions of RFRA. NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. STATES WITH RELIGIOUS FREEDOM RESTORATION ACTS AND/OR LEGISLATION SIMILAR TO INDIANA'S (2015), available at https://abcnews.go.com/Politics/full-page/us-states-religious-freedom-restoration-acts-andor-legislation-30019519; Tanner Bean, *"To the Person:" RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 B.Y.U. L. Rev. 1, 2 n.4 (2019). RFRA still applies to the federal government. *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[5] 597 U.S. 215, 3000 (2022) (procuring an abortion is not a fundamental constitutional right so the states may regulate abortion for legitimate reasons).

religious liberty for exemptions from state-law abortion bans. Federal religion doctrine permits and sometimes requires accommodations for free exercise; here that means exempting those with religious requirements for abortions from state-law abortion bans. In states with free exercise doctrines that track federal law, the same principle will follow in lockstep.[6] And states that have attempted to enforce stricter establishment clause separation (like California and Montana) now must follow federal law and permit greater free exercise accommodation.

Abortion restrictions implicate free exercise rights because some religions have doctrines that can require their adherents to choose the pregnant person's life over an unborn. Modern American Judaism is one such religion, and we use it as our example.

A. *Some Faiths Have Religious Doctrines Favoring Abortion.*

For thousands of years, Judaism — which views life as beginning at birth rather than at conception — has held that access to abortion is a religious obligation. Because Jewish law (*halachah*) holds that "existing life" and "potential life" are distinct categories, and because Judaism holds that the existing life of the pregnant person must always take precedence over the potential life of the fetus, many rabbis insist that there are times when abortion is not just permitted in Judaism but required by Jewish law. Thus, laws limiting access to abortion services abridge the religious liberty of American Jews.

1. Abortion Is a Historical Jewish Tenet.

Judaism has viewed abortion as morally acceptable in many situations — and religiously required in others — for thousands of years. In the Torah,[7] one of the earliest Jewish texts,) we see a clear statement that a fetus is not a person in Exodus 21:22-23: "When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined."[8] This stands in sharp contrast with the next verse, which makes clear that if the pregnant person is injured, then the punishment is "a life for a life, an eye for an eye."[9] Unlike the common Christian reading of this verse, the juxtaposition between a mere financial penalty for causing a pregnancy's failure versus capital punishment for causing the pregnant person to die has for millennia been understood by Jewish interpretive tradition as an explicit statement that a fetus is not a human life.

This view of a fetus as but a part of the pregnant person's body, not an independent life, was established in the Talmud, a central religious text for Jews

[6] Many (perhaps most) states lock their state constitutional individual liberty guarantees to federal law, applying federal doctrine and decisions to determine their extent and application. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 194 (Oxford Univ. Press 2009).

[7] The Torah includes the Five Books of Moses.

[8] Exodus 21, 22–23.

[9] *Id.* at 23–24.

written over 1,400 years ago. Rabbi Yehudah HaNasi, one of the foremost rabbis of the Mishna (the central part of the Talmud), codified Jewish views on abortion 1,800 years ago by stating that "a fetus is considered a part of the pregnant person's body, equivalent to their thigh."[10]

In a section of the Mishna (circa 200 C.E.) about the death penalty, a ruling states: "if a pregnant person is set to be executed, you don't delay the execution unless they are in labor."[11] This shows that across wide-ranging applications of Jewish legal thinking a fetus is not viewed as a full human life but as potential life. The Mishna makes this clear in Oholot 7:6, where it commands that "a person who is having trouble giving birth, they abort the fetus and even take it out limb by limb if they must, because existing life always comes before potential life. If most of the child has come out already they do not touch it, for we do not push off one life for another."[12] This builds on longstanding Jewish legal understandings that a fetus moves from the category of "potential life" to "life" once more than half of the fetus has emerged into the world.

The great Jewish philosopher and legal thinker Maimonides[13] coalesced these ideas into what has become one of the central legal categories for understanding abortion in Judaism: the "rodef" or "pursuer."[14] Rodef is a legal category in Jewish thought for someone or something that is on the way to kill a human being.[15] Jewish law obligates every individual to stop a rodef at almost any cost — up to and including taking their life.[16] Thus, when Maimonides classified a pregnancy that is dangerous to a pregnant person's future as a rodef, he established a rule for Jews of the past 1,000 years that sometimes abortion is the only acceptable choice. A pregnancy that endangers life is considered a rodef, and consequently traditional Jewish views suggest that it must be terminated.

Thus, access to abortion is a religious requirement for Jews when the life of the pregnant person is threatened.

2. Abortion Remains an Article of Faith in Modern Judaism.

Absolute abortion bans infringe on the religious liberty of every American Jew, for whom access to abortion services has been a religious requirement for thousands of years. Views vary widely among the different movements of modern Judaism about when an abortion is considered to be morally and halachically (Jewish legally) acceptable, when it is required and when it is forbidden. Jewish legal judges (*poskim*) have a range of views on applying this tenet: some restricting it to physical threats that would lead to imminent death, and others in the Reform and Conservative communities broadly reading it to

[10] Babylonian Talmud, Gittin 23b.

[11] Mishnah Arikhin 1:4.

[12] Mishnah Oholot 7:6.

[13] Moses ben Maimon, also known as Rambam.

[14] MAIMONEDES, The Laws of Murderers and the Protection of Life, in MISHNEH TORAH.

[15] *Id.*

[16] Id.

include threats to quality of life. Regardless, there is broad consensus in modern American Judaism that blanket abortion bans violate the religious liberty of every Jew who can become pregnant.

Reform Judaism, the largest movement in American Judaism at 37% of the Jewish population, has long held that in the context of potential risk to the life of a pregnant person, that person's livelihood, aspirations, and future are included as parts of their life.[17] Rabbi Sara Zober of Temple Sinai in Reno, Nevada, said in an interview that for Reform Judaism, "mental health is a part of health. Which means that when we're talking about abortion and pregnancy, [the pregnant person's] life has to come before the fetus' life. And not just her physical life, but the fullness of her life. Her future, her mental health . . . her whole lived experience."[18] The Conservative movement (17% of American Jews)[19] is closely aligned on this issue: its rabbinical arm issued a statement after *Dobbs* that it "is outraged by the decision of the U.S. Supreme Court to end the constitutional right to abortion and deny access to lifesaving medical procedures for millions of individuals in the U.S., in what will be regarded as one of the most extreme instances of governmental overreach in our lifetime."[20]

Orthodox Jews, the most conservative (and the smallest, at 9%) modern denomination, likewise view blanket abortion bans as violations of core Jewish religious liberty.[21] According to Maharat Rori Picker Neiss, an Orthodox spiritual leader in St. Louis, "Just about every Orthodox rabbi has had to counsel someone through an abortion, [but] it is important to understand that in the Orthodox community people don't think of abortion as a political stance, but instead as something to be dealt with privately, on a case-by-case basis . . . which is why these laws which ban access to abortion are a violation of our religious liberty and an infringement on our obligation to counsel people."[22]

---

[17] *Jewish Americans in 2020*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020/.

[18] Zoom Interview by Daniel Bogard with Sara Zober, Rabbi of Temple Sinai in Reno, Nevada (June 24, 2023).

[19] *Jewish Americans in 2020*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020/.

[20] Press Release, The Rabbinical Assembly, Conservative Rabbis Strongly Condemn U.S. Supreme Court Decision to Overturn Abortion Rights (May 2, 2022), https://www.rabbinicalassembly.org/story/conservative-rabbis-strongly-condemn-us-supreme-court-decision-overturn-abortion-rights.

[21] *Jewish Americans in 2020*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020/.

[22] Daniel Bogard, *The Jewish Case for Abortion: How Overturning Roe v. Wade Threatens Religious Liberty*, THE MESSENGER (Jun. 27, 2022), https://themessenger.com/grid/the-jewish-case-for-abortion-how-overturning-roe-v-wade-threatens-religious-liberty (alterations in original).

3. Abortion bans discriminate against religious minorities.

State abortion bans violate the free exercise right for Jews and any other religion with equivalent views on abortion by burdening the ability to practice their faith free from governmental interference. If a state legislature intends such a law to codify a Christian value, doing so creates an establishment clause issue by imposing governmental Christianity on every religion. Doing so violates the core establishment clause principle that government cannot endorse one particular view of religion — Christian or otherwise — and foreclose the right of religious minorities to practice their faith free from governmental control.

And while access to abortion services is fundamental for Jewish Americans, American Judaism says nothing about imposing that belief on others. Indeed, none of the Jewish law authorities cited here require non-Jews to end their pregnancies. Consistent with the establishment clause's central religious pluralism principle, the only requirement is that Christians not impose their faith on Jews in the form of abortion bans. For Jews and other religious adherents with equivalent views, abortion is a question of religious freedom. And because every religious minority community relies on American religious liberty, this principle of religious liberty applies to any faith.

II. FREE EXERCISE CAN OVERRIDE STATE ABORTION BANS.

Banning or criminalizing abortion discriminates based on religion in two ways. One is that it discriminates against religions that (like Judaism) hold the existing life above a potential life, making abortion a tenet of faith. The other is that abortion bans often are religiously motivated and impose a Christian value (abortion is a sin) on those with different religious beliefs, or no faith at all. Criminalizing a disfavored religious practice — on that basis — is forbidden.[23] For example, in *Lukumi* a city sought to suppress ritualistic animal sacrifices of the Santeria religion by criminalizing certain kinds of animal slaughter.[24] In striking down the law for violating the "fundamental nonpersecution principle of the First Amendment," the high court held that the principle that government may not enact laws that suppress religious belief or practice "is so well understood that few violations are recorded in our opinions."[25] That principle applies to state laws that criminalize abortion. Such disfavor of religion, by imposing criminal sanctions on a religious exercise, violates the federal free exercise clause.

A religious exercise is any act motivated by religious belief. In *Hobby Lobby* the Court held that requiring closely-held corporations to pay for employees' insurance that covered contraceptives implicated the federal RFRA because the challenged regulation "demands that they engage in conduct that seriously

[23] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534–42 (1993); *see also* Locke v. Davey, 540 U.S. 712, 720 (2004).

[24] *Lukumi*, 508 U.S. at 535.

[25] *Id*. at 523.

violates their religious beliefs" that life begins at conception.[26] Belief manifests through exercise, so religious exercise is substantially burdened if the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[27] *Hobby Lobby* is clear that enforcing compliance with a law that violates religious beliefs concerning abortion imposes a substantial burden on religious exercise.

When abortion is an article of faith, the fact that others disagree with that belief is irrelevant. Although the practice of abortion may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[28] No government official, "high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[29] Nor is the free exercise of religion "limited to beliefs which are shared by all of the members of a religious sect."[30] The free exercise clause bars the government from enforcing laws "that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[31] Courts cannot question claims that abortion has religious significance for some faiths.[32] "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."[33]

Abortion bans do not fall in the narrow zone of permitted government regulations on religion. On one end of the spectrum the government can be considerate of religion and pass laws "to provide very broad protection for religious liberty."[34] On the other end free exercise rights can be limited by

[26] *Hobby Lobby*, 573 U.S. at 720.

[27] Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981).

[28] *Lukumi*, 508 U.S. at 531.

[29] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

[30] *Thomas*, 450 U.S. at 715–16.

[31] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Com'n, 138 S.Ct. 1719, 1731 (2018).

[32] *Hobby Lobby*, 573 U.S. at 735. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigants' interpretation of those creeds." Hernandez v. Comm'r., 490 U.S. 680, 699 (1989). Sincerity is the key; fakers will not be validated. Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (holding that proffered belief must be sincerely held, because First Amendment does not protect obvious "shams and absurdities").

[33] Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 887 (1990) (citations omitted).

[34] Ramirez v. Collier, 595 U.S. 411, 424 (2022) (describing the motivation for Congress to enact RLUIPA and its sister statute RFRA to ensure "greater protection for religious exercise than is available under the First Amendment.").

generally applicable laws.[35] On the consideration end of things, abortion bans are either inconsiderate of religions that require abortion or discriminatory for being overly considerate of some Christian views on abortion. On the general applicability end, many state abortion bans provide for certain exemptions, which makes them fail the general applicability test.[36] But a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise."[37] States with abortion bans arguably treat the secular act of giving birth more favorably than the religious act of terminating a pregnancy.

The free exercise clause protects the right to live out unpopular religious beliefs publicly in "the performance of (or abstention from) physical acts."[38] Laws targeting acts for disfavor because they are religious in nature or because of their religious character are "doubtless" unconstitutional.[39] As a result, where "official expressions of hostility to religion" accompany laws burdening free exercise, the high court has invalidated those laws.[40] Even where such overt animus is lacking, laws that impose burdens on religious exercise must still be both neutral toward religion and generally applicable or survive strict scrutiny.[41] State abortion bans will fail those tests because they are biased against some religions, lack a compelling justification, and contain exemptions.

Because religious practices are burdened by state abortion bans, state governments can and must accommodate the faithful's religious practice of having abortions.

A. *Free Exercise Can Require Accommodations.*

Federal free exercise rights can permit or mandate accommodation for religion-required abortions, without violating the establishment clause.[42] Any

[35] *Masterpiece Cakeshop*, 138 S.Ct. at 1724; *Smith*, 494 U.S. at 881 (holding that a neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the free exercise clause).

[36] *Lukumi*, 508 U.S. at 537 (holding that law triggers strict scrutiny if it creates a mechanism for "individualized exemptions"); *see also* Fulton v. Philadelphia, 141 S.Ct. 1868, 1876–77 (2021).

[37] Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (emphasis in original); *see also Fulton*, 141 S.Ct. at 1877; *Lukumi*, 508 U.S. at 542–46.

[38] *Smith*, 494 U.S. at 877.

[39] *Id.* at 877–78.

[40] *Masterpiece Cakeshop*, 138 S.Ct. at 1732.

[41] *Lukumi*, 508 U.S. at 546.

[42] Prisons are a good example of a context where religious accommodations are often required. *See, e.g.,* School District of Abington Township v. Schepp, 374 U.S. 203, 296–98 (1963) (Brennan, J., concurring); Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988) ("Prisons are entitled to employ chaplains"); Theriault v. Silber, 547 F.2d 1279, 1280 (5th Cir. 1977) (holding that federal prison chaplains do not violate the establishment clause); Horn v. California, 321 F.Supp. 961, 965 (E.D.Cal. 1968), *aff'd sub nom.* Horn v. People of the State of California, 436 F.2d 1375 (9th Cir. 1970) (holding that claim that state-paid

establishment clause concerns are excused because the government is accommodating a fundamental constitutional right to free exercise.[43] Indeed, at times the government must *provide* goods or services to accommodate free exercise rights, as necessary to alleviate a government-imposed burden.[44] For example, in special contexts (such as prisons and the military) free exercise rights require government accommodation.[45] Complying with such a constitutional requirement is a secular and compelling purpose.[46] And such accommodation is permissible even if some advancement of religion results.[47]

Many states have state constitutional religious liberty provisions that significantly expand these rights beyond the First Amendment minimum. Some states adopted their own versions of the federal RFRA, and those state RFRA laws require their state courts to apply strict scrutiny to laws that burden an individual's free exercise rights. Florida, for example, has both an expanded religious liberty provision in its state constitution and a state RFRA law.[48] This makes Florida's House Bill 5 (outlawing abortion after 15 weeks of pregnancy) vulnerable to the Florida constitution's religious liberty guarantee because it imposes one particular religious view on the entire population of the state — and that law is subject to strict scrutiny under Florida's RFRA statute.[49]

chaplains violate the establishment clause is "without merit"); *see also* Duffy v. State Pers. Bd., 232 Cal.App.3d 1, 19 (1991) (holding that prison chaplain positions did not violate establishment clause).

[43] See Cutter v. Wilkinson, 544 U.S. 709, 721 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.").

[44] *Id.* at 719; see Ashelman v. Wawrzaszek, 111 F.3d 674, 678 (9th Cir. 1997) ("[T]he prison must provide a diet sufficient to sustain Ashelman in good health without violating the laws of kashruth.").

[45] *See* Katcoff v. Marsh, 755 F.2d 223, 234–35 (2nd Cir. 1985); Larsen v. U.S. Navy, 486 F.Supp.2d 11, 27–28 (D.D.C. 2007).

[46] Widmar v. Vincent, 454 U.S. 263, 271 (1981); Abdulhaseeb v. Calbone, No. CIV-05-1211-W, 2008 WL 904661, at *30 (W.D. Okla. Apr. 2, 2008).

[47] Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

[48] Florida Religious Freedom Restoration Act of 1998, Ch. 98–412, §§ 1–6, 3297–98, Laws of Fla. (codified as Fla. Stat. §§ 761.01–.05 (2003)); *see* Warner v. City of Boca Raton, 887 So.2d 1023, 1032 (Fla. 2004) ("The protection afforded to the free exercise of religiously motivated activity under the FRFRA is broader than that afforded by the decisions of the United States Supreme Court.").

[49] Section four of Florida's Heartbeat Protection Act, Ch. 2023-21, Laws of Fla., amends Florida Statutes section 390.0111 to bar physicians from knowingly performing or inducing abortions where the fetus has reached a gestational age of more than six weeks. But the Act provides that its effective date is "30 days after any of the following occurs: a decision by the Florida Supreme Court holding that the right to privacy enshrined in s. 23, Article I of the State Constitution does not include a right to abortion; a decision by the Florida Supreme Court in *Planned Parenthood v. State*, SC2022-1050, that allows the prohibition on abortions after 15 weeks in s. 390.0111(1), Florida Statutes, to remain in effect . . . " *See* In re Doe, 370

Religious accommodations are also required by state RFRA provisions, which commonly prohibit burdening "religious exercise," broadly defining that as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[50] RFRA statutes generally require the government to demonstrate that the compelling interest test is satisfied by applying the challenged law to the particular person whose sincere exercise of religion is being substantially burdened.[51]

States likely would assert an interest in protecting potential life, and states indeed have "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[52] Thus, a state may define personhood how it wishes, but it must leave people "free to put their own religious beliefs into practice."[53] Outright bans and hard restrictions prevent some faithful from following their own religious beliefs concerning abortion, which requires an accommodation.

Religious accommodations can require exemptions from generally applicable laws or policies. In *O Centro* the high court rejected the government's claim that uniform drug law enforcement is a compelling interest and held that a religious group could have a regulated plant-based hallucinogen for communion.[54] In *Hobby Lobby* the Court ordered a religious exemption from a nationwide requirement to provide insurance, even assuming a compelling governmental interest.[55] And in *Holt* the Court rejected arguments about institutional security and ordered a prison to permit a Muslim prisoner to grow a beard for religious reasons.[56]

Supplying accommodations to the faithful by exempting them from state abortion laws is consistent with the long history and tradition of government solicitude towards religious observance.

B. *History and Tradition Support and Require Accommodations.*

The nation's long history of positive interaction between government and religion supports applying the accommodation principle to abortion. The Court has recently expanded its history-and-tradition focus to other liberty contexts,

So.3d 703, 706 (Fla. Dist. Ct. App. 2023). The Florida Supreme Court case was argued on September 8, 2023, decision pending (Case Number SC2022-1050).

[50] *See, e.g.,* IND. CODE § 34-13-9-8(a), 34-13-9-5.

[51] Gonzales v. O Centro Espírita Beneficente União de Vegetal, 546 U.S. 418, 430–31 (2006).

[52] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992), *overruled by* Dobbs, 597 U.S. 215.

[53] Doe v. Rokita, 54 F.4th 518, 520 (7th Cir. 2022).

[54] *O Centro*, 546 U.S. at 425–27, 439 (applying federal RFRA).

[55] *Hobby Lobby*, 573 U.S. at 728, 736 (applying federal RFRA).

[56] Holt v. Hobbs, 574 U.S. 352, 369–70 (2015) (applying RLUIPA).

emphasizing the importance of this analysis.[57] And the Court often cautions that the federal religion clauses may not be construed "with a literalness that would undermine the ultimate constitutional objective as illuminated by history."[58] History aids constitutional analysis by identifying the core values and principles underlying the federal constitution's text. Thus, a proper construction of the federal religion clauses must comport with "what history reveals was the contemporaneous understanding of [their] guarantees."[59]

Although the history of religion interacting with government is complex, overall, it amounts to an amicable accord. In *Reynolds v. United States*, the Court endorsed Thomas Jefferson's view that the establishment clause was intended to erect "a wall of separation between church and State" as "almost as an authoritative declaration of the scope and effect" of the First Amendment.[60] Yet the Court has never thought it to be "either possible or desirable to enforce a regime of total separation" between church and state. And the Court cautioned that Jefferson's metaphor "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[61] Consequently, the country's history "has not been one of entirely sanitized separation between Church and State."[62]

Instead, religion has permeated American society from the nation's colonial origins.[63] The same week that Congress approved the establishment clause saw

[57] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022) (holding government must justify its regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation); Kennedy v. Bremerton School District, 142 S.Ct. 2407, 2411 (2022) (stating an analysis focused on original meaning and history has long represented the rule in establishment clause jurisprudence).

[58] Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970*)*, 671; see also *Lynch*, 465 U.S. at 678.

[59] *Lynch*, 465 U.S. at 673; *see also* Committee for Public Education v. Nyquist, 413 U.S. 756, 777 n.33 (1973) (stating that establishment clause cases have recognized "the special relevance in this area of Mr. Justice Holmes' comment that a page of history is worth a volume of logic") (quotation omitted).

[60] Reynolds v. United States, 98 U.S. 145, 164 (1878); Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[61] *Lynch*, 465 U.S. at 673.

[62] *Nyquist*, 413 U.S. at 760.

[63] *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."); *see also* James Edward WOOD, THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (Baylor Univ. 1990); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); Richard H. Jones, *"In God We Trust" and the Establishment Clause*, 31 J. CHURCH & STATE 381 (1989); RODNEY K SMITH, PUBLIC PRAYER AND THE CONSTITUTION (Rowman & Littlefield Publishers 1987); THOMAS J. CURRY, THE FIRST FREEDOMS (Oxford Univ. Press 1986); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (Lambeth Press 1982); CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER (Fordham Univ. Press 1964); ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES (Harper & Row 1964).

it enact legislation providing for paid chaplains for the House and Senate, a practice that has continued for nearly two centuries.[64] "God" appears in the Declaration of Independence and the California constitution's preamble; postage stamps show the likeness of George Washington at prayer; the expression "In God We Trust" on the currency; the term "Anno Domini" on the cornerstone of the California Supreme Court building; the invocation "God save the United States and this Honorable Court" is proclaimed at the opening of the Supreme Court term.[65] These invocations of the Almighty have been variously justified as benign recognitions of religion as part of American culture,[66] as generic ceremonial deism,[67] or as a traditional part of American heritage.[68] As a result, the federal establishment clause "does not require eradication of all religious symbols in the public realm" and the "Constitution does not oblige government to avoid any public acknowledgment of religion's role in society."[69]

The Court has long endorsed government recognition of religion in society. This consideration towards religion flows from the religious nature of American society: "religion has been closely identified with our history and government."[70] "We are a religious people whose institutions presuppose a Supreme Being."[71] Indeed, the Court declared that this country is not only "a religious nation . . . this is a Christian nation."[72] Many references to Christian ideology appear in early American political writing; for example, Samuel Adams described the new republican version of the American city on the hill as "the *Christian* Sparta."[73] The Court has acknowledged that the nation's heritage

[64] *Lynch*, 465 U.S. at 674 ("It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.").

[65] *See* Marsh v. Chambers, 463 U.S. 783, 818 (1983); Fox v. City of Los Angeles, 22 Cal.3d 792, 822 (1978) (Richardson, J., dissenting); *see also* 36 U.S.C. § 302 ("'In God We Trust' is the national motto"); 36 U.S.C. § 119 ("The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."); 36 U.S.C. § 116(b)(2) ("The President is requested to issue each year a proclamation . . . designating a period of time on Memorial Day during which the people may unite in prayer for a permanent peace"); County of Allegheny v. ACLU, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring and dissenting); *Lynch*, 465 U.S. at 674–78 (describing numerous illustrations of government acknowledgment of religious heritage).

[66] Sands v. Morongo Unified Sch. Dist, 53 Cal.3d 863, 890 (1991) (Lucas, C.J., concurring).

[67] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37–38 (2004) (O'Connor, J., concurring).

[68] *Marsh*, 463 U.S. at 787–88.

[69] Salazar v. Buono, 559 U.S. 700, 718-719 (2010).

[70] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 211 (1963).

[71] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[72] Church of Holy Trinity v. United States, 143 U.S. 457, 470–71 (1892).

[73] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 at 118 (University of North Carolina Press 1998) (emphasis original).

and culture is in part grounded in belief in the Almighty.[74] And it called "pervasive" the evidence of accommodation of all faiths and forms of religious expression.[75]

On that foundation, the federal constitution "affirmatively mandates accommodation, not merely tolerance, of all religions" — the opposite of requiring government divestment from religious life.[76] This requires government accommodation of religious exercise to relieve burdens the government itself created, and the establishment clause is not offended when the government acts with the purpose of alleviating "exceptional government-created burdens on private religious exercise."[77] Government can provide benefits to religious groups; indeed, it must include religious entities in generally-available government benefit programs.[78] Even more: respecting the favored place religion holds in American society permits the state to volunteer its assistance to religious organizations: "when the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[79]

Whether grounded in accommodation or a pure free exercise claim, this body of law justifies abrogating state laws to the extent they prevent religious adherents from obtaining abortions as a tenet of their faith. Modern American Judaism is such a religion because it requires its followers to value an existing life over an unborn. When that belief conflicts with a state-law restriction on abortion, the state law must bend.

C. Espinoza *Requires States To Be More Accommodating of Free Exercise Claims.*

Some states, such as California and Montana, have broad state constitutional establishment clauses that their courts have used to enforce strict government neutrality in religious matters to protect religious freedom.[80] The high court recently rejected that approach in *Espinoza*, and instead required states to be more flexible with establishment clause claims and, consequently, more

[74] *Schempp*, 374 U.S. at 213 ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings. . . . This background is evidenced today in our public life . . .").

[75] *Lynch*, 465 U.S. at 677.

[76] *Id.* at 673.

[77] *Cutter*, 544 U.S. at 720.

[78] *Espinoza*, 140 S.Ct. at 2255.

[79] *Zorach*, 343 U.S. at 313–14.

[80] *See, e.g.,* California Tchrs. Ass'n v. Riles, 29 Cal.3d 794 (1981) (holding statute authorizing funding for superintendent of public instruction to lend, without charge, textbooks to students attending nonpublic schools violates article XVI, section 5); Wilson v. State Bd. of Ed., 75 Cal.App.4th 1125, 1143 (1999) (holding a charter school controlled by a sectarian organization would be illegal under article XVI, section 5); Espinoza v. Montana Department of Revenue, 393 Mont. 446 (2018), *rev'd and remanded*, 140 S.Ct. 2246 (2020).

accommodating of free exercise claims. This approach seeks to protect religious freedom by involving the government rather than excluding it. And by allowing or requiring greater government accommodation for free exercise claims, the high court created a new basis for protecting abortion rights: government accommodation of the free exercise rights of adherents whose faiths require them to terminate pregnancies.

Espinoza dealt a mortal blow to the independent vitality of many state constitutional religion provisions.[81] A number of states, including Montana and California, have "no aid" state constitutional provisions that ban state government aid to sectarian entities in general and religious schools in particular.[82] The rationale is twofold: these clauses provide greater protection for individual rights against establishment violations, and a stronger shield for individual freedom of belief, because the state constitution requires greater government neutrality and provides broader restrictions on actual or apparent preference than the federal constitution does.[83] On that view, California's constitutional provisions on religion require a standard that follows the strictest neutral line permissible under federal law.[84]

The *Espinoza* decision rejected that view. In *Espinoza* the high court considered the constitutionality of Montana Constitution article X, section 6(1), which (like California's no-aid provisions) bars government aid to any school "controlled in whole or in part by any church, sect, or denomination."[85] Montana relied on that state constitutional provision to exclude religiously affiliated private schools from a state scholarship program for students attending private schools. But the Court held that the scholarship program was permissible under the federal establishment clause, and that the no-aid provision was subject to strict scrutiny because it discriminated based on religious status.

Fatally for state no-aid provisions, the Court held that Montana's interest in using its no-aid provision to separate church and state more than the federal constitution would require was not a compelling interest that could satisfy strict scrutiny. The Court also held that relying on the no-aid provision to bar religious schools from the scholarship program repressed rather than promoted religious freedom. The Court expressly rejected the argument that a no-aid provision ensures greater religious liberty by requiring even more separation of church and state than the federal constitution would require.[86] As a subsequent case later

[81] *Espinoza*, 140 S.Ct. at 2252, quoting MONT. CONST. art. X, § 6(1).

[82] *See* MONT. CONST. art. X, § 6(1); CAL. CONST art. XVI, § 5.

[83] David A. Carrillo & Shane G. Smith, *California Constitutional Law: The Religion Clauses,* 45 U.S.F. L. Rev. 689, 690 (2011).

[84] *Id.*

[85] MONT. CONST. art. X, § 6(1).

[86] *Espinoza*, 140 S.Ct. at 2260 (rejecting Montana's argument that by "more fiercely" enforcing establishment clause protection its no-aid clause achieved greater church and state separation, thereby better promoting religious freedom.). The Court recently reaffirmed this approach holding that Maine's school tuition assistance program could not be limited to only

explained, "[A]s we explained in both *Trinity Lutheran* and *Espinoza*, such an interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise."[87]

Espinoza likely renders moot questions about state constitutional prohibitions on government aid to religion. Of course, state constitutional religion analysis must operate within the limits of federal law because the religion clauses of the First Amendment apply to the states through the due process clause of the Fourteenth Amendment.[88] If *Espinoza* applies broadly to all similar state constitutional no-aid provisions, the federal religion clauses will likely be dispositive in challenges to government aid programs in those states and foreclose arguments about ensuring stricter separation of church and state than the federal constitution. Thus, *Espinoza* arguably abrogates any vitality state constitutions have for enforcing greater separation of church and state.

California's constitution, for example, has several provisions related to religion. The establishment clause in Article I, section 4 of the California constitution (added by the voters as an initiative amendment in the November 5, 1974 general election) is nearly identical to the federal establishment clause.[89] Yet the terms of the California free exercise clause in Article I, section 4 (known as the "no preference" clause) are distinct, and the California constitution contains two other provisions (no sectarian education in Article IX, section 8, and no sectarian aid in Article XVI, section 5) that have no analogues anywhere in the federal constitution.[90] Justices of the California Supreme Court have viewed these distinct provisions as providing additional, stricter state law guarantees that religion and state government must remain separate.[91] But after the high court dispatched Montana's equivalent state constitutional imperative, California is likely barred from "more fiercely" enforcing church and state separation. Little life remains in the California constitution's religion clauses

"nonsectarian" private schools. Carson *ex. rel.* v. Makin, 596 U.S. 767, 1996–97 (2022); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (holding that a benefit program under which private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not offend the establishment clause).

[87] *Carson*, 596 U.S at 781 (internal quotations omitted).

[88] *Nyquist*, 413 U.S. at 760 n.3; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying freedom of religion clause); *Everson*, 330 U.S. at 15 (applying establishment clause); California Educ. Facilities Auth. v. Priest, 12 Cal.3d 593, 599 n.6 (1974).

[89] *See* Carrillo & Smith, *supra* note 83, at 707.

[90] *Id*.

[91] *See Sands*, 53 Cal.3d at 883; East Bay Asian Local Dev. Corp. v. State of California, 24 Cal.4th 693, 723 (2000) (Mosk, J., dissenting) ("Our state constitutional law is analytically distinct and more protective of the principle of church-state separation than the First Amendment.").

given the California Supreme Court's prior decision that federal law applies to establishment claims under the state constitution.[92]

The same goes for any state with an equivalent "no aid" provision and establishment clause doctrine. Thus, *Espinoza* has a dual effect of quashing state establishment clauses and elevating federal free exercise rights. Yet in closing the door on state constitution establishment clauses and superimposing federal free exercise doctrine, *Espinoza* opened a new path to protect abortion rights with federal free exercise claims. Federal free exercise doctrine can mount a direct attack on abortion bans and can be used to carve out accommodations.

In states that restrict or ban abortion, persons of faith have three arguments: federal free exercise, the state's lockstepping doctrine, and state statutory RFRA. Federal free exercise rights now override state constitutional no-aid and establishment clauses and require an accommodation to relieve the burden placed on religious observance by state laws that target a specific religious practice. Such state laws must bend both because of the federal constitution's supremacy clause, and because most states use lockstepping doctrines to tie their state constitutional law to federal doctrine. And because states with abortion bans likely have statutory RFRA provisions, their state courts must apply strict scrutiny to state statutory abortion bans when they burden the free exercise rights of that state's citizens who hold that abortion is a tenet of faith.

CONCLUSION

In the aftermath of *Dobbs*, it appeared that no federal constitutional abortion questions remained and that states were left alone to legislate about abortion rights. But free exercise rights are a previously dormant spark that can reignite the federal constitution's role in abortion, at least where a person's sincere religious beliefs (like those long held in American Judaism) compel it. This argument responds not only to existing state laws, but also to any future federal statute restricting or banning abortion access. Thus, even after *Dobbs* abortion access may still be required by the federal constitution — for the faithful.

---

[92] *East Bay Asian*, 24 Cal.4th at 718–19 ("Presumably, the electorate intended that the right being added to article I, section 4 through the new establishment clause would afford the same protection as the establishment clause of the First Amendment on which it was patterned.").