Religious Exemptions from Abortion Bans?

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Introduction

Abortion activists after *Dobbs v. Jackson Women's Health Organization*[1] have resorted to religious exemptions to circumvent state prohibitions. This Article will analyze the obstacles they face in their strategy given the current constitutional and statutory framework. For this purpose, the Article will use as an illustration the recent decision of the Marion Superior Court, a state court from Indiana, in *Anonymous Plaintiff 1, et al. v. The Individual Members of the Medical Licensing Board of Indiana, et al.*[2] Based on a critical analysis of the decision's arguments, this Article will show that, contrary to some academic commentaries, there is not a strong case for religious exemptions from abortion bans.

The First Section of the Article presents a summary of the case. In the Second Section, the Article will make a brief overview of the law of religious exemptions in the United States, with a special focus

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1 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

2 No. 49D01-2209-PL-031056, 2022 WL 22906464 (Ind.Super. Dec. 02, 2022), *aff'd*, 233 N.E.3d 416 (Ind. Ct. App.), *transfer denied*, 246 N.E.3d 271 (Ind. 2024) [hereinafter *Indiana Case*]. This Article notes the procedural posture of the case. Following the trial court's 2022 decision, the State appealed. During the appeal, the Superior Court certified the case as a class action and the State moved for interlocutory appeal. The Court of Appeals accepted jurisdiction and affirmed. In 2024, the Indiana Supreme Court affirmed the Superior Court's preliminary injunction in anticipation of subsequent review of a final order. Given that both the Indiana Court of Appeals and Supreme Court affirmed the trial court and discussed matters such as standing requirements that are not germane to this Article's argument, this piece will focus on the initial Marion Superior Court decision. References to *Indiana Case* will refer to the Superior Court's decision unless otherwise indicated.

on the precedents that the Indiana court cited in its decision. As this Article will show, religious exemptions to general prohibitions – like those created by criminalization of conduct – present particularly challenging problems in the current framework. First, granting these exemptions incentivizes more people to adopt a particular religious belief, and, relatedly, it may lead others to perceive that religious people, or their communities, are run as a law unto themselves. This is especially significant in the current context, because, as some scholars have argued, religious exemptions are one of the areas of dispute in the so-called "culture wars,"[3] especially in cases where religious individuals or organizations request exemptions from civil rights legislation related to sexual or reproductive matters.[4] Second, some courts' loose analysis of the requirements for obtaining religious exemptions creates an incentive for unwarranted requests. The decision in *Indiana Case* is an example of this problematic approach.

Following that discussion, the Article will focus on three problems for religious exemptions as they apply to *Indiana Case*: (1) claimants in religious exemption cases must show that abortion regulations pose a substantial burden for their religious exercise, but in *Indiana Case* the plaintiffs did not claim a religious obligation to have an abortion performed, (2) claimants must show that their religious belief regarding abortions is sincerely held, but in *Indiana Case* the court did not analyze the sincerity of the plaintiffs, and (3) the government might prove that the abortion ban is narrowly tailored to comply with a governmental interest in protecting intrauterine life, but in *Indiana Case*, the court's analysis was extremely deferential to the petitioners. This Article will argue in favor of a stricter verification of the fulfillment of these requisites to grant religious exemptions.

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[3] *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839; Mary Anne Case, *Why Live-and-Let-Live Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights Symposium*, 88 S. CAL. L. REV. 463 (2015); Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation*, 88 S. CAL. L. REV. 703 (2015).

[4] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n, 584 U.S. 617 (2018).

BACKGROUND

I. THE CASE FOR EXEMPTIONS FROM ABORTION BANS IN INDIANA

Since the Supreme Court's decision in *Dobbs* came out, state courts have been asked to decide on diverse challenges to abortion restrictions.[5] This Article deals with one group of those challenges: those who seek a religious exception to the general restrictions on abortion.[6] Specifically, this Article will take as an example of this litigation *Indiana Case*, in which the Marion Superior Court, a state court of Indiana, granted a motion for a preliminary injunction enjoining the enforcement of the state abortion ban on the plaintiffs.[7]

Indiana law makes it a criminal offense to have an "[a]bortion . . . in all instances . . . ,"[8] except when performed under determined circumstances.[9] The plaintiffs asserted that they have sincere religious beliefs that direct them to have an abortion performed under circumstances prohibited by the law, and therefore sought a religious exemption from the criminal prohibition.[10]

The plaintiffs' complaint included a description of each claimant's religious beliefs and biography.[11] Plaintiff 1 identified herself as a Jewish woman, who believes that the life of a pregnant woman, including her physical and mental health, must take precedence over the potential for life embodied in a fetus.[12] Thus, if her physical, mental, or emotional well-being were endangered by a pregnancy-related condition or fetal abnormality, she would have to terminate the pregnancy.[13] Plaintiff 3 is Muslim and believes that her overall well-being always takes

[5] Some challenges to abortion bans have no relation to religious rights. *See* Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 126 (S.C. 2023).

[6] For a list of cases involving religious challenges to abortion restrictions, *see* Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2303–04 (2023).

[7] *Indiana Case*, *supra* note 2.

[8] Ind. Code Ann. § 16-34-2-1(a).

[9] *See* Ind. Code Ann. § 16-34-2-1; *see also Indiana Case*, *supra* note 2, at *3–4.

[10] *See Indiana Case*, *supra* note 2.

[11] *Id.* at *6–10.

[12] *Id.* at *6–7.

[13] *Id.*

precedence over a fetus.[14] Accordingly, if her health was harmed by a pregnancy-related condition, she should, according to her religious beliefs, terminate the pregnancy.[15] Plaintiffs 4 and 5 are Jewish females who are married to each other, and they share the same beliefs as Plaintiff 1.[16]

Plaintiff 2 does not belong to a specific religious denomination or tradition, but she affirms to have religious and spiritual beliefs that guide her moral and ethical practices as well as the way she lives her life.[17] She identifies as central to her beliefs that persons are endowed with bodily autonomy and, according to her faith, at least prior to viability, a fetus is a part of the body of the mother.[18] Finally, she believes that if a pregnancy or the birth of a child would not allow her to fully realize her humanity and inherent dignity, she should terminate that pregnancy.[19]

Hoosier Jews for Choice, another plaintiff in the *Indiana Case*, is an organization that believes that an abortion under Jewish law is directed to occur if it is necessary to prevent physical or emotional harm to a pregnant woman, even if there is not a physical health risk that is likely to cause substantial and irreversible physical impairment of a major bodily function.[20]

As noted, the court granted the plaintiffs' motion.[21] The court went through the allegations of the parties and concluded that "[t]he plaintiff's religious beliefs are sincerely held and mandate that they receive abortions in circumstances that are prohibited..."[22] To determine if the plaintiffs met their burden to show a likelihood of success on the merits of their claim, the court considered Indiana's Religious Freedom Restoration Act (RFRA), which provides that:

> (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

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14 *Id.* at *8–9.

15 *Id.*

16 *See Indiana Case*, *supra* note 2, at *9.

17 *Id.* at *7–8.

18 *Id.*

19 *Id.*

20 *Id.* at *10–11.

21 *Id.* at *21.

22 *Indiana Case*, *supra* note 2, at *11.

> (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person:
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> > (1) is in furtherance of a compelling governmental interest; and
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> > (2) is the least restrictive means of furthering that compelling governmental interest.[23]

The court also noted that, within the context of Indiana's RFRA, the exercise of religion "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[24]

The court then asserted that Indiana's abortion ban imposes a substantial burden on the plaintiff's religious exercise, thus triggering RFRA's protection.[25] The opinion noted that criminal defendants in Indiana may invoke RFRA as a defense in criminal prosecutions because the state law does not exempt criminal statutes.[26] Then, the court found that "the Plaintiffs have satisfied their prima facie burden that they have a defense under RFRA."[27] The opinion went on to consider the state's arguments: (1) that the plaintiffs' religious exercise was not substantially burdened because abortion was not a religious practice, but a secular means to a religious end, and (2) that plaintiffs are not burdened by the state prohibition on abortion because they are taking steps to prevent

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23 *Id.* at *13.

24 *Id.*

25 *Id.*

26 *Id.* The court relied on Blattert v. State, 190 N.E.3d 417 (Ind. Ct. App. 2022). The case is relevant to the extent that it illustrates how the analysis of religious exemptions claims is conducted on the Indiana state courts. There, the defendant had been prosecuted for repeatedly punishing his children by beating and strangling them. Blattert claimed to be a member of the Ellettsville Church of Christ and to believe that he had to follow God's commands, including to "discipline his children with corporal punishment as he sees fit, even if that includes punching them in the face, striking their heads with his elbow, and choking them . . . ." *Id.* at 419. The court asserted that Indiana's RFRA "provides a defense to criminal prosecutions that substantially burden religious exercise unless the State shows the prosecutions are the least restrictive means of furthering a compelling governmental interest." *Id.* Even though the court considered that the initial burden is on the defendant to show that the disputed governmental action substantially burdens a sincerely held religious belief, the court decided the case without addressing whether the State's prosecution substantially burdened Blattert's religious exercise. *Id.* The court ultimately decided that the State's interest in protecting the welfare of children was of a substantial nature and that the State had showed how prosecuting Blattert advanced that interest.

27 *Indiana Case*, *supra* note 2, at *14.

the possibility of becoming pregnant, specifically, altering their sexual behavior.[28]

To the first argument, the court answered that there are activities that are considered secular to most people but that have religious meaning for those who believe.[29] Citing the Supreme Court decision *Burwell v. Hobby Lobby Stores*, the *Indiana Case* court stated that even though the plaintiffs' only activity was "the payment of money," that activity was not "too attenuated to constitute a religious practice."[30] To the second argument, the court replied quoting another Supreme Court precedent, *Sherbert v. Verner*, and it concluded that the pressure to forego certain conduct that the state bans on abortion impose on the plaintiffs is sufficiently burdensome.[31] "[The plaintiffs] have adopted these practices solely to avoid placing themselves in circumstances that would require them to exercise their religious belief, but where that exercise would be prohibited . . . "[32] Therefore, "[t]he government's pressure upon them to abandon their religious beliefs is clear."[33]

Then, the court analyzed whether the state government demonstrated that the burden posed on the plaintiffs satisfied RFRA's strict scrutiny.[34] The state invoked its interest in protecting innocent human beings from being killed.[35] The court, however, once again relied on *Hobby Lobby* to assert that, according to the Supreme Court, the question of when life begins "is a religious one that the State may not answer legislatively or as a factual matter."[36] The court concluded that "Indiana has no interest in violating the sincere religious beliefs and exercise of the Plaintiffs . . . . "[37]

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[28] *Id.*

[29] *Id.*

[30] *Id.* at *15 (citing Burwell v. Hobby Lobby Stores, 573 U.S. 682, 725 (2014)).

[31] *Id.* at *15 (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

[32] *Id.*

[33] *Indiana Case*, *supra* note 2, at *15.

[34] *Id.* at *16.

[35] *Id.*

[36] *Id.*

[37] *Id.* at *18.

II. AN OVERVIEW OF THE CONSTITUTIONAL AND LEGAL FRAMEWORK FOR RELIGIOUS EXEMPTIONS IN THE U.S.

The law regarding religious exemptions in the U.S. has changed dramatically over time. The decision of the Marion Superior Court and, more generally, the litigation about the religious exemptions from state abortion bans are happening in the "after *Smith*" era,[38] and, probably, in the prelude of a new era.[39] This overview begins with the oldest case cited by the Indiana court because older decisions remain of interest to present how the compelling-interest test works in certain cases – not including neutral and generally applicable laws – and how the test could work if *Smith* were overruled in the future. This Section then discusses the most recent cases that help explain the current state of the law of religious exemptions.

A. *Sherbert v. Verner*

Sherbert was the first case where the Supreme Court applied the strict scrutiny standard for religious accommodations cases.[40] *Sherbert* involved a member of the Seventh-day Adventist Church who was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her faith, and who was subsequently denied unemployment benefits.[41] The Supreme Court's analysis of the case consisted of two parts. First, the Court found that the disqualification of the applicant from a generally available benefit imposed a burden on the free exercise of her religion because it generated "pressure upon her to forego"[42] the religious observance of Sabbath. Then, the Court

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[38] Emp. Div. v. Smith, 494 U.S. 872 (1990); *see, e.g.*, MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 137 et seq. (5th ed. 2022); BORIS I. BITTKER, SCOTT C. IDLEMAN & FRANK S. RAVITCH, RELIGION AND THE STATE IN AMERICAN LAW 211 et seq. (2015).

[39] *See* discussion *infra* Section I(C)(3), a majority of the current members of the Supreme Court have criticized the current state of the law. Some of the Justices, and some scholars too, are currently advocating for the overruling of *Smith*.

[40] *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); JOHN WITTE, JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 141 (Oxford Univ. Press, 2022).

[41] *Sherbert*, 374 U.S. at 399.

[42] *Id.* at 404.

considered whether South Carolina had justified the burden by asserting some "compelling state interest enforced in the eligibility provisions."[43]

Under *Sherbert*, a challenged governmental act that posed a burden – even an indirect burden – on religious exercise would be subjected to "strict scrutiny."[44] Therefore, the burden would have to "(1) serve a compelling state interest, and (2) be narrowly tailored to achieve that interest, imposing the least possible intrusion or burden on free exercise rights."[45] This Article will refer to this test as the "*Sherbert* test." Under this test, religious exemptions from generally applicable laws are constitutionally required and, if the political branches burden a claimant's free exercise rights, it is the courts' role to create an exception to the law.[46] As for the burden on free exercise, the Court considered not only the direct burden such as the criminalization of the religious practice, but also the indirect burden such as the incompatibility of generally applicable governmental benefits with the exercise of a person's religion.[47] The Court operated within that paradigm until 1990, when it decided *Smith*.[48]

B. *Employment Divison v. Smith*

Smith was also a case about the denial of unemployment benefits.[49] There, the conflict required the Court to decide if Oregon's criminalization of the use of peyote could constitutionally prohibit the use of that drug as part of a religious ceremony.[50] The Supreme Court's core analysis considered whether the criminal prohibition of religiously motivated conduct was permissible under the Free Exercise Clause.[51]

The Supreme Court distinguished *Sherbert* because it "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[52] That situation, according to the Court, had "nothing to do with an across-the-board

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43 *Id.* at 406.
44 *Id.* at 404.
45 *Id.*; WITTE ET AL., *supra* note 40.
46 *See generally Sherbert*, 374 U.S. 398.
47 *Id.* at 404.
48 *See generally Emp. Div.*, 494 U.S. 872 (1990).
49 *Id.*
50 *Id.* at 876.
51 *See id.* at 876–77.
52 *Id.* at 884.

criminal prohibition on a particular form of conduct."[53] Thus, the "*Sherbert* test" was inapplicable to challenges to general criminal laws as well as to "other aspects of public policy."[54]

Therefore, it can be stated that, in the "after *Smith*" era, religious exemptions from neutral and generally applicable laws are not constitutionally commanded, and the free exercise of religion is deemed to be a value that is likely to be protected by the political branches.[55] In other words, recognizing religious exemptions is a job for Congress, not the courts.

This broad, primary holding of *Smith* is limited to generally applicable and neutral laws; accordingly, it does not apply to laws that are not neutral towards religion or that are not generally applicable.[56] In such cases, involving not generally applicable or non-neutral laws, the government must show that the measure serves a compelling interest, that is *Smith*'s "B-side" rule.[57] In *Smith*, the Court maintained the application of the *Sherbert* test for laws that have a "system of individual exemptions"[58] and for hybrid claims. *Sherbert* was an example of a system of individualized exemptions because the criteria for the eligibility for unemployment compensation had to be applied case-to-case, in what the Court called "individualized governmental assessment."[59] Hybrid claims include cases that involve "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . . "[60]

The protective side of *Smith* became clearer when the Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*.[61] There, the Court confirmed that strict scrutiny was applicable when the law did not comply with the characteristics of being neutral or generally

53 *Id.*

54 *Emp. Div.*, 494 U.S. at 885.

55 *See id.*

56 *See id.* at 882.

57 Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under Smith and after Smith First Amendment*, 2020–2021 CATO SUP. CT. REV. 33, 34 (2020) (distinguishing two rules that *Smith* announced, the "unprotective rule" and the "protective rule").

58 *Smith*, 494 U.S. at 884.

59 *Id.*

60 *Id.* at 881.

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

applicable.[62] It explained that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[63] The specific formulation of that test was that "a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[64] After this decision, however, some confusion remained about the precise meaning of the characteristics of "neutrality" and "general applicability."[65] Recent cases have worked on the distinction between these elements.[66]

In addition to the developments in the case law, Congress and state legislatures took up the role that the Supreme Court reserved to them in *Smith*.[67] Two relevant federal pieces of legislation were enacted after the decision: the RFRA[68] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[69] Moreover, many states enacted state versions of RFRA, known as "state RFRAs,"[70] one of which is the Indiana statute under which the exemptions from abortion bans were claimed in *Indiana Case*. These laws have reinstated strict scrutiny to most cases arising in the federal jurisdiction or in states that have enacted them.[71] States have also continued creating individualized exemptions addressing conflicts that arise in the context of its ordinary legislation.[72]

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62 *Id.* at 546; *Smith*, 494 U.S. 872 at 879.

63 *Church of Lukumi Babalu Aye*, 508 U.S. at 544. In the case, the Supreme Court invalidated city ordinances that targeted the practice of animal sacrifices of Santeria, while authorizing other forms of animal killings for secular or other religious purposes. The Court found that the ordinances were not neutral nor generally applicable and that they were not narrowly tailored to accomplish compelling governmental interests. It concluded that the ordinances violated the Free Exercise Clause, so it declared them unconstitutional and void.

64 *Id.*

65 *Id.* at 557 (Scalia, J., concurring).

66 *See* Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021).

67 Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005).

68 Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§2000bb to -4 (2012)).

69 Pub. L. No. 106–274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc to -5 (2012)).

70 28 states have enacted RFRAs. RFRA Info Central, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/ (last visited July 3, 2024). Other states reached the same result through a broad interpretation of the religious clauses of their constitutions, recognizing a constitutional right to religious exemptions from general laws as a matter of state law. Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 169 (2016).

71 *See id.*

72 *Id.*

C. *Recent Case Law: Religious Exemptions and Culture Wars*

The Supreme Court decision in *Smith* and the legislative exemptions provide the general framework for religious exemptions in U.S. law.[73] But, there is still one missing piece that is necessary to understand the context in which the challenges to abortion laws are arising. An examination of three more recent cases provides a more profound understanding of what is at stake in the litigation of religious exemptions from abortion prohibitions.

1. *Burwell v. Hobby Lobby*

In *Hobby Lobby*, the Supreme Court held that the RFRA banned the Federal Government from requiring three closely held for-profit corporations to provide health insurance coverage under the Patient Protection and Affordable Care Act for methods of contraception that they considered to be abortifacients and that, thus, violated their owners sincerely held religious beliefs.[74] The Marion Superior Court relied heavily on this case; however, *Hobby Lobby* involved a different kind of conflict. There, the plaintiffs asserted that the state could not force them to engage in conduct that violated their religious beliefs when the conduct they objected to was precisely what the governmental program mandated – the payment and facilitation of their employees' access to certain contraceptive methods.[75] As Professor Chapman puts it, the religious exercise was "abstaining from paying for contraceptive insurance,"[76] while the reason for the objection was to avoid "facilitating sin."[77]

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[73] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022) ("[A] plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.' Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."); Ramirez v. Collier, 595 U.S. 411, 432 (2022) (applying strict scrutiny under RLUIPA and explaining that "[O]nce a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy 'is the least restrictive means of furthering [a] compelling governmental interest.'").

[74] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 736 (2014).

[75] *Id.* at 702.

[76] Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1193 (2017).

[77] *Id.* at 1248.

The government's main argument to deny the burden on the plaintiffs' religious beliefs was that "the connection between what the objecting parties must do [provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg] and the end that they find to be morally wrong [destruction of an embryo] is simply too attenuated."[78] However, the Supreme Court considered in the decision that the courts should not analyze whether the religious beliefs asserted in this case were reasonable.[79]

Later, the Marion Superior Court relied on this argument to reject the government's objection that abortion was not a religious obligation, but merely a secular means to a religious end.[80] It is important to note that the problem in *Hobby Lobby* was different: there is no doubt that facilitating an abortion was in fact forbidden according to the plaintiffs' religious beliefs.[81] The government's argument in *Hobby Lobby* was that providing health insurance was not close enough to the use of contraceptives to be rationally considered as its facilitation.[82] In this context, the Supreme Court considered that "this belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[83] Notably, in *Indiana Case* there was not any discussion of line-drawing regarding the religious obligations of the plaintiffs. Accordingly, the court's reliance on *Hobby Lobby* looks, at least, suspicious.

2. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commision*

Two more recent cases have been at the center of the discussion about religious exemptions and the "culture wars." The first is *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,[84] where the

[78] *Hobby Lobby*, 573 U.S. at 706.
[79] *Id.* at 724.
[80] *Indiana Case*, *supra* note 2, at *15.
[81] *Hobby Lobby*, 573 U.S. at 700.
[82] *Id.* at 723.
[83] *Id.* at 724.
[84] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n, 584 U.S. 617, 640 (2018).

Supreme Court found that Colorado's adjudication procedure showed hostility to a religious viewpoint and, therefore, violated the First Amendment. The conflict involved a Christian baker's belief that he was forbidden by his religion to participate in or otherwise sponsor a celebration of a same-sex wedding, and the state's mandate that he could not validly decide not to provide services to gay customers.[85] According to the Court, the baker's "main goal in life [was] to be obedient to Jesus Christ" and he wanted to "honor God through his work at Masterpiece Cakeshop."[86]

The Supreme Court emphasized that the baker was entitled to a "neutral and respectful consideration" of his claim.[87] The Court, however, found that the administrative proceeding by the Colorado Commission of Civil Rights had shown hostility towards the baker's religious beliefs.[88] The Court noted that during the Commission's meetings, the commissioners "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[89] The decision emphasized that at the commission's second meeting, a commissioner described the baker's faith as "one of the most despicable pieces of rhetoric that people can use," and compared Phillips' religious claims with defenses of slavery and the Holocaust.[90] According to the Court, these expressions cast doubt on the Commission's "fairness and impartiality" on the adjudication of this case.[91]

At the end of the day, the Supreme Court's decision in *Masterpiece Cakeshop* only required a neutral treatment of religious claims. This means religious claims must be given the same treatment as comparable secular claims.[92]

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[85] *Id.* at 621–22.

[86] *Id.* at 626.

[87] *Id.* at 634.

[88] *Id.*

[89] *Id.*

[90] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n, 584 U.S. 617, 635 (2018).

[91] *Id.* at 636. The Court also considered the difference in treatment between this case and the case of other bakers who had objected to requests for cakes with designs that conveyed disapproval of same-sex marriage.

[92] *Id.* at 640.

3. *Fulton v. City of Philadelphia*

Finally, in *Fulton v. City of Philadelphia*,[93] the Supreme Court ruled that the City of Philadelphia violated the First Amendment when it required a Catholic foster care agency – Catholic Social Services (CSS) – to certify same-sex couples to be foster parents. The Court explained what it means for a government rule or policy not to be neutral or generally applicable.[94] According to the Court, *Masterpiece Cakeshop* was an example of a violation to the neutrality requirement.[95] The Court explained that the government is not neutral if "it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[96] As for the second element, the Court exemplified *Sherbert*, and explained that "a law is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'"[97] The Court also cited *Lukumi* to say that "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[98]

The Court found that the state policy at issue created a formal mechanism for granting exemptions, so it was not of general application, and therefore, was subject to strict scrutiny. The policy would survive "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests."[99] Here, the Court explained that it was not enough for the state to rely on "broadly formulated interests," because strict scrutiny analysis demanded the demonstration of "a compelling interest in . . . denying an exception to CSS."[100] Importantly, although interests like maximizing the number of foster parents available in the system are generally accepted as relevant, this case shows that these interests may not be enough to reject a religious exemption claim. This is because the government must prove that denying an exemption for the particular claimant is incompatible

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[93] Fulton v. City of Philadelphia, 593 U.S. 522, 541 (2021).

[94] *See id.* at 533.

[95] *Id.*

[96] *Id.* at 533.

[97] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[98] *Id.*

[99] *Fulton*, 593 U.S. 522 at 541.

[100] *Id.*

with its interest. Thus, the city's interest in assuring equal treatment for prospective parents was not compelling, because the existence of a system of exemptions revealed that the non-discrimination policy allowed departures at least in some cases.[101]

There is another important takeaway from *Fulton*. While the Court's opinion applied the test of *Smith*, five Justices in separate opinions rejected or disapproved the precedent.[102] Justice Alito wrote a concurring opinion, to which Justices Thomas and Gorsuch joined, explaining why *Smith* should be overruled and proposing that strict scrutiny should be applied even to neutral and generally applicable laws that burden the free exercise of religion.[103] Justice Barrett and Justice Kavanaugh also criticized the doctrine of *Smith*, although they did not share the position that it should be overruled.[104] The majority opinion considered that the case did not fall within the scope of *Smith* because the policy of Philadelphia was not generally applicable.[105]

D. *Criticism of the Current State of Religious Exemptions*

After *Fulton*,[106] the current law of religious exemptions and specifically *Smith*[107] is a lame duck. The current law has lost the power to convince a majority of Justices, who are debating about the most convenient way to replace it and enhance the protection of the free exercise of religion.[108] At the same time, the current trend of the law of religious exemptions is under attack from a completely different wing. Punctually, the decisions in *Masterpiece Cakeshop*[109] and *Fulton*[110] have been strongly criticized by defenders of LGBT interests. The basic idea behind this criticism is that religious exemptions are being used by conservative Christian groups to legalize discrimination

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101 *Id.* at 542.
102 *Id.*
103 *Id.*
104 *Id.* at 543–44.
105 *Fulton*, 593 U.S. at 540–41.
106 *Id.*
107 Emp. Div. v. Smith, 494 U.S. 872 (1990).
108 *See generally Fulton*, 593 U.S. 522.
109 Masterpiece Cakeshop v. Colo. Civil Rts. Comm'n, 584 U.S. 617 (2018).
110 *See Fulton*, 593 U.S. 522.

against those who do not live their lives according to traditional values.[111]

In a particularly illustrative note, Professor Underkuffler explained that from her perspective, these two opinions construe a "separate but equal" regime, resurrecting the holding of *Plessy*.[112] They accomplish that, she explained, by denying that the interest in anti-discrimination is compelling, and by ignoring the damage suffered by the targets of the discrimination just because they have other places of public accommodation available.[113] The situation would be different if "religious individuals or organizations operate[d] apart from the public world,"[114] but if they want to share the public sphere, they have to comply with the anti-discriminatory legislation.

Professor Case also criticized the current state of the law, specifically, the passing of RFRA and the decision in *Hobby Lobby* and found that this approach to religious exemptions is impracticable. Professor Case argued that exemptions are going to present problems with the Establishment and the Equal Protection clauses of the Constitution if it applies only to conservative Christians, and it is going to present even more serious problems of administrability if a broader set of claims is admissible.[115] But, she also presented this problem as part of a "battle" between conservative and liberal "opponents" when she says:

> As a strong supporter of rights to sexual liberty and equality, I . . . observe that many religiously motivated opponents of rights seem to want to have their cake, eat it too, and shove it down my throat; and that most, if not all, religious liberty scholars who claim their goal is a live-and-let-live solution seem to support my religious opponents in their ongoing efforts to realize these desires at my expense.[116]

That quotation illustrates that although religious freedoms might be gaining stronger support from the Supreme Court Justices, those same freedoms are losing support from vast sectors of society. Thus, it

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111 *See generally*, Laura S. Underkuffler, Plessy *Redux: Why the Human Rights of Gay, Lesbian, and Transgender Citizens Lost to Religious Claims Early Arguments and Contemporary Thoughts: A Festschrift Honoring Michael J. Perry*, 71 EMORY L.J. 1611, 1631 (2021).

112 *Id.*

113 *Id.* at 1631, 1635.

114 *Id.* at 1639.

115 Case, *supra* note 3, at 468–69.

116 *Id.* at 471.

could be considered that at least in this battle of the culture wars there are on one side supporters of religious freedoms and traditional values, and on the other side supporters of LGBT and reproductive interests.[117]

Professor Case's rejection of a "live-and-let-live" model was a direct response to an article by Professor Douglas Laycock who proposed to have spaces preserved for both groups individually, where they can live according to their values and beliefs.[118] Although he did not enter the details of his proposal, his idea seems reasonable. Both groups have interests that are not conciliable: religions, or at least some religions, support certain beliefs and reject others as wrong or sinful, and refuse to treat everybody as deserving the same treatment. "A religion that cannot make distinctions on the basis of religion is not likely to survive as a religion."[119] On the other hand, the stigma of being refused admission to certain places, or service at some locations, may certainly be unpleasant. Professor Laycock reached a solution of compromise where nobody gets to control all spaces.[120] He recognized, though, that this proposal arises from the concern that the religious side may be losing the war.[121] But in that position, it was predictable that the other side in the culture wars would not be prone to negotiate the terms of a truce.

Importantly, Professor Laycock is also against the current state of the law in this area, although the mistake for him is not RFRA, but *Smith*.[122] A champion of religious liberty, he considers that it is necessary to protect the free exercise of religion even from laws that are generally applicable.[123] "A law that prohibits religious exercise in a particular application still prohibits religious exercise[.]"[124] Professor Laycock and Professor Thomas Berg have proposed to return to the regime of *Sherbert*.[125] Also in favor of overruling *Smith*, Professor Steven Smith considers that overruling is necessary to confront the current threats to the free exercise of religion, which he identifies as the problem of democratic disregard and the rise of secular

[117] Laycock, *supra* note 3, at 870.

[118] *Id.* at 876.

[119] *Id.* at 868.

[120] *Id.*

[121] *Id.* at 869.

[122] *See* Laycock & Berg, *supra* note 57, at 38.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 41.

egalitarianism.[126] The problem of democratic disregard points to the fact that Congress might not accommodate religion because it would not perceive those accommodations as necessary or correct. The problem of secular egalitarianism means that the prevailing ideology tends to impose a new type of orthodoxy in public life, which is hostile to some traditional values according to which some religious people want to live their life.[127] Professor Smith's perceptions are confirmed by the analogy between *Masterpiece Cakeshop* and *Plessy* presented by Professor Underkuffler.[128] If secular egalitarianism eventually gets the majority in Congress and the state legislatures, the model of legislative exemptions might not be fit to protect religious freedom from its opponents.

In contrast, Professor Nathan Chapman has recently positioned himself in favor of the current framework, which he considers more protective of free exercise and more consistent with American history, tradition, and precedent than the strict scrutiny approach.[129] Crucial for his position is the Supreme Court's decision in *Tandon v. Newsom*,[130] a case regarding exemptions to general schemes of regulation during the COVID-19 pandemic. In that case, the Court built on the *Smith* standards and established that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever it treats *any* comparable secular activity more favorably than religious exercise."[131] For some commentators, this opinion has embraced the "most favored nation approach," which would require courts to:

> Compare the possible harm of a religious exemption [to the state's interest in regulation] with the harm of an existing secular exception . . . [and] if the possible harm of a religious exemption is less (or equal) to that of any existing secular exception, then the court must give a religious exemption.[132]

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126 Steven D. Smith, *Religious Freedom and its Enemies, or Why the* Smith *Decision May be a Greater Loss Now than it was Then Symposium: Twenty Years after* Employment Division v. Smith*: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How it Changed History*, 32 CARDOZO L. REV. 2033, 2046 (2010).

127 *Id.*

128 *Id.*; Underkuffler, *supra* note 111, at 1631; *see generally* Masterpiece Cakeshop v. Colo. Civil Rts. Comm'n, 584 U.S. 617 (2018); Plessy v. Ferguson, 163 U.S. 537 (1896).

129 Chapman, *supra* note 76, at 1191.

130 *See* Tandon v. Newsom, 593 U.S. 61 (2021).

131 *Id.* at 62.

132 MCCONNELL ET AL., *supra* note 38, at 178.

For Professor Chapman, *Tandon* inaugurates the "*Smith-Tandon* regime,"[133] and that adjustment would be enough to preserve religious freedom in front of what Professor Smith calls the problem of "democratic disregard."[134] With the "most favored nation approach," the system of legislative accommodations preserves a stronger role for judicial review and increases the potential for courts to identify and correct problematic cases when a religious exemption was not recognized by the state legislature or Congress.[135]

When analyzing these problems and possible solutions, it is important to bear in mind that the cases of religious exemptions that get public exposition and are at the edge of culture wars are the exception. Religious exemptions have been especially relevant for minority, insular groups whose customs and practices are at odds with the law.[136] But, the erosion of support for free exercise that the culture war brings will affect those cases as well. The challenge for religious freedom advocates is to control the number of religious exemptions that the system grants so that all deserving cases are admitted, but leaving as few opportunities as possible for abuse by opportunists who want to take advantage of the protection for religious freedom to obtain secular benefits. In this context, the problems pointed out by Professor Case also come into play: the system cannot be limited in such a way that only cases from a particular religious background are processed.[137] The difficulties in administering this system increase when judges with different backgrounds, trajectories, and control systems have a high degree of discretion.

In this state of uncertainty, possibilities of change, and confrontation, cases of religious exemptions to abortion bans emerge. The context reviewed in the preceding sections may explain why the Indiana state judge who granted the preliminary injunction made a particularly lax examination of the requirements for the action to proceed. In this case, the net result might be a discrediting of religious

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133 Chapman, *supra* note 76, at 1241. Chapman considers decisions that came shortly after *Smith*, such as *Lukumi*, weakened its doctrine as to the meaning of "neutral law of general applicability." *Id.* at 3, 6. He also observes that the "*Sherbert* test" was applied with deference to the government, and therefore, that the strict scrutiny under the post-*Smith* doctrine ends up being more protective of religious exercise. *Id.* at 8.

134 Smith, *supra* note 126, at 2039.

135 *See id.* at 2040.

136 Lund, *supra* note 70, at 164; Laycock, *supra* note 3, at 877.

137 Case, *supra* note 3, at 868–69.

exemptions in the eyes of the rest of society: a small group of people gets an exemption from a ban that generated worldwide controversy, which translates into a secular advantage. Certainly, the *Indiana Case* poses a challenge to religious freedom. Coincidentally, Professor Case had warned in her article that:

> One way to prove the extent to which proponents of live-and-let-live are serious about the symmetry of their assertion . . . is to consider what support they would offer to someone who sought to mobilize the church Amendment as a conscientious objection against the values of traditional conservative religion in the sexual culture wars.[138]

The challenge, then, is to determine how the system of religious exemptions should work in a case involving religious beliefs contrary to traditional Christian beliefs. *The Indiana Case* is an example of that.[139]

ANALYSIS

III. THE PROBLEMS FOR RELIGIOUS CLAIMS AGAINST ABORTION BANS UNDER THE CURRENT LAW

Some authors have asserted that the application of the rules for obtaining a religious exemption from a generally applicable law is favorable to those seeking exemptions from abortion bans.[140] Moreover, they argue that, if such requests fail, it will be because of flaws in the system.[141] In their view, the Supreme Court tends to favor religious exemptions arising from orthodox Christian beliefs, and the limits set by the system are sufficiently vague to suit the preferences of judges.[142] This Section will demonstrate that this view is not correct.

It is the belief of the author of this Article that the reasons underlying the recognition of religious exemptions are not applicable to any request, but only to those that meet certain characteristics regarding the beliefs of the person seeking the exception and their relationship to the state interests involved. The problem for the requests for exemptions

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138 *Id.* at 491.

139 *Indiana Case*, *supra* note 2.

140 Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 510 (2023), https://papers.ssrn.com/abstract=4375866 (last visited Jun 11, 2023); Schragger & Schwartzman, *supra* note 6, at 2301.

141 *Id.*

142 Schragger & Schwartzman, *supra* note 6, at 2335; Corbin, *supra* note 140, at 509.

from abortion bans is not the ideology of the judges, but the weaknesses of the "religious" interests involved when compared to the relevance of the state interest. The *Indiana Case* is an anomaly in the system, because it is based on an erroneous interpretation of existing law and an excessively deferential view of the applicants' requests. The following Sub-Sections outline the problems claimants encounter in abortion exemption cases and the relationship to *Indiana Case*.

A. *The Prohibition Must "Substantially Burden" the Applicant's "Religious" Exercise*

Indiana's RFRA is activated when a governmental entity "substantially burden[s] a person's exercise of religion."[143] The first issue presented to the Marion Superior Court is whether the general prohibition on abortions "substantially burdens" the plaintiffs' exercise of religion.[144] As explained, the court responded to this question in the affirmative.[145] The court refused to analyze whether the plaintiffs' asserted beliefs were "religious" or "reasonable," and the court concluded that the state prohibition put pressure on the plaintiffs to abandon their religious exercise.[146] To some extent, that approach to the case is compatible with the current majoritarian view on the field, however, as this section argues, a more demanding test would be more consistent with the rationale for religious exemptions.

The question of what constitutes a "substantial burden" is often evaded by the courts.[147] When courts do mention this issue, it is usually to caution that they will not judge the reasonableness of the religious beliefs that have been alleged.[148] That was the approach taken by the Indiana court, citing the Supreme Court's decision in *Hobby Lobby*.[149] This view is also consistent with the position of some scholars.[150] The

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143 *Indiana Case*, *supra* note 2, at *13.

144 *Id.* at *14.

145 *Id.* at *14, 16.

146 *Id.* at *17.

147 Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. 10, 13 (2016).

148 *Id.*

149 *Indiana Case*, *supra* note 2, at *16.

150 *See, e.g.*, Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion under RFRA and the First Amendment? The Religion Clauses*, 97 WASH. U. L. REV. 1755, 1778 (2019); Matthew Linnabary, Employment Division v. Smith *and State Free Exercise Protections: Should State Courts*

main concern of those who favor this approach is that if courts were to scrutinize if a religious belief is reasonable or unreasonable, true or false, likely or unlikely, this would be religious entanglement in violation of the Establishment Clause.[151] From this point of view, questions about the veracity or the importance of religious beliefs are not for the courts to answer.[152] At most, they should defer to the plaintiffs' allegations and continue their analysis assuming them as true.[153]

Thus, the question of what a "substantial burden" is has been addressed mainly by scholars.[154] Their answers may be divided into two main groups. One group interprets that what must be "substantial" is the cost or pressure that the challenged act or regulation poses on the exercise of religion.[155] The other group points out that a "substantial burden" presupposes a certain status of the religious beliefs or practices affected.[156]

1. "Substantial Burden" as a Measure of Cost or Pressure

Professors Michael Helfand[157] and Chad Flanders[158] may be placed in the first group. Professor Helfand considers that the courts should examine the "substantiality of the civil penalties triggered by religious exercise."[159] For him, every form of religious exercise should be protected from the state imposition of penalties that are considered "substantial," no matter how important that exercise is to the claimant.[160] On the other hand, "individuals can be expected to absorb some minimal costs

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Feel Obligated to Apply the Federal Standard in Adjudicating Alleged Violations of Their State Free Exercise Clauses? 93 NOTRE DAME L. REV. 99, 106 (2017).

151 *See*, *e.g.*, Michael A. Helfand, *Identifying Substantial Burdens Symposium: Law, Religion and the Family Unit after* Hobby Lobby*: A Tribute to Professor Harry Krause*, 2016 U. ILL. L. REV. 1771, 1789–90 (2016).

152 Corbin, *supra* note 147, at 13.

153 *Id.*

154 *See* Chad Flanders, *Substantial Confusion about Substantial Burdens*, 2016 U. ILL. L. REV. 27, 30 (2016); Helfand, *supra* note 151, at 1772, 1775; *see also* Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 21 (2016).

155 Flanders, *supra* note 154, at 30; Helfand, *supra* note 154, at 1775.

156 DeGirolami, *supra* note 154, at 21.

157 Helfand, *supra* note 154, at 1775.

158 Flanders, *supra* note 154, at 30.

159 Helfand, *supra* note 154, at 1775.

160 *Id.* at 1793.

for their religious observances, just not costs that will price them out of the practice."[161]

As for Professor Flanders, he thinks that what should be "substantial" is the pressure that the state produces on the claimant to abandon his religious exercise.[162] Professor Flanders, like Professor Helfand, does not consider it necessary to examine the value or centrality of religious exercise to the claimant: the pressure could be to abandon "any part of his religious beliefs, and for any amount of time."[163]

These positions present two arguments in their favor. First, they state that they comply with the definition of "religious exercise" adopted by the legislator: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[164] Second, they avoid entanglement between the State and religion by preventing judges from analyzing theological issues.[165] Moreover, this approach prevents judges from bringing their own biases about religious practices into play.[166]

2. "Substantial Burden" As A Measure of the Religious Exercise

Professor Marc DeGirolami[167] is an exponent of the second group. In his opinion, the "substantial burden" element of the test requires claimants to explain their "religious system"[168] or "system of belief and practice."[169] Courts would have to assess the "place" of the religious belief or practice in the context of other, interconnected beliefs or practices, and determine whether the governmental interference is significant, important, or central to that system.[170] Professor DeGirolami believes the definition of "religious exercise" contained in RLUIPA and in some

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161 *Id.*

162 Flanders, *supra* note 154, at 27–28.

163 *Id.* at 29.

164 *See id.*; Helfand, *supra* note 154, at 1785.

165 *See* Flanders, *supra* note 154, at 30; Helfand, *supra* note 154, at 1798.

166 Helfand, *supra* note 154, at 1788.

167 *See* DeGirolami, *supra* note 154, at 21.

168 *Id.*

169 Marc O. DeGirolami, *Religious Accommodation Religious Tradition, and Political Polarization Symposium: Law and Religion in an Increasingly Polarized America*, 20 LEWIS & CLARK L. REV. 1127, 1154 (2016).

170 DeGirolami, *supra* note 154, at 21.

state RFRAs is favorable to his opinion, because it explicitly includes a reference to "a system of religious beliefs."[171] He therefore considers that the text of the provisions recognizes the requisite for the claimants "to have a system of religious belief before alleging a substantial burden on it."[172] He also responds to the second argument asserted by the first group, as he considers that courts do not escape excessive entanglement by refusing to analyze the substance of the religious claim.[173] On the contrary, he believes that courts promote a certain understanding of religion as "a matter of autonomous, individual choice – a choice that must be honored because it is personally 'fulfilling' and that marks off one's distinctive human 'identity.'"[174] This argument will be reexamined later in this Section.

It is interesting to note that Professor DeGirolami does not limit the possibility of exemptions just to religious obligations.[175] Instead, he explicitly recognizes that a "substantial burden" could arise from the interference with religiously "commanded, recommended, rewarded, encouraged, or desired behavior."[176] Surprisingly, Helfand presupposes that a "substantial burden" implicates a religious requirement,[177] although he claims to be focused "solely on the civil consequences,"[178] he recognizes that even the burden of beliefs that are not central to the practice of the claimant might be substantial.

3. "Substantial Burden" As A Measure of Both Cost, Pressure, and Religious Exercise

The position of Gabrielle Girgis[179] is somewhere in between the two groups. For her, a "substantial burden" implies something about the significance of the religious exercise involved, and something about

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171 *Id.*

172 *Id.*

173 *Id.*

174 DeGirolami, *supra* note 169, at 1148.

175 DeGirolami, *supra* note 154, at 25.

176 *Id.*

177 Helfand, *supra* note 154, at 1793 ("On this interpretation, RFRA would first require a claimant to demonstrate that a sincerely held religious belief required him to engage in a practice that was being burdened by the law.").

178 *Id.* at 1798.

179 *See* Girgis, *supra* note 150, at 1765.

the impact of the laws on that exercise.[180] Therefore, she includes in her account the costs and pressure analyzed in the conceptions of the first group, and the status of the religious exercise crucial for the second group.[181] Moreover, she merges both the "civil costs" conception proposed by Professor Helfand and the "pressure" conception proposed by Professor Flanders.[182]

On the substantive part of her test, Girgis defines that a substantial burden would affect two different groups of religious exercise: obligations and significant or substantial exercises of religious autonomy.[183] Her inclusion of obligations responds to the characterization of religion as a "fragile good": "its demands tend to be rigid and precise, and so someone easily becomes deficient in her religion because it's easy to fail to meet those demands."[184] The second category of her classification, exercises of religious autonomy, is more difficult to identify, but she explains some characteristics of the religious practices that may be helpful. First, she describes these claims of exercise of religion as covering "a wide swath of significant, decisive undertakings or pursuits that look different than they would if one were not in a perceived relationship to an ultimate source . . ."[185] Some examples are "a choice about our professional path, or where to educate our children, or how to run a business."[186] These activities are "hard to replace in an easily acceptable way,"[187] then, "you might well be substantially worse off in your experience or pursuit of religion if a law urges you to give up that form of religious exercise."[188] But they still do not include "every single action of a religious person."[189]

The case for the claimants of religious exemptions from abortion bans is not problematic if the indicator of the substantial burden is the civil cost or the pressure, because criminal prohibitions will generally satisfy this test. The risk of a criminal conviction will always be a high cost to pay and will impose substantial pressure to abandon religious exercise. But there is something counterintuitive in thinking that the

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180 *Id.* at 1766.
181 *Id.* at 1761.
182 *Id.*
183 *Id.* at 1767–68.
184 *Id.* at 1767.
185 Girgis, *supra* note 150, at 1768.
186 *Id.*
187 *Id.*
188 *Id.* at 1770.
189 *Id.* at 1768.

criminalization of any act performed for religious reasons would trigger strict scrutiny. There must be good reasons for courts to intervene in the design of the law and decide to confer religious exemptions from laws that are meant to be of general applicability. One reason why religious exemptions are necessary in general terms is that religious persons whose religious exercise requires them to engage in conduct contrary to law experience a psychic pressure comparable to that which arises from conflicting legal obligations. Moreover, when the pressure affects extended religious communities, the law might be in danger of being undermined by noncompliance. In such cases, it is in the best interest of the rule of law to channel these conflicts through exemptions for religious conduct.

As Girgis stated, religious duties are the primary candidates for religious exemptions when conflicting with generally applicable laws.[190] Thus, when claiming an exemption from a general law, plaintiffs should prove that the form of religious exercise they want to engage in is mandatory, or that compliance with a secular duty is forbidden by their religious beliefs. This should be the hard core of religious exemption law in general. As Professor McConnell explained, "[t]he principle underlying the First Amendment is that the freedom to carry out one's duties to God is an inalienable right, not one dependent on the grace of the legislature."[191] Furthermore, limiting exemptions to religious duties would also help mitigate the perception in certain groups that religious people are unfairly benefited. Religious exemptions do not look for a benefit, but the alleviation of a conflict of duties.

The limitation of religious exemptions for conduct that is considered mandatory or forbidden would exclude religions that do not recognize those kinds of commands. Professor Case's warning about the constitutional problems of limiting religious exemptions to orthodox Christianity is relevant here.[192] Girgis' proposal avoids that problem by recognizing the second category of protected beliefs, the significant or substantial exercises of religious autonomy.[193] This would allow exemptions to be applied in cases involving religions that

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190 *See also* KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 217 (2016) (Pointing to similar concerns when asserting that "exemptions that were based on mere preferences . . . would be misguided.").

191 Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 691 (1991).

192 Case, *supra* note 3, at 468–69.

193 Girgis, *supra* note 150, at 1767–68.

do not recognize obligations. Girgis, however, fails to give guidelines for adjudication of difficult cases.[194] Thus, although it emerges clearly from her work that not every form of religious exercise would pass her test,[195] her proposal would not change the current judicial practice of avoiding the issue. On the contrary, judges should control whether the religious conflict is substantial enough to merit a religious exemption. It should not be necessary for the belief to involve activity that is strictly mandatory or prohibited in a system of religious beliefs. The standard should be that the conflict between the religious exercise and the legal regulations must generate psychic pressure comparable to that which would produce a collision between two civil, non-religious duties.

This approach is not contrary to the Establishment Clause,[196] because courts would not be intruding into the substance of religious beliefs, nor deciding theological questions in violation of state neutrality. All courts should do is determine whether claimants are experiencing a situation equivalent to a collision of duties. Far from producing excessive entanglement with religion, this approach would make it possible to show that religious exemptions exist to alleviate the special burden that some laws generate on religious people or communities. At the same time, this position would enable the system to avoid fraud– along with a scrutiny of sincerity, which are addressed in the following Section.

The fact that the focus of the proposed standard in this Article is on religious duties reveals that not every conduct carried out for religious reasons will merit special treatment. For the kind of collision of duties that merit granting religious exemptions, the belief affected cannot have the structure "I have to do what I want to do." That structure of thinking is no different from secular beliefs that constantly must yield in the face of laws of general applicability. Conversely, religious exercise that triggers the protection of the Religion Clauses of the First Amendment protection must be specifically presented on religious grounds. Consequently, a religious conviction that there should be a right to personal autonomy is not sufficient to grant the claimant that right as a religious exemption. To hold otherwise would create incentives for people who wish to enjoy that right to convert – or, at least, to declare that they have converted – to a religion. Those incentives have nothing

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194 *See generally id.*

195 *Id.*

196 U.S. CONST. amend. I.

to do with the justification for religious exemptions. The rational of religious exemptions is that they alleviate a special burden created by general laws, it is not about favoritism for religious claimants.[197]

In the case decided by the Marion Superior Court, the plaintiffs relied heavily on arguments based on personal autonomy, rather than religious duties.[198] While they tried to show that abortions would be required by their beliefs in certain cases or under certain circumstances, the structure of the reasoning was "if we want to do it, we must have the right to do it."[199] Therefore, the court should have made a stricter analysis of the plaintiffs' allegations, instead of adopting a deferential attitude.[200]

Commenting on recent cases of exemptions from criminal laws restricting abortions, Elizabeth Sepper affirms these claims for exemptions are motivated or even compelled by religious beliefs.[201] However, she fails to identify any concrete religious obligation in the testimonies that she considers.[202] To pray for a way out of a troubling

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197 *See* McConnell, *supra* note 191, at 716 (including examples of accommodations that create no incentive to convert to a religion: permission to wear a turban, say prayers at designated times, limit one's diet, attend religious ceremonies, etc.).

198 *See Indiana Case*, *supra* note 2.

199 *Id.*

200 My model would then support the decision of the Ninth Circuit in Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012 (2016). In that case, the Oklevueha Native American Church of Hawaii and its founder, Michael Rex "Raging Bear" Mooney, sought a religious exemption under RFRA from federal laws prohibiting the possession and distribution of cannabis. *Id.* They explained that members of the church "receive communion through cannabis in their religious ceremonies and daily worship." *Id.* at 1014. However, the claimants said that their religion's most significant sacrament was Peyote, while cannabis was consumed "in addition to and in the substitute for their primary entheogenic sacrament." *Id.* No obstacle to obtaining Peyote was alleged. The government objected that the claim was not based on a religious exercise, but on a secular belief on the benefits of cannabis. However, the court chose to avoid that question, focusing instead on the issue of the substantial burden. *Id.* at 1016. The court considered that a substantial burden exists "only when individuals are . . . coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* Therefore, the court correctly focused on the conflict of duties, as it observed that "[n]othing in the record indicates that Mooney or Oklevueha face such a dilemma, because they have expressly told us that foregoing cannabis is not contrary to their religious beliefs." *Id.* Moreover, the court found that "nothing in the record demonstrates that a prohibition on cannabis forces Mooney and Oklevueha to choose between obedience to their religion and criminal sanction." *Id.* The Court rightfully concluded that "Mooney's and Oklevueha's failure to demonstrate that the prohibition on cannabis puts them to such a choice is fatal to their claim." *Id.*

201 Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 179 (2023) (citing Sobel v. Cameron, 645 F. Supp. 3d 691 (W.D. Ky. 2022), and Satanic Temple v. Holcomb, No. 1:22-cv-01859, 2022 WL 4378551 (S.D. Ind. Sept. 21, 2022), in addition to the *Indiana Case*).

202 *See generally* Sepper, *supra* note 201, at 178.

situation, or to be convinced that abortion is "the best option" or "the best decision" is not the same as experiencing the "collision of duties" that justifies the recognition of religious exemptions.[203] The fact that "many religions take positions supportive of abortion decisions"[204] is not decisive; just because a religious group supports a person does not mean the group supports or endorses that person's actions.

Before moving on to the next Section, it is important to note that the requisite that the substantial burden must be based on a "religious" belief, might generate an independent group of issues. The *Indiana Case* does not include an analysis of whether the beliefs invoked by the plaintiffs are religious.[205] This is probably because some of the plaintiffs asserted that their petitions were based on beliefs of traditional religious groups, such as Judaism and Islam.[206] However, that is not the case with Plaintiff 2, who claimed she did not belong to any specific religious denomination or tradition.[207] She explained, however, that she does have spiritual beliefs.[208] That should have led the court to ask whether that kind of belief also qualifies as "religious" for the purposes of accessing a religious exemption.

As Professor Movsesian noted, a fast-growing percentage of Americans say that they have no religious affiliation, reaching around 30% of the population today.[209] These people, whom he calls "the nones," pose a challenge to the law of religious exemptions, because their claims are made from "non-institutional[,] . . . idiosyncratic beliefs, disconnected from a communal tradition."[210] These kinds of claims increase two independent risks: fraud and the appearance of excessive

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203 *See generally id.*

204 *Id.* at 188.

205 *See Indiana Case*, *supra* note 2; *but see* Anonymous Plaintiff 1 v. Members of the Med. Licensing Bd. 233 N.E.3d 416, 450 (Ind. Ct. App. 2024) (questioning whether access to abortion could qualify as a religious exercise and emphasizing that it is not necessary for a practice to constitute a mandatory ritual to be include within the scope of the RFRA). The Appellate Court did not consider whether the beliefs underlying the claim were religious; rather, the Court assumed that the beliefs were religious in nature and pointed out that any kind of practice or abstention may be encompassed by the concept of religious exercise. *See id.*

206 *See Indiana Case*, *supra* note 2, at *6–10.

207 *Id.* at *7–8.

208 *Id.* at *7.

209 Mark Movsesian, *The New Thoreaus*, 4 (2022), https://papers.ssrn.com/abstract=4181953 (last visited Apr. 22, 2023).

210 *Id.* at 5.

entanglement.[211] Moreover, when the idiosyncratic beliefs of claimants are based on assigning religious value to traditionally secular and widespread interests, these claims might lead to a generalized feeling of rejection against religious exemptions in society.

In the *Indiana Case*, for example, Plaintiff 2's claim coincides with a sustained demand of a group of the society (e.g., every person who thinks abortion should be legal at least in certain cases), with respect to which there was a recent change in state policy, and the claimant seeks special treatment based on her alleged religious belief.[212] "A religion that consists of nothing other than subjectively chosen benefits is at least somewhat suspicious."[213] The best approach for these cases is adopting the proposal of Professor Movsesian: "The farther one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible is the claim that one is exercising a religion."[214]

One possible objection to this approach is that the government would be showing its preference for traditional religious groups, in violation of the Establishment Clause.[215] That criticism, however, would be misguided. First, while this proposal involves narrowing the access to a religious exemption by excluding some claimants, that is counterbalanced by the lesser public and organizational scrutiny to which those claimants are subject. Second, following DeGirolami,[216] refusing to distinguish between these categories of beliefs also implies taking a stand in favor of religious beliefs more in tune with the *zeitgeist*: individual and sporadic beliefs, whose foundations are irrational and not controllable by an impartial decision-maker. Consequently, a more deferential approach does not necessarily imply that courts are being neutral.

B. *The Applicant's Religious Belief Must Be Sincerely Held*

The Marion Superior Court did not analyze the sincerity of the claimants, probably because the government might not have questioned

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211 *See* WITTE ET AL., *supra* note 40, at 136 ("[I]f courts are to be protected from fraudulent or sham claims, some measured inquiry into the "religious" nature of claims and the sincerity of religious claimants seems unavoidable, especially for new religions.").

212 *Indiana Case*, *supra* note 2, at *7–8.

213 MCCONNELL ET AL., *supra* note 38, at 688.

214 Movsesian, *supra* note 209, at 29.

215 U.S. CONST. amend. I.

216 *See* DeGirolami, *supra* note 169, at 1148.

their sincerity.[217] However, there is at least one indication that suggests that the claimants might have been insincere. Arguably, this is true in most cases of exemptions from criminal prohibitions: the claimants are seeking something that is forbidden for everybody else. Thus, in these cases it is reasonable to suspect that the claimant's petition stems from secular beliefs or convictions, instead of religious ones. But if that were the case, then religious freedom would be irrelevant to the petitioners' claims. Alluding to the literal terms of RFRA, there would be no religious freedom to be restored.[218]

Probably, the reason why the religious sincerity of the claimants was not questioned by the Marion Superior Court was out of respect for the Establishment Clause. That concern, however, is unjustified. The Establishment Clause does not forbid the adjudication of religious sincerity, although it may have relevance in determining its limits or characteristics.[219] Moreover, the Indiana court may have implicitly relied on local precedents, such as *Blattert v. State*[220] where the issue of sincerity was explicitly avoided because the claim was rejected on other grounds. The avoidance of the question of sincerity is just a decision about the order of the analysis that has no consequences on the result of the case when the claim is rejected. The same is not true, however, when the final decision grants an exemption.

As a rule, all applicants for religious exemptions should demonstrate that their claim is based on sincerely held religious beliefs.[221] The Supreme Court has explained that it is the function of the courts to determine if the claimants' beliefs are "an honest conviction."[222] Furthermore, this requirement is derived from the justification for religious exemptions: if the objective is to lessen the burden that arises from the conflict between religious and secular duties, then, the exemptions are pointless if the claimant is not sincere about his beliefs. "When a claimant is insincere, the law imposes no burden on religious exercise at all."[223] Consequently, religious exemptions are not justifiable when the claimant's beliefs are not sincerely held.

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217 *See generally Indiana Case*, *supra* note 2.

218 Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§2000bb-4 (2012)).

219 U.S. CONST. amend. I.

220 *See* Blattert v. State, 190 N.E.3d 417 (2022).

221 Chapman, *supra* note 76, at 1187.

222 Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

223 Chapman, *supra* note 76, at 1188.

There is also another policy reason not to skip the sincerity test. Given that religious beliefs may be asserted as an excuse for obtaining secular advantages, the sincerity test helps ensure that opportunists will not take advantage of the protection of religious freedom by making fraudulent claims.[224] As Professor Helfand puts it, a court administering the sincerity test acts as a "gatekeeper," and it ensures "the overall integrity of a religious accommodations regime."[225] Arguably, strong protection of religious freedom would not survive public scrutiny if it was seen as a generally available way of violating the law.[226] Even if religious exemptions are justified, it does not follow that society forgo its interest in having generally applicable public policies. If the gatekeeper fails and the system is invaded by fraudulent claims, the entire structure risks collapse.

There are different positions on how the sincerity analysis should be carried out by the courts. One of the most thorough examinations of the issue is from Professor Chapman, who proposes to apply the general rules of evidence, adding the rule that courts should avoid inferring sincerity from implausibility.[227] For him, that additional rule is the consequence of the "no orthodox principle," which "prohibits the government from distributing benefits and burdens on the basis of religious doctrine."[228] According to Professor Chapman, the objective of the test is to determine whether the person "actually believes"[229] what he claims to believe. He identifies three categories of evidence that are particularly relevant for that purpose: (1) evidence about non-religious incentives, (2) evidence about the "fit" of the claim in the "religious biography" of the claimant, and (3) evidence about the "fit" of the claim in the religious community of the claimant.[230]

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224 *See* KEVIN VALLIER & MICHAEL WEBER, RELIGIOUS EXEMPTIONS: IN DEFENSE OF THE SINCERITY TEST 248 (Oxford Academic, 2018); *see also* Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L. J. 1836, 1839 (2019) (explaining that this problem is particularly acute in the context of prisons, "where life is often made difficult as a form of punishment").

225 Helfand, *supra* note 154, at 1801.

226 *See* Chapman, *supra* note 76, at 1222 ("When the government gives a pass to those who insincerely claim the benefits of religious liberty, it erodes the value of that liberty in the eyes of the public.").

227 *Id.* at 1223.

228 *Id.* at 1198.

229 *Id.* at 1199.

230 *Id.* at 1231.

There is consensus that evidence regarding non-religious incentives the religious exemption should be considered as a factor strongly adverse to the claim.[231] Precisely for this reason, the Marion Superior Court should have made an analysis of the sincerity of the claimants. Evidence regarding the beliefs of other people in the religious communities and the religious biography of the claimants would have been necessary to perform this test. This would be a hard case for Anonymous Plaintiff 2, the plaintiff from *Indiana Case* who does not belong to any religious community. Plaintiff 2 would have evidence about the non-religious incentives to seek the exception against her, and almost no evidence in her favor, except for her own assertions.[232] A possible way to overcome the evidence against her would be to prove that she has previously lost other secular benefits because of her religious beliefs, as did the owners of *Hobby Lobby* by closing on Sundays.[233] As argued in another commentary to the Indiana court's decision, judges should be suspicious of the sincerity of plaintiffs whose religion has "exactly one divine law regarding specific conduct" and "by some amazing coincidence," it happens to coincide with the claim they are making in the process.[234]

In a recent case, the Supreme Court considered the following facts before establishing that the claimant's religious beliefs were sincere: (1) that the religious accommodations that he was asking were "traditional forms of religious exercise," (2) that he had stated that those practices were part of his faith, and (3) that his religious minister had accompanied the claim, stating that is was "a significant part" of their faith.[235] While the second and the third points may be consistent with Professor Chapman's model, arguably he would reject the consideration of the first element because if the objective of the test of sincerity is to know what the claimant effectively believes, it is of no relevance how

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231 Linnabary, *supra* note 150, at 106; Chapman, *supra* note 76, at 1231; VALLIER & WEBER, *supra* note 224, at 255; GREENAWALT, *supra* note 190, at 16.

232 *See Indiana Case*, *supra* note 2, at *7–8.

233 *See* VALLIER & WEBER, *supra* note 224, at 257 (stating that "claimants who have demonstrated a willingness to lose secular benefits by complying with their religious beliefs are more likely to be deemed sincere," and providing several examples, including the idea that a prisoner who refused to eat for several days to avoid eating non-kosher food was found to have proved his sincerity).

234 Josh Blackman et al., *Abortion and Religious Liberty*, 27 TEX. REV. L. & POL. 443, 465 (2023).

235 The claimant was a death-row prisoner in the Texas state system who requested under RLUIPA that his pastor was allowed to lay hands over him and pray during his execution. *See* Ramirez v. Collier, 595 U.S. 411, 413 (2022).

traditional a particular belief is.[236] Moreover, if "traditional" should be understood as "orthodox," Professor Chapman would find that the Supreme Court has violated the non-orthodoxy principle.[237]

The test applied by the Supreme Court might be closer to the "plausibility" test defined by Adeel Mohammadi.[238] This author denies that the objective of the sincerity test is to determine what the claimant believes, and instead focuses on "whether or not the claim presented makes sense to someone generally familiar with the tenets of a given religion."[239] For this purpose, the relevant evidence is more diverse, and it may include, for example, the fact that the religious accommodations are "traditional forms of religious exercise."[240] This point of view would assign considerably more weight to the third element of proof that the Court mentioned in *Ramírez v. Collier*.[241]

In Professor Chapman's model[242] that would be evidence regarding the fit of the claim with the religious community. His model[243] would not support a decision holding that a claimant is insincere merely because his religious authorities do not share his belief. For Mohammadi's plausibility framework,[244] the favorable opinion of the religious minister in *Ramirez*,[245] saying that the practice is traditional for the Baptist faith, would be essential for the outcome of the case. For example, in cases regarding religious accommodations from criminal prohibitions, where there may be strong evidence pointing to the result that the claimant is seeking to avoid the prohibition for secular reasons, the divergent opinion of the religious authority could be decisive.

Without defining which model is preferable,[246] the Indiana court should have analyzed the sincerity of the claimants. Moreover, the

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236 *See* Chapman, *supra* note 76, at 1198.

237 *Id.*

238 Mohammadi, *supra* note 224, at 1883.

239 *Id.*

240 The fact that Mohammadi's view is more appropriate to explain the test performed by the Supreme Court in *Ramírez* should not be surprising, given that it is a model developed to explain the practices of the courts in examining sincerity in cases of religious accommodations in prisons. *See Ramirez*, 595 U.S. at 413.

241 *See id.*

242 Chapman, *supra* note 76, at 1231, 1237.

243 *See id.* at 1238–39.

244 *See* Mohammadi, *supra* note 224, at 1878.

245 *Ramirez*, 595 U.S. at 424.

246 A subjective conception of the sincerity test might be defended by saying that courts are used to decide what a person knows or believes, for example, in criminal cases when

claimants should have presented evidence demonstrating that their beliefs were not based solely on their secular convictions regarding abortion.

Recently, Sepper criticized the sincerity requirement, at least when applied to claims of exemptions from abortion bans.[247] She points out that this analysis has not been applied to cases involving state insurance payouts or delays in the execution of the death penalty, even though those claims also involve material, secular benefits.[248] Consequently, she argues that objectors to abortion bans confuse sincerity with their own views regarding the truth of the plaintiffs' religious beliefs, or that they are trying to hide "constitutionally illicit gender stereotypes."[249] As this Section has demonstrated, all claimants should demonstrate that their claims are based on sincerely held religious beliefs, especially when the plaintiffs seek an exemption that could be desirable because of non-religious reasons. The cases mentioned by Sepper – insurance payouts and delaying the death penalty[250] – are examples of the latter group of cases. Therefore, these cases constitute good examples of situations where the sincerity test becomes essential. The courts have not modified the analysis on the bases of the gender of the person seeking the exemption; in fact, Adell Sherbert, the claimant seeking unemployment compensation in *Sherbert v. Verner*, was a woman.[251] Consequently, there is no reason to think that sincerity has not been

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evaluating intent. *See* VALLIER & WEBER, *supra* note 224, at 247; *but see* José Antonio Caro John, *La normativización del Tipo Subjetivo en el ejemplo del dolo*, DERECHO & SOCIEDAD 22 (2012). Professor Caro John distinguishes two theories that have two different objectives when analyzing the subjective elements of crimes: the psychologist, which seeks to discover what the defendant knew at the time of the act, and the normativist, which asks what the law expects a person in the defendant's condition to know. Certainly, many of the criticisms to the psychologistic conception are applicable to the subjective model of sincerity: how to prove in a criminal case that a person deserves an exception because he has religious beliefs "beyond a reasonable doubt"? The parallel may not be perfect, because of the differences between believing and knowing, and the law probably has less legitimacy to require certain characteristics of someone's beliefs than to require certain knowledge or representations. However, I believe that this parallel shows a qualitative difference between the two models of sincerity: it is not the same to ask only about the subjectivity of the author as it is to evaluate a normative expectation about what that belief should be like. This may be a point to work on in the future: how a theoretical foundation for a normative, non-naturalistic model of sincerity would be.

247 *See* Sepper, *supra* note 201, at 207.

248 *Id.* at 212–13.

249 *Id.* at 215.

250 *Id.* at 212–13.

251 *See Sherbert*, 374 U.S. at 400.

consistently scrutinized because of an underlying misogyny. The judicial opinions and scholarship reviewed in this Section are likely to lead to a more systematic application of the sincerity test.

C. *The Weight of the Governmental Interest*

Under Indiana's RFRA – and the strict scrutiny under RFRAs in general – once it is determined that the government substantially burdened a person's exercise of religion, the government must demonstrate that the burden is: (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering such interest.[252] This is the second part of the strict scrutiny test applied by the Court before *Smith*, and after *Smith* when analyzing a law that is not neutral or generally applicable.[253] In the *Indiana Case,* the court concluded that the state had not established a compelling interest in enforcing the abortion ban against the plaintiffs.[254] As the proceeding paragraphs demonstrate, this was the weakest part of the court's analysis.

The basic argument for the state was that it had a compelling interest in protecting prenatal life.[255] The court rejected this allegation saying that "[t]he Supreme Court already recognized in *Hobby Lobby* that the question of when life begins is a religious one that the State may not answer legislatively or as a factual matter."[256] The court quoted *Hobby Lobby*, where the Supreme Court "[took] as the starting point that 'the plaintiffs have a sincere religious belief that life begins at conception.'"[257] Then, according to the Marion Court, "the question of when life begins is a theological one [,] not a factual question for this Court."[258] Moreover, it found that "the Plaintiffs [did] not share the State's belief that life begins at fertilization or that abortion constitutes the intentional taking of a human life."[259]

That analysis measures the weight of the governmental interest, adopting the perspective of the claimant. From that point of view, if the

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252 *Indiana Case*, *supra* note 2, at *13.

253 *See supra* Section II.

254 *Indiana Case*, *supra* note 2, at *18.

255 *Id.* at *16.

256 *Id.*

257 *Id.* (quoting Burwell v. Hobby Lobby Stores, 573 U.S. 682, 720 (2014)).

258 *Id.*

259 *Id.* at *18.

plaintiffs believe that life begins after conception, the state will not have any interest in protecting life beginning at conception. But this approach intermingles two distinct categories. References to the claimants' religious beliefs and sincerity should not form part of the assessment of the governmental interest. As other commentary of this case explained, in virtually every case arising under RFRA, the applicants for a religious exemption will disagree with the state's interest.[260] The court's analysis is flawed because it confuses the two parts of the RFRA test. This way of applying strict scrutiny is extremely deferential to the claimant and ultimately makes him the decision-maker in the application of public policy in his respect. This is not a correct application of strict scrutiny.

Then, how should the Court determine whether a governmental interest is compelling? In *United States v. Lee,*[261] the Court decided that a member of the Old Order Amish was not entitled to a religious exemption from paying social security and unemployment insurance taxes, even though he was opposed to the national social security system based on traditional Amish beliefs. In that case, the division between the assessment of religious beliefs and the consideration of governmental interests is evident. First, the Court accepted "appellee's contention that both payment and receipt of social security benefits [was] forbidden by the Amish faith."[262] But then, it noted that "[b]ecause the social security system is nationwide, the governmental interest [was] apparent."[263] In assessing the relevance of the governmental interest, the Court did not defer to the beliefs of the claimant, otherwise, it could have not considered that a uniform comprehensive insurance system was valuable to maintain.[264]

The Court will not defer to the claimant's perspective on the state interest even when it rules in his favor. For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,*[265] the Court did not find that *hoasca* was a dangerous substance because of the claimant's religious

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260 *See* Blackman et al., *supra* note 234, at 470–71.

261 United States v. Lee, 455 U.S. 252 (1982).

262 *Id.* at 257. That is not, as should be clear at this point, this Article's position regarding the required analysis of the asserted religious beliefs' actual religiosity, substantiality and sincerity. However, this case is clear in that all those issues are independent from the assessment of the governmental interest in the questioned regulation.

263 *Id.* at 258.

264 *See id.* at 252, 257, 258–59.

265 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432, 433 (2006).

beliefs. The Court said that there was "no indication that Congress, in classifying DMT [the substance contained in *hoasca*], considered the harms posed by the particular use at issue here – the circumscribed, sacramental use of *hoasca* by the [claimants]."[266] Rather than relying on the claimants' religious beliefs, the Court noted that Congress itself considered that exemptions to the general prohibition of some substances could be "consistent with the public health and safety."[267] Moreover, the Court distinguished *Lee* saying that the government had failed to demonstrate a compelling interest in uniform application of a particular program.[268] This could be achieved "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[269]

Therefore, according to Supreme Court precedent, the analysis of the governmental interest must be based on objective parameters.[270] In the cases presented here,[271] the Court did not deny the value of the regulations as general foundations for public policy because of the disagreements that they might produce in society or the conflict with the claimants' religious beliefs. The Court denied relief without granting deference to the groups seeking a religious exemption.[272]

The Marion Superior Court justified its analysis with the test applied in *Hobby Lobby*.[273] However, it is false that the Supreme Court in that case began its analysis of whether there was a compelling governmental interest by asserting that the plaintiffs had a religious belief that life begins at conception.[274] That proposition was the beginning of the first part of the test, which referred to whether the contraceptive mandate posed a burden on their religious beliefs.[275] After resolving that part of the analysis in favor of the claimants, the Court advanced to the second part declaring that:

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266 *Id.* at 432.

267 *Id.* at 432–33.

268 *See id.*

269 *Id.* at 421.

270 *See generally id.*

271 *See generally Gonzales*, 546 U.S. at 432–33, 434, 439; United States v. Lee, 455 U.S. 252, 261 (1982).

272 *See generally Gonzales*, 546 U.S. at 421, 438, 439.

273 *See Indiana Case*, *supra* note 2, at *14–15.

274 *See Hobby Lobby*, 573 U.S. at 719–20 (2014).

275 *Id.*

> [S]ince the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[276]

Notably, the Court did not defer to the claimants, as the Marion Supreme Court did.[277] On the contrary, the Court assumed "that the interest in guaranteeing cost-free access to the four challenged contraceptive methods [was] compelling within the meaning of RFRA," and proceeded to step two and considered whether the contraceptive mandate was the least restrictive means to further that interest.[278]

Thus, the deference to the claimant's religious beliefs in the analysis of the governmental interests under RFRA is not supported by Supreme Court precedent. It could still be argued, however, that the core idea of the Indiana court was not the deference to the claimant, but a more objective proposition stating that the state cannot invoke a substantive interest in something that is highly contested in society. Professor Eugene Volokh criticized that proposition in a blog entry.[279] According to Professor Volokh, the state can argue a compelling interest "in protecting what the majority views as important rights even when there is a basic moral and spiritual disagreement on the issue."[280] *Hobby Lobby* provides more support to Professor Volokh's position than to the Indiana court's position.[281] In *Hobby Lobby*, the Supreme Court assumed that there was a compelling interest in enforcing the contraceptive mandate even though that measure raised important disagreements in society, and, more significantly, it was an interest that the claimants themselves did not share.[282] Accordingly, that case arguably provides no support for the Marion Superior Courts' test.

Note that the importance of this last step of the test increases as the previous filters are relaxed. In other words, if the categories of "substantial burden" and "sincerity" are not employed to prevent the

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276 *Id.* at 726.

277 *See id.*; *Indiana Case, supra* note 2, at *21.

278 *Hobby Lobby*, 573 U.S. at 728.

279 *See* Eugene Volokh, *Court Holds that Indiana RFRA Provides Religious Exemptions from Abortion Ban*, THE VOLOKH CONSPIRACY (2022), https://reason.com/volokh/2022/12/03/court-holds-that-indiana-rfra-provides-religious-exemptions-from-abortion-ban/ (last visited Jun. 20, 2024).

280 *Id.*

281 *See Hobby Lobby*, 573 U.S. at 720, 723; Volokh, *supra* note 279.

282 *See id.* at 720.

abuse of the system for fraud, greater deference to the interest decided by the political branches is justified. Indeed, it could be argued that an overly flexible judicial posture toward requests for religious exemptions endangers legitimate state objectives, which justifies judicial restraint. The *Indiana Case* shows this clearly.[283] If the courts do not filter out fraudulent requests, the exemptions from abortion bans could become so frequent that they could make virtually impossible for the state to maintain its policy of protection of intrauterine life.[284] Other legislative exemptions to abortion bans, for example in cases where the life of the mother is in danger, would not produce the same problem, as they would be easier to limit and control. This shows that, contrary to Professors Schragger and Schwartzman's assertion,[285] the mere existence of legislative exceptions to the protection of intrauterine life should not necessarily lead to the recognition of religious exemptions.

Finally, it should be kept in mind that the last word on this issue, under the regime of RFRA, is on the political branches of government. Consequently, even if the courts consider that the protection of prenatal life is not a substantial governmental interest to which the prohibition of abortion is narrowly tailored, the legislative branch could exclude abortion bans from the application of RFRA. Under traditional strict scrutiny, the protection of prenatal life would likely be classified as a compelling interest to which an abortion would not constitute a minor affectation, since that conduct would directly eliminate the state interest. "In general, physical harms, actual or likely, are most likely to implicate overriding interests."[286]

CONCLUSION

This Article has shown how the litigation of religious exemptions from laws forbidding abortion is framed in the context of the U.S. law and in the so-called "culture wars." Exemptions to abortion bans address what some perceive as a benefit to Orthodox Christian groups. These claims test the system: if the claimants are denied exemptions

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283 *See generally Indiana Case*, *supra* note 2.

284 *See* Chapman, *supra* note 76, at 1221; *see also* GREENAWALT, *supra* note 190, at 16 (noting that problems of administrability should be considered together with other principles to determine whether a possible exemption should be granted, including whether the exemption would generate fraudulent claims or claims that are "weakly based").

285 *See* Schragger & Schwartzman, *supra* note 6, at 2321–22.

286 Laycock & Berg, *supra* note 57, at 59.

without a fair chance, it could be perceived within the "culture wars" as an admission that religious exemptions do not seek to protect genuine religious rights, but to benefit a determined group of people. If admitted, however, it could be virtually impossible for the State to preserve the interest in intrauterine life in the face of fraudulent claims by persons seeking access to the same benefits as those exempted.

As shown, the solution to this dilemma is to strengthen the test that applies to claims for religious exemptions. To do this, it is important to identify the theoretical justification for religious exemptions. As explained, the main reason why religious exemptions are necessary is that religious persons whose religious exercise required them to engage in conduct contrary to law experience a psychic pressure comparable to that which arises from conflicting legal obligations. Moreover, this Article shows it is in the best interest of the rule of law to channel these conflicts through exemptions for religious conduct to prevent the law from being undermined by noncompliance of the religious communities.

This justification of religious exemptions has concrete implications for the application of the test. First, judges should effectively control whether the conflict between the religious exercise and the law is substantial enough to merit a religious exemption. The analysis, however, should not make it necessary for the belief to involve activity that is strictly mandatory or prohibited on a system of religious beliefs. This Article has proposed as the proper standard that the collision of religious and civil duties arising from the burdening of the religious exercise must generate a psychic conflict comparable to that which would produce a collision of two civil duties. Furthermore, according to the opinion presented in this Article, for the kind of collision of duties that merit granting religious exemptions to occur, the affected belief cannot have the structure of "I have to do what I want to do." This is because that structure of thought is not different from the secular preferences that constantly must yield in the face of laws of general applicability. Granting religious exemptions for claimants that have mere preferences for secular benefits would not be coherent with their purpose and would ultimately undermine the system.

This Article also demonstrated that for religious exemptions to be justified, it is necessary that the conflict of duties involves sincerely held religious beliefs.[287] Moreover, the claimant's sincerity is especially

[287] *See supra* Section III(B).

relevant when it is reasonable to suspect that the petition for exemptions stems from secular convictions, for example, when an exemption would provide the claimant with something that has secular value. That is the case with all exemptions from criminal prohibitions because the claimants are seeking something that is forbidden for everybody else. At the same time, if the claimant is not sincere about his religious beliefs, then there is no conflict and granting religious exemptions is not justified. This Article presented two main models for testing the sincerity of the claimants, a subjective approach that looks for what the claimant believes, and an objective approach that evaluates the plausibility of the belief. Both models are consistent with this Article's proposed rationale for religious exemptions. Indeed, if one acknowledges the special difficulty of proving a person's beliefs, the State may limit the exemptions for beliefs that it considers "plausible." This could be acceptable if "plausibility" is not interpreted in terms that would violate other constitutional clauses, for example, denying equal protection under the law.

Using the *Indiana Case* as an example, this Article explored how one state court analyzed religious exemptions to an abortion ban and concluded that the court reached an improper decision. Had the court adopted this Article's position, it would have been highly unlikely that the claimants would have won the case. The deferential analysis applied by the state court here produces multiple problems. First, recognizing religious exemptions incentivizes more people to adopt a particular religious belief, and it may lead non-religious people to perceive that religious exemptions are mere pantomimes. Moreover, the loss of public confidence in the system of religious exemptions may lead to an increased number of unwarranted requests, and this, exacerbated by the context of "culture wars," may lead to a generalized loss of support for religious freedom. This result would be extremely negative for multiple religious groups that have found in religious exemptions the way to freely practice their religion in America.

It should not be lost that problematic cases of religious exemptions involving reproductive interests or LGBT rights are in the minority. Most religious exemption cases have no connection to the "culture war." Therefore, it is imperative that the system does not have an unacceptable number of false positives that undermine religious freedom for those who genuinely need it.

The requirements of "substantial burden" and "sincerity" are the "gatekeepers" of the religious exemption system, and they must be strengthened so that only genuine conflictive situations trigger the strict scrutiny analysis. But, once within the strict scrutiny system, the courts must weigh the governmental interest under objective parameters, without adopting the perspective of the religious claimants. Moreover, if the categories of "substantial burden" and "sincerity" are not employed to prevent the abuse of the system, greater deference to the interest invoked by the political branches is warranted.

The Indiana court erred in deciding the case because the interest sought by the government was not shared by the claimants. Generally, if the claimants agreed with the state's objective, they probably would not seek relief. This Article has also demonstrated that the court's citations to the Supreme Court decision in *Hobby Lobby* indicate that this ruling is an implicit criticism of the recent religious liberty cases. If that is true, this is another battle of the "culture war." Hopefully, this war does not have freedom of religion among its casualties.