NOTES

The Free Exercise Clause in Transition: Examining Religious Challenges to State Bans on Gender-Affirming Care

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INTRODUCTION

When Rabbi Daniel Bogard's child was four years old, he asked his father one night, "[D]addy, do you think God could make me over again as a boy?"[1] Although his son's school was supportive of his son's transition and a local rabbi even gave him a yarmulke in the colors of the trans pride flag, Bogard and his family found less acceptance elsewhere.[2] In particular, Bogard felt threatened by increasing legislative efforts in Missouri to restrict the rights of transgender youth, which he characterized as the government "creat[ing] an undue burden on [his] ability to practice [his] own faith."[3] As a result, Bogard has been among the many religious leaders advocating against the restriction of transgender rights in statehouses across the United States.[4]

There are many ongoing attacks on transgender rights right now, but one of the quickest to gain traction has been the effort to restrict access to gender-affirming care for minors. As of the end of October 2023, twenty-two states have enacted laws or executive-level policies aimed at denying access to gender-affirming care for transgender and nonbinary minors.[5] Many of these laws have sparked intense public debate and backlash, with opponents arguing that these laws often have devastating and even deadly consequences for youth who are targeted.[6] Opponents of

1. What Next, *After They Testified: The Rabbi Leading an Interfaith Fight for Trans Rights*, SLATE, at 01:43 (June 15, 2023, 5:00 AM), https://slate.com/podcasts/what-next/2023/06/jewish-community-fighting-anti-trans-legislation-missouri [https://perma.cc/GB5G-2LKT].

2. *See* Ariana Eunjung Cha, *'Our State Is at War with Our Family': Clergy with Trans Kids Fight Back*, WASH. POST (Feb. 28, 2023, 2:18 PM), https://www.washingtonpost.com/health/2023/02/28/missouri-transgender-bills.

3. Daniel Bogard (@RavBogard), X (Feb. 7, 2023, 6:13 AM), https://twitter.com/RavBogard/status/1622916568437952513; *see* Cha, *supra* note 2.

4. *See* Jackie Hajdenberg, *Missouri Jewish Leaders Advocate for Trans Rights at State Legislature*, TIMES ISR. (Feb. 10, 2023, 2:09 AM), https://www.timesofisrael.com/missouri-jewish-leaders-advocate-for-trans-rights-at-state-legislature/ [https://perma.cc/C8AV-6P6H] (highlighting one Jewish educator who said, "As a Jew, this is something that speaks to me quite a bit. We call it 'b'tzelem Elokim' – 'created in the image of God,' literally . . . . But the way we understand this is that God bestows a special honor onto humans that requires that we need to be treated with dignity and we need to treat others with dignity."); Cha, *supra* note 2.

5. *See infra* Table 1; *see also* HRC Found., *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (Nov. 13, 2023), https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/6TEV-3V3J].

6. *See* Kareen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives: Growing Legislative Attempts to Limit, Ban, or Criminalize Access to This Critical Model of Medical Care Endangers the Health and Well-Being of Transgender and Nonbinary Youth*, COLUM. U. DEP'T. PSYCHIATRY (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/ZTQ7-M6H2]; Orion Rummler, *How Utah's New Ban on Gender-Affirming Care for Minors Is Affecting*

these bans on gender-affirming care have filed lawsuits challenging the laws, typically relying upon the Equal Protection Clause of the Fourteenth Amendment and arguing that the bans constitute an impermissible classification based on sex and transgender status.[7] While some efforts to challenge these laws on Equal Protection Clause grounds have had some success thus far,[8] litigation remains pending in several cases, and it is unlikely that these issues will be resolved any time soon.[9]

Much of the public discourse around these laws has conceptualized these legislative efforts as at least partially religiously motivated discrimination against transgender youth.[10] Many commentators perceive the fight for LGBTQ+ rights as fundamentally incompatible with religious liberty, and recent litigation has further bolstered this notion.[11] Indeed, several Supreme Court cases have touched upon LGBTQ+ rights and religion in recent years,[12] including the Court's June 2023 holding in *303 Creative LLC v. Elenis* that a website designer's refusal to create wedding websites for same-sex couples was protected under the First Amendment's speech clause.[13] Transgender rights have been a particular target of religion-related lawsuits, as litigants have intensely clashed over the use of pronouns in religious employment settings,[14] access to bathrooms and locker rooms,[15] and whether

Trans Teens in the State, PBS NEWSHOUR (Feb. 3, 2023, 5:25 PM), https://www.pbs.org/newshour/nation/how-utahs-new-ban-on-gender-affirming-care-for-minors-is-affecting-trans-teens-in-the-state [https://perma.cc/Q4AN-P2AD].

7. *See, e.g.*, Class Action Complaint for Declaratory and Injunctive Relief/Notice of Challenge to Constitutionality of Indiana Statute at 2, 42–43, K.C. v. Individual Members of the Med. Licensing Bd. of Ind., No. 23-CV-595, 2023 U.S. Dist. LEXIS 104870 (S.D. Ind. June 16, 2023).

8. *See* Brandt v. Rutledge, 47 F.4th 661, 667–68 (8th Cir. 2022) (affirming preliminary injunction against enforcement of Arkansas ban on gender-affirming care for minors); Brandt v. Rutledge, No. 21-2875, 2022 WL 16957734 (8th Cir. Nov. 16, 2022) (denying petition for a rehearing en banc).

9. *See, e.g.*, Doe v. Ladapo, No. 23cv114, 2023 WL 3833848, at *1 (N.D. Fla. June 6, 2023) (granting preliminary injunction against Florida statute banning gender-affirming care for minors); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1230–31 (11th Cir. 2023) (vacating a district court's preliminary injunction against enforcement of Alabama's ban on gender-affirming care, and finding that the ban is "subject only to rational basis review"); *K.C.*, 2023 U.S. Dist. LEXIS 104870, at *3–4 (granting preliminary injunction against Indiana statute banning gender transition procedures for minors).

10. *See* Russell Contreras, *The Forces Behind Anti-Trans Bills Across the U.S.*, AXIOS (Mar. 31, 2023), https://www.axios.com/2023/03/31/anti-trans-bills-2023-america [https://perma.cc/QW7Y-QDVE] ("Critics and civil liberties advocates say anti-transgender proposals reflect a narrow, religious worldview on gender and other issues while endangering free speech and non-discriminatory education.").

11. *See, e.g.*, Arianna Nord, Comment, *Queer and Convincing: Reviewing Freedom of Religion and LGBTQ+ Protections Post-*Fulton v. City of Philadelphia, 97 WASH. L. REV. 265, 266–67 (2022) (citing response to Pope Francis's remarks in favor of civil unions for same-sex couples as "one example of the growing tension between LGBTQ+ protections and the right to exercise one's religion in opposition to those protections").

12. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

13. 600 U.S. 570, 580, 587–88 (2023).

14. *See* Khorri Atkinson, *Fight over Transgender Pronouns at Work Faces Muddy Legal Waters*, BLOOMBERG L. (Apr. 13, 2023, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/fight-over-transgender-pronouns-at-work-faces-muddy-legal-waters.

15. *See* Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 22-cv-337, 2023 WL 5018511, at *17–20 (S.D. Ohio Aug. 7, 2023) (rejecting an argument that allowing transgender students to use the bathroom consistent with their gender identity violated other students' Free Exercise Clause rights); Parents for Priv. v. Barr, 949 F.3d 1210, 1235–36, 1239 (9th Cir. 2020) (same).

medical professionals who refuse to provide gender-affirming care to transgender people because of their religious beliefs are entitled to exemptions.[16] In contrast, the ways in which religious free exercise rights might be used to *advance* transgender rights have gone largely overlooked. Though it is true that many religious groups and individuals oppose providing gender-affirming care to transgender people,[17] there are also many religious believers who are themselves transgender or who support and encourage the provision of gender-affirming care and welcome transgender individuals within their religious communities.[18] For these religious individuals, denying minors gender-affirming care poses a serious burden on their abilities to freely exercise their religion under the First Amendment.

This potential litigation strategy under the First Amendment may be particularly powerful because the Supreme Court has increasingly strengthened the protections of the Free Exercise Clause in recent years, offering a potent legal vehicle for the assertion of these rights.[19] The Court's recent ruling in *Fulton v. City of Philadelphia* substantially weakened the holding of the controversial case *Employment Division v. Smith* and provided new opportunities for religious litigants to seek exemptions from laws that infringe upon their religious free exercise.[20]

This Note explores the potential arguments available to transgender minors and their parents seeking to obtain access to gender-affirming care under the Free

16. *See, e.g.*, Franciscan All., Inc. v. Becerra, 47 F.4th 368, 371 (5th Cir. 2022) (enjoining the U.S. Department of Health and Human Services from requiring a Catholic medical services organization to provide gender-reassignment surgeries pursuant to the Affordable Care Act).

17. *See, e.g.*, Jack Jenkins, *Bishops Discourage Catholic Health-Care Groups from Performing Gender-Affirming Care*, WASH. POST (Mar. 23, 2023, 12:08 PM), https://www.washingtonpost.com/religion/2023/03/23/bishops-discourage-catholic-health-care-groups-performing-gender-affirming-care/.

18. *See infra* Section II.B.

19. *See* Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 99, https://www.illinoislawreview.org/wp-content/uploads/2021/04/Helfand.pdf [https://perma.cc/2Y6E-8VTR] (observing that "the Court has both bolstered and expanded the category of religious discrimination" in *Trinity Lutheran v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*); Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1189–91 (2023); *see also* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2241–42 (2023) (critiquing the Court's expansion of the "most-favored nation" theory in the context of restrictions on public gatherings during the COVID-19 pandemic); Nicole Stelle Garnett, *Supreme Court Opens a Path to Religious Charter Schools*, EDUC. NEXT, Spring 2023, at 8, 11 (arguing that the Court's Free Exercise Clause-based holding in *Carson v. Makin* may lead to an expansion of religious charter schools).

20. *See* Note, *supra* note 19, at 1181, 1184 ("[U]ntil late 2020, the Supreme Court had never found that a law violated the First Amendment based on the mere existence of a secular exemption."); *see also* Hannah Wimberley, *Satan and the Law: How the Satanic Temple Is Fighting Christian Hegemony in Reproductive Healthcare*, 22 HOUS. J. HEALTH L. & POL'Y 1, 31 (2023) (discussing the Satanic Temple's efforts to use the Court's holding in *Burwell v. Hobby Lobby* to challenge restrictions on abortion in Texas on religious grounds). This strategy has also seen renewed attention in the wake of *Dobbs v. Jackson Women's Health Organization* as a potential path to protecting abortion rights post-*Roe*. *See* Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES (July 5, 2023), https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html (documenting challenges to abortion bans by religious believers and noting that "[l]egal experts s[ay] some religious freedom lawsuits seeking abortion rights might succeed, given recent Supreme Court decisions" which have granted religious exemptions).

Exercise Clause. Part I proceeds with an overview of gender-affirming care, including recommended best practices for healthcare providers, and argues that the current backlash against providing gender-affirming care is out of step with the approaches recommended by the overwhelming majority of medical professionals. Next, Part II analyzes the laws that ban gender-affirming care for minors in twenty-two states and argues that these laws pose tremendous dangers, both as a result of their legal repercussions and their effects on minors' physical and mental health. Part II also shows how these laws infringe upon the Free Exercise Clause rights of religious transgender youth and their parents by limiting their bodily autonomy, medical decisionmaking, and self-fulfillment in contravention of their religious beliefs and practices. After, Part III analyzes the evolution of Free Exercise Clause jurisprudence and its interplay with the doctrines of parental right and the mature minor when it comes to medical decisionmaking. Part III concludes that the Court's increased permissiveness toward Free Exercise Clause claims in recent years has created fertile grounds for effective claims by those affected by gender-affirming-care bans. Finally, Part IV analyzes how litigants can obtain strict scrutiny review of their Free Exercise Clause claims by using the doctrines discussed in Part III. Litigants have several viable vehicles by exploiting statutory exemptions pursuant to *Fulton*, asserting hybrid rights as recognized in *Smith*, and making use of state-level Religious Freedom Restoration Acts (RFRAs). Part IV concludes with a discussion of the potential shortcomings of pursuing a Free Exercise Clause claim and argues that litigants can strategically minimize these downsides.

Transgender minors' access to gender-affirming care is an urgent, pressing topic. Transgender youth face disproportionately high rates of mental illness and suicide, and therefore, efforts by policymakers across the country to restrict access to gender-affirming care potentially pose tremendous dangers.[21] Although not all transgender youth or their parents will identify as religious or regard access to gender-affirming care as a form of religious exercise, many do identify in this way, and for those individuals, the Court's recent expansion of its Free Exercise Clause jurisprudence may prove a potent vehicle by which they can obtain the healthcare they need.

I. EXAMINING THE CONTROVERSY OVER GENDER-AFFIRMING CARE FOR MINORS

While gender-affirming care for minors has ignited a firestorm of controversy in the United States in recent months, what precisely constitutes gender-affirming care and what its effects are remain poorly understood by much of the American public. According to the Pew Research Center, more than one in three (thirty-eight percent of) Americans believe that "society has gone too far in accepting" transgender people, and attitudes toward youth seeking to transition are often

21. *See* ELANA REDFIELD, KERITH J. CONRON, WILL TENTINDO & ERICA BROWNING, WILLIAMS INST., UCLA SCH. OF L., PROHIBITING GENDER-AFFIRMING MEDICAL CARE FOR YOUTH 15 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf [https://perma.cc/MJ89-HCLE].

especially unfavorable, despite being rooted in factual misunderstandings.[22] Therefore, understanding what exactly gender-affirming care is and how it affects patients is essential. Section I.A proceeds first with an overview of scientific attitudes surrounding gender-affirming care, noting that the American Academy of Pediatrics currently recommends providing gender-affirming care at all ages. Next, Section I.B summarizes typical objections to providing gender-affirming care to minors and discusses common responses, which often rest upon the crucial mental-health benefits such care provides for youth. Ultimately, the stakes are quite high for transgender minors when it comes to receiving the care that they seek.

A. WHAT IS GENDER-AFFIRMING CARE?

An estimated 1.4 million adults and 150,000 youth in the United States identify as transgender or gender nonconforming.[23] Some transgender individuals also have gender dysphoria.[24] Among youth in particular, an estimated 121,000 children were diagnosed with gender dysphoria in the United States between 2017 and 2021.[25] Gender dysphoria is a psychiatric diagnosis in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders and is characterized as "[a] clinical symptom that is characterized by a sense of alienation to some or all of the physical characteristics or social roles of one's assigned gender."[26] Provision of gender-affirming care is recommended by the American Academy of Pediatrics to treat gender dysphoria.[27]

Gender-affirming care exists on a spectrum and can range from socially transitioning to medical intervention, up to and including gender-affirming surgery. Ideally, for minors, gender-affirming care is "developmentally appropriate care that is oriented toward understanding and appreciating the youth's gender experience," with best results achieved "through the integration of medical, mental health, and social services, including specific resources and supports for parents and families."[28] In providing gender-affirming care, socially transitioning may

22. *See* KIM PARKER, JULIANA HOROWITZ & ANNA BROWN, PEW RSCH. CTR., AMERICANS' COMPLEX VIEWS ON GENDER IDENTITY AND TRANSGENDER ISSUES 4 (2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/ [https://perma.cc/RY3E-QHLY]; *see also Debunking Common Myths About Gender-Affirming Care for Youth*, PBS NEWSHOUR (Nov. 27, 2022, 5:40 PM), https://www.pbs.org/newshour/show/debunking-common-myths-about-gender-affirming-care-for-youth [https://perma.cc/67MW-ETHB] (quoting adolescent medicine specialist Dr. Meredithe McNamara as noting that "in these politicized and misinformed debates on gender-affirming care, surgery is being overly represented to stoke fear in the public and to convince people that politicians should be intervening in healthcare decisions between parents and physicians and patients themselves").

23. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 3.

24. *See id.*

25. Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS (Oct. 6, 2022, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-transyouth-data/ [https://perma.cc/9G85-CWNC].

26. Rafferty, *supra* note 23, at 2.

27. *See id.* at 10.

28. *Id.* at 4.

include changing one's name and pronouns and altering one's gender expression through clothing and self-styling.[29]

Medical interventions, meanwhile, can range dramatically, including puberty blockers, cross-sex hormone therapy, and surgery.[30] These medical interventions have been the source of much controversy in recent months and the primary targets of state legislative efforts to restrict access to care for transgender youth.[31] While the American Academy of Pediatrics's official position is that gender-affirming care can begin at any age when it comes to social and legal affirmation, medical interventions are not recommended until early adolescence, and gender-affirming surgeries are recommended "typically" for adults, with adolescents on a "case-by-case basis."[32] By comparison, in Europe, countries' age minimums for access to hormone therapy for transgender children range from age twelve (with parental consent) to age eighteen.[33] Notably, the World Professional Association for Transgender Health (WPATH) previously recommended beginning hormone therapy at age sixteen but last year removed all age recommendations pertaining to hormone therapy.[34]

B. DESPITE MEDICAL CONSENSUS, SIGNIFICANT OPPOSITION REMAINS

Provision of this medical care to youth is especially controversial because some research as to the long-term effects of hormone therapy is underdeveloped and some forms of gender-affirming care are not readily reversible.[35] Some opponents of providing gender-affirming care to minors argue that the minors should

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29. *Id.* at 6.

30. *Id.*

31. *See infra* Section II.A.

32. Rafferty, *supra* note 23, at 6–7.

33. *See Access to Transgender Hormone Therapy*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., http://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/access-transgender-hormone-therapy [https://perma.cc/KS3C-MHC8] (last visited Jan. 7, 2024) (surveying twenty member states of the European Union and highlighting that five countries require the child to be eighteen years old, the Netherlands permits hormone therapy at age twelve with parental consent, and seven countries make access dependent "on the maturity of the child"). For a recent discussion of this debate in Western Europe, see Frieda Klotz, *A Teen Gender-Care Debate Is Spreading Across Europe*, ATLANTIC (Apr. 28, 2023), https://www.theatlantic.com/health/archive/2023/04/gender-affirming-care-debate-europe-dutch-protocol/673890/. A split has emerged: Public health officials in Finland, Sweden, France, and the United Kingdom have begun to recommend against providing puberty blockers for teenagers in at least some circumstances, while more accessible care for minors has continued in the Netherlands. *See id.*

34. *See* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S43 (2022); *see also New Standards of Transgender Health Care Raise Eyebrows*, ECONOMIST (Sept. 22, 2022), https://www.economist.com/united-states/2022/09/22/new-standards-of-transgender-health-care-raise-eyebrows (noting that the standards of care by WPATH previously "included a list of minimum ages for treatments—14 for cross-sex hormones, 15 for removal of breasts, 17 for testicles. Hours later, a 'correction' eliminated the age limits.").

35. For instance, some of the effects of hormone therapy, such as its effects on "skin texture, muscle mass, and fat deposition," are "partially reversible," but other effects of testosterone or estrogen treatment are "irreversible once developed," and the reversibility of effects on fertility is characterized as "unknown." Rafferty, *supra* note 23, at 6.

simply wait until they are adults to seek such care to ensure that the medical decisions are properly considered and deliberated upon.[36]

However, advocates for gender-affirming care counter that it is essential that minors seeking gender-affirming care receive it as soon as practicable.[37] They highlight the psychological harm that withholding care from youth can pose, that delay in providing care can cause the need for later surgery, and that gender-affirming care is necessary to prevent physical changes that would otherwise be irreversible (for instance, the changing of one's voice during puberty, or the appearance of male-pattern baldness).[38] Ultimately, a consensus has emerged among medical professionals that while providing gender-affirming care to youth who seek it is not entirely without risks, it is far less harmful than withholding gender-affirming care until those minors become adults, and therefore, interference by public policymakers is dangerous.[39] However, the American public is far from unanimous on this topic,[40] and this controversy over health and safety remains a continual motivator for the enactment of bans on gender-affirming care for minors across the United States.[41]

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36. *See, e.g.*, JAY P. GREENE, HERITAGE FOUND. BACKGROUNDER NO. 3712, PUBERTY BLOCKERS, CROSS-SEX HORMONES, AND YOUTH SUICIDE 16 (2022), https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide [https://perma.cc/GMJ4-9TMX] (concluding that "given the danger of cross-sex treatments . . . states should tighten the criteria for receiving these interventions, including raising the minimum eligibility age"). This rationale is also cited in several of the state laws discussed *infra* in Section II.A.

37. *See* OFF. POPULATION AFFS., DEP'T HEALTH & HUM. SERVS., GENDER-AFFIRMING CARE AND YOUNG PEOPLE 1 (2022), https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf [https://perma.cc/WU8V-CZV7] ("[E]arly gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent to focus on social transitions and can increase their confidence while navigating the healthcare system.").

38. *See* Rafferty, *supra* note 23, at 5.

39. *See* Press Release, Am. Med. Ass'n, AMA to States: Stop Interfering in Health Care of Transgender Children (Apr. 26, 2021), https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children ("Clinical guidelines established by professional medical organizations for the care of minors promote these supportive interventions based on the current evidence and that enable young people to explore and live the gender that they choose. Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.").

40. *See* PARKER ET AL., *supra* note 22, at 6–7 (discussing survey data that indicate that "46% [of Americans would] favor making it illegal for health care professionals to provide someone younger than 18 with medical care for a gender transition" and 37% support "investigating parents for child abuse if they help someone younger than 18 get medical care for a gender transition").

41. *See, e.g.*, Rebecca Boone, *Idaho to Ban Gender-Affirming Care for Transgender Youth*, AP (Apr. 5, 2023, 5:07 PM), https://apnews.com/article/transgender-health-care-ban-kids-idaho-d17ca5b1549509bb4b21ec26e2691968 [https://perma.cc/5Z8J-PKV9] (quoting Idaho Governor Brad Little's signing statement stating that "I recognize our society plays a role in protecting minors from surgeries or treatments that can irreversibly damage their healthy bodies"); Associated Press, *North Dakota Governor Signs Law Limiting Trans Health Care*, NPR (Apr. 21, 2023, 5:21 AM), https://www.npr.org/2023/04/21/1171204454/north-dakota-governor-signs-law-limiting-trans-health-care [https://perma.cc/X9PD-Q9ZN] (noting North Dakota Governor Doug Burgum's press release which stated that North Dakota's ban on gender-affirming care for minors is "aimed at protecting children from the life-altering ramifications of gender reassignment surgeries").

II. THE PROBLEM: BANS ON GENDER-AFFIRMING CARE HINDER FREE RELIGIOUS EXERCISE

Bans on gender-affirming care have spread rapidly in the United States over recent months and drawn tremendous public scrutiny and debate.[42] This Part proceeds first in Section II.A with an overview of state-level bans on gender-affirming care, summarizing trends across laws and regulations and identifying key components that may become relevant for future litigation. Many states' bans include exemptions which may implicate the Court's recent holding in *Fulton v. City of Philadelphia*, and many states also have state-level religious freedom restoration acts in place, providing potentially fruitful grounds for future litigation. Next, Section II.A discusses harmful secular effects of these bans, including the civil and criminal penalties medical providers may face, and analyzes current efforts by advocacy groups to challenge the bans, concluding that challenging the bans under the Equal Protection Clause may prove unsuccessful. Lastly, Section II.B presents the harms to religious freedom that such bans threaten, examining the effects on Reform Jews, Episcopalians, and Unitarians in particular. As bans continue to be enacted and other avenues of litigation falter, bringing challenges to state bans on religious liberty grounds would serve to protect transgender youth and their parents' interests on multiple fronts.

A. STATE-LEVEL BANS ON GENDER-AFFIRMING CARE AND THEIR HARMFUL EFFECTS

Currently, more than one in every three transgender youth live in a state that has banned gender-affirming care for individuals under eighteen.[43] In recent months, a disturbing trend has emerged as state legislatures across the country have increasingly turned to restrictions on gender-affirming care for minors, while at the same time other protections and rights for LGBTQ+ youth are threatened.[44] Twenty-two states have currently passed bans on gender-affirming care for minors through either legislative or executive action.[45] Many of the policies share common traits, typically banning gender-affirming surgery, strictly limiting

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42. *See* Nicole Narea & Fabiola Cineas, *The GOP's Coordinated National Campaign Against Trans Rights, Explained*, VOX (Apr. 6, 2023, 3:50 PM), https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures [https://perma.cc/MWL8-8J8G] (characterizing recent attacks on transgender rights as a Republican strategy "to run on trans issues as part of a broader 'protect the children' platform heading into 2024").

43. HRC Found., *supra* note 5.

44. *See, e.g.*, Narea & Cineas, *supra* note 42 (observing that these "anti-trans laws are part of a larger wave of Republican anti-LGBTQ legislation"); Kimberly Kindy, *GOP Targets Drag Shows with New Bills in At Least 14 States*, WASH. POST (Feb. 14, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/02/14/drag-shows-republican-bills-bans/ ("[A]t least 26 bills have been introduced in 14 states by Republican legislators taking aim at drag events — an abrupt movement that has emerged this year amid a wider conservative backlash to expanded LGBTQ rights."); *Wisconsin Legislature Allows Conversion Therapy for Patients*, AP (Mar. 22, 2023, 1:02 PM), https://apnews.com/article/wisconsin-conversion-therapy-legislature-25cdc6b77216eef7dcc9ad9cbd251dea [https://perma.cc/LH3W-WCQ6] (describing a vote by the Wisconsin state legislature to prevent its governor from banning conversion therapy).

45. *See* HRC Found., *supra* note 5. The twenty-two states, as of the end of October 2023, are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi,

or altogether banning hormone therapy, and also often limiting the administration of puberty blockers. Penalties range from loss of medical licenses for physicians[46] to a civil cause of action for minors who receive treatments[47] to criminal punishments[48] bringing with them fines and potential incarceration (in the case of Idaho's law, imprisonment for up to ten years).[49] The below table provides a brief overview of these policies across states and indicates whether the ban contains secular exemptions, as well as whether the state in question has a state-level Religious Freedom Restoration Act (RFRA). Both are key potential tools for the litigation strategy presented in Parts III and IV of this Note: secular exemptions bring the statute potentially within the ambit of *Fulton*, while a state RFRA provides an alternative basis for litigants' free exercise claims and with it a potentially more straightforward route to strict scrutiny.

Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia. *Id.*

46. *See, e.g.*, S.D. CODIFIED LAWS § 34-24-36.

47. *See, e.g.*, Gender Transition Procedures for Minors, IND. CODE §§ 25-1-22-16, -17(b).

48. *See* Alabama Vulnerable Child Compassion and Protection Act (V-CAP), ALA. CODE § 26-26-4(c).

49. *See* Vulnerable Child Protection Act, IDAHO CODE § 18-1506C(5).

TABLE 1: OVERVIEW OF STATE LAWS

State	Ban on Gender-Affirming Surgery	Ban on Hormone Therapy	Exemptions[50]	State RFRA
Alabama[51]	Yes	Yes	Yes	Yes[52]
Arizona[53]	Yes	No	Yes	Yes[54]
Arkansas[55]	Yes	Yes	Yes	Yes[56]
Florida[57]	Yes	Partial[58]	No	Yes[59]
Georgia[60]	Yes	Yes	Yes	No
Idaho[61]	Yes	Yes	Yes	Yes[62]
Indiana[63]	Yes	Partial[64]	Yes	Yes[65]

50. Exemptions vary across state bans. Most commonly, the bans tend to contain exemptions for the treatment of chromosomal abnormalities and physical injuries to minor patients. Some bans also expressly carve out mental health treatment. *See, e.g.*, Stop Harming Our Kids Act, LA. STAT. ANN. § 40:1098.2(C)(1), (4) (exempting minors with a "verifiable disorder of sex development" or "physical disorder, physical injury, or physical illness"); S.D. CODIFIED LAWS § 34-24-35 (exempting minors with "a medically verifiable disorder of sex development" such as "irresolvably ambiguous" "external biological sex characteristics" or a "disorder of sexual development" resulting in chromosomal or hormonal abnormalities); W. VA. CODE § 30-3-20(c)(5)(A), (D) (permitting provision of puberty blockers and hormone therapy for "severe gender dysphoria" if specific psychiatric findings by mental health providers are made and it is "limited to the lowest titratable dosage necessary to treat the psychiatric condition and not for purposes of gender transition").

51. ALA. CODE §§ 26-26-1 to -9.

52. ALA. CONST. amend. 622.

53. ARIZ. REV. STAT. ANN. § 32-3230.

54. *Id.* § 41-1493.01.

55. Protecting Minors from Medical Malpractice Act of 2023, ARK. CODE ANN. §§ 16-114-401 to -403. The statute does not ban gender-affirming care outright, but it permits a minor or their parents to file a civil suit for injunctive relief, compensatory and punitive damages, and attorney's fees. *See id.* § 16-114-402(b)(1).

56. *Id.* §§ 16-123-401 to -407.

57. Standards of Practice for the Treatment of Gender Dysphoria in Minors, FLA. ADMIN. CODE ANN. r. 64B8-9.019.

58. Minors receiving puberty blockers or hormone therapy prior to the rule's effective date are permitted to continue receiving treatment. *Id.* at r. 64B8-9.019(2).

59. FLA. STAT. §§ 761.01–.061.

60. GA. CODE ANN. §§ 31-7-3.5, 43-34-15.

61. Vulnerable Child Protection Act, IDAHO CODE § 18-1506C.

62. IDAHO CODE §§ 73-401 to -404.

63. Gender Transition Procedures for Minors, IND. CODE §§ 25-1-22-1 to -18.

64. For patients who are currently prescribed hormone therapy at the time that the law goes into effect, their doctors are permitted to continue prescribing hormone therapy for six more months, until December 31, 2023. *See id.* § 25-1-22-13(d).

65. *Id.* §§ 34-13-9-0.7 to -11.

State	Ban on Gender-Affirming Surgery	Ban on Hormone Therapy	Exemptions[50]	State RFRA
Iowa[66]	Yes	Yes	Yes	No
Kentucky[67]	Yes	Yes	Yes	Yes[68]
Louisiana[69]	Yes	Yes	Yes	Yes[70]
Mississippi[71]	Yes	Yes	Yes	Yes[72]
Missouri[73]	Yes	Partial[74]	Yes	Yes[75]
Montana[76]	Yes	Yes	Yes	Yes[77]
Nebraska[78]	Yes	Partial[79]	Yes	No
North Carolina[80]	Yes	Yes	Yes	No
North Dakota[81]	Yes	Partial[82]	Yes	Yes[83]

66. IOWA CODE ANN. § 147.164.
67. KY. REV. STAT. ANN. § 311.372.
68. *Id.* § 446.350.
69. Stop Harming Our Kids Act, LA. STAT. ANN. §§ 40:1098.1–.6.
70. *Id.* §§ 13:5231–:5242.
71. Regulate Experimental Adolescent Procedures (REAP) Act, H.B. 1125, 2023 Reg. Sess. (Miss. 2023); MISS. CODE ANN. § 73-25-33.
72. MISS. CODE ANN. § 11-61-1.
73. Missouri Save Adolescents from Experimentation (SAFE) Act, MO. REV. STAT. § 191.1720. Notably, this law's provision banning hormone therapy will expire in August 2027. *Id.* § 191.1720(4)(3); *see also* Summer Ballentine, *Missouri Governor Signs Bill Banning Gender-Affirming Care for Minors and Some Adults*, PBS NEWSHOUR (June 7, 2023, 3:23 PM), https://www.pbs.org/newshour/health/missouri-governor-signs-bill-banning-gender-affirming-care-for-minors-and-some-adults [https://perma.cc/DCM6-35AS] (characterizing this sunset provision "as part of a Republican compromise with Senate Democrats").
74. Minors who were prescribed puberty blockers or hormone therapy prior to the effective date are permitted to continue receiving treatment. *See* § 191.1720(4)(2).
75. MO. REV. STAT. §§ 1.302–.307.
76. Youth Health Protection Act, S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023).
77. MONT. CODE ANN. §§ 27-33-101 to -105.
78. Let Them Grow Act, NEB. REV. STAT. §§ 71-7301 to -7307.
79. Nebraska exempts "continuation of treatment" of puberty blockers and/or hormone therapy when treatment began before October 1, 2023. *Id.* § 71-7304.
80. N.C. GEN. STAT. §§ 90-21.150–154.
81. N.D. CENT. CODE ANN. §§ 12.1-36.1-01 to -04.
82. North Dakota exempts medical procedures which began prior to April 21, 2023. *Id.* § 12.1-36.1-03(2).
83. *Id.* § 14-02.4-08.1.

State	Ban on Gender-Affirming Surgery	Ban on Hormone Therapy	Exemptions[50]	State RFRA
Oklahoma[84]	Yes	Yes	Yes	Yes[85]
South Dakota[86]	Yes	Yes	Yes	Yes[87]
Tennessee[88]	Yes	Yes	Yes	Yes[89]
Texas[90]	Yes	Partial[91]	Yes	Yes[92]
Utah[93]	Yes	No	Yes	No
West Virginia[94]	Yes	Partial[95]	Yes	Yes[96]

Many of the state bans resemble both one another and model legislation circulated by far-right groups.[97] To look more closely at the statutory language of one law that closely adheres to model legislation, Montana's law, enacted earlier this year, declares that its purpose is "to enhance the protection of minors and their families . . . from any form of pressure to receive harmful, experimental puberty

84. OKLA. STAT. tit. 63, § 2607.1.
85. *Id.* at tit. 51, §§ 251–258.
86. S.D. CODIFIED LAWS §§ 34-24-33 to -38.
87. *Id.* § 1-1A-4.
88. TENN. CODE. ANN. §§ 68-33-101 to -109.
89. *Id.* § 4-1-407.
90. Gender Transitioning and Gender Reassignment Procedures and Treatments for Certain Children, TEX. HEALTH & SAFETY CODE ANN. §§ 161.701–.706; *id.* § 62.151; TEX. HUM. RES. CODE ANN. § 32.024 (pp); TEX. OCC. CODE ANN. § 164.052(a)(24).
91. Texas permits continued provision of puberty blockers and hormone therapy if it is a part of a "continuing course of treatment" prior to the statute's effective date and the minor has attended twelve or more mental health treatment sessions in the past six months. HEALTH & SAFETY § 161.703(b).
92. TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012.
93. UTAH CODE ANN. §§ 58-67-102, -67-502, -68-102, -68-502.
94. W. VA. CODE §§ 30-3-20, -14-17.
95. West Virginia permits prescription of puberty blockers and hormone therapy for "severe gender dysphoria" under limited circumstances. *Id.* § 30-3-20(c)(5).
96. *Id.* § 35-1A-1.
97. *See, e.g.*, DO NO HARM, MODEL LEGISLATION: THE JUST FACTS ACT (THE JUSTICE FOR ADOLESCENT AND CHILD TRANSITIONERS ACT) (2023), https://donoharmmedicine.org/wp-content/uploads/2023/01/Do-No-Harm-The-JUST-FACTs-Act-Model-Legislation.pdf [https://perma.cc/CAL8-S4HD]; *see also* Jeff McMillan, Kavish Harjai & Kimberlee Kruesi, *Many Transgender Health Bills Came from a Handful of Far-Right Interest Groups, AP Finds*, AP (May 20, 2023, 9:42 AM), https://apnews.com/article/transgender-health-model-legislation-5cc4a7cb4ab69150f670d06fd0f361ab [https://perma.cc/EMY8-DMZD] (reporting on an analysis which found that many of the bans "are identical or very similar to some model legislation" and noting that Montana Senator Jon Fuller altered the Do No Harm model bill's language prior to introducing a highly similar bill in the Montana Senate).

blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority."[98]

The law goes on to prohibit healthcare providers from providing surgeries, puberty blockers, or hormone therapies when "knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male."[99] However, the law provides an exception for such procedures if provided for other reasons, including chromosomal abnormalities and the treatment of "any infection, injury, disease, or disorder" resulting from the provision of gender-affirming care.[100] While the law does not hold minors who receive such procedures liable, healthcare providers face licensing sanctions, including a mandatory minimum suspension of one year, and strict civil liability in any potential lawsuits by former patients and their guardians.[101] These penalties imposed on healthcare providers are also included in model legislation[102] and appear in most of the state bans in various forms.[103] While this focus on healthcare providers means that, in general, transgender youth and their parents will not shoulder direct legal penalties for obtaining gender-affirming care, the chilling effect on healthcare providers means that care will be largely inaccessible.

Denial of gender-affirming care for transgender youth can have devastating and even deadly consequences. Access to gender-affirming hormone therapy is associated with lower rates of depression and suicide for transgender and nonbinary children.[104] This is especially significant given that more than 50% of transgender and nonbinary youth "seriously considered" committing suicide in 2022 and nearly 20% actually attempted suicide that year.[105] Bans on access to gender-affirming care are a matter of particular concern for transgender and nonbinary youth—93% reported feeling "worried" about being denied access.[106]

In addition, various state-level bans carry with them significant legal consequences, imposing civil liabilities on medical providers.[107] Beyond that, medical

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98. Youth Health Protection Act, S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023).

99. *Id.*

100. *Id.* These exemptions are typical among all the state-level bans on gender-affirming care thus far enacted, as Table 1 indicates.

101. *Id.*

102. *See* DO NO HARM, *supra* note 97, §§ 5(d), 6(d).

103. *See, e.g.*, Protecting Minors from Medical Malpractice Act of 2023, ARK. CODE ANN. § 16-114-402(b)(1); N.C. GEN. STAT. § 90-21.154(a); TENN. CODE. ANN. §§ 68-33-105(a)–(b), -107.

104. *See* Amy E. Green, Jonah P. DeChants, Myeshia N. Price & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 647 (2022) (discussing research findings which "provide support for a significant relationship between access to [gender-affirming hormone therapy] and lower depression and suicidality among transgender and nonbinary youth").

105. TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 5 (2022), https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf [https://perma.cc/U9VL-TM75].

106. *Id.* at 14.

107. *See, e.g.*, IOWA CODE ANN. § 147.164(3)(a); TENN. CODE. ANN. § 68-33-105.

professionals also stand to lose their licenses or face disciplinary proceedings for prohibited conduct.[108] In the states that have criminalized provision of gender-affirming care by medical providers, the stakes are even higher, forcing medical providers to choose between potential incarceration and providing badly needed care to minors.[109] While beyond the scope of this Note, it is possible that these medical providers may also have claims under the Free Exercise Clause.[110]

As a result of this wide range of devastating consequences, some families have contemplated moving from states that have enacted or are considering enacting these bans.[111] In response, other states have enacted or proposed safe-haven laws aimed at preserving access to gender-affirming care.[112] Families are being forced to contemplate incredibly difficult decisions—whether to uproot themselves from the homes which they have built and move across state lines, or whether to remain in a state that seeks to deny and even criminalize obtaining the medical support that their child needs.[113] As attacks continue to grow on the rights of LGBTQ+ youth, it is all too likely that even more families will face this dilemma.

In response to these bans, families and advocates have filed lawsuits in several states, typically proceeding under the Equal Protection Clause of the Fourteenth Amendment and arguing discrimination on the basis of sex and on the basis of transgender status.[114] However, while there have been some early victories

108. *See, e.g.*, IOWA CODE ANN. § 147.164(2)(d); KY. REV. STAT. ANN. § 311.372(4); OKLA. STAT. ANN. tit. 63, § 2607.1(C).

109. *See* Alabama Vulnerable Child Compassion and Protection Act, ALA. CODE § 26-26-4(c) (providing that a violation is a Class C felony); Vulnerable Child Protection Act, IDAHO CODE § 18-1506C(5). In Alabama, Class C felonies carry a minimum term of incarceration of at least one year and a day. ALA. CODE § 13A-5-6(a)(3).

110. *See, e.g.*, Daniel Block, *The Halachic Mandate for Gender Affirming Care: Examining the Potential Efficacy of Religious Liberty Claims Made by Jewish Health Care Providers*, 10 BRANDEIS U. L.J. 115, 127–32 (2022) (arguing that an Arkansas ban on gender-affirming care must provide exemptions to Jewish doctors under the First Amendment).

111. *See, e.g.*, Madeleine Carlisle, *As Texas Targets Trans Youth, a Family Leaves in Search of a Better Future*, TIME (July 14, 2022, 8:41 AM), https://time.com/6196617/trans-kids-texas-leave/ [https://perma.cc/MA6X-ZW2K]; Grace Deng, *Families with Transgender Children Seek Refuge in Minnesota*, MINN. REFORMER (Mar. 9, 2023, 6:00 AM), https://minnesotareformer.com/2023/03/09/families-with-transgender-children-flee-states-with-anti-trans-legislation-for-minnesota/ [https://perma.cc/ZH2E-A36Y].

112. *See* Jo Yurcaba, *California Governor Signs Bill Offering Legal Refuge to Transgender Youths*, NBC NEWS (Sept. 30, 2022, 4:30 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/california-governor-signs-bill-offering-legal-refuge-transgender-youth-rcna50240 [https://perma.cc/8RQL-FCNT]; Dana Ferguson, Scott Maucione, Bente Birkeland, Rick Pluta, Colin Jackson & Acacia Squires, *Minnesota to Join at Least 4 Other States in Protecting Transgender Care This Year*, NPR (Apr. 21, 2023, 6:34 PM), https://www.npr.org/2023/04/21/1171069066/states-protect-transgender-affirming-care-minnesota-colorado-maryland-illinois [https://perma.cc/K2MK-969U].

113. *See* Annie Connell-Bryan, Joanne Kenen & Jael Holzman, *Conservative States Are Blocking Trans Medical Care. Families Are Fleeing.*, POLITICO (Nov. 27, 2022, 1:02 PM), https://www.politico.com/news/2022/11/27/trans-medical-care-red-states-families-00064394 [https://perma.cc/BM9W-38YQ].

114. *See, e.g.*, Class Action Complaint for Declaratory and Injunctive Relief/Notice of Challenge to Constitutionality of Indiana Statute, *supra* note 7, at 2; Brief of Plaintiffs-Appellees at 29, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875).

against state bans on Equal Protection grounds,[115] these suits may falter, particularly in light of the Supreme Court's complicated jurisprudence surrounding intermediate scrutiny for sex and the lack of clarity about what implications that may have for transgender status.[116] Given this uncertainty, advocates would do well to explore alternative bases for challenging these bans. The Free Exercise Clause may prove an effective alternative claim for litigants whose religious beliefs and practices have been burdened by these bans, particularly as the Court has grown more permissive in its Free Exercise Clause jurisprudence over recent years. This potential strategy is explored in Part IV, *infra*.

B. RELIGION CAN COMPEL INDIVIDUALS TO SEEK GENDER-AFFIRMING CARE

Many religious individuals have beliefs that compel them to seek out gender-affirming care, when needed or desired, for themselves or for their children. Although the most common perception of religious adherents' attitudes toward transgender individuals and gender-affirming care may be one of suspicion and even hostility,[117] such attitudes are not universal. Indeed, some religious

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115. *See, e.g.*, *Brandt*, 47 F.4th at 667–68 (affirming preliminary injunction against enforcement of Arkansas ban on gender-affirming care for minors); Doe v. Ladapo, No. 23cv114, 2023 WL 3833848, at *1 (N.D. Fla. June 6, 2023) (granting preliminary injunction against Florida statute banning gender-affirming care for minors); K.C. v. Individual Members of the Med. Licensing Bd. of Ind., No. 23-cv-00595, 2023 U.S. Dist. LEXIS 104870, at *3–4 (S.D. Ind. June 16, 2023) (granting preliminary injunction against Indiana statute banning gender-affirming care for minors).

116. *See* JARED P. COLE, CONG. RSCH. SERV., LSB10902, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: EQUAL PROTECTION CHALLENGES DIVIDE APPELLATE COURTS 3–5 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10902 [https://perma.cc/J5C2-FX2K] (observing that "the Supreme Court has not addressed the proper standard of review for government classifications involving transgender individuals," and analyzing a circuit split over bathroom policies for transgender students); Erik Fredericksen, Note, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 1149, 1152–53 (2023) (arguing that the Court's holding in *Bostock v. Clayton County* should be understood to require intermediate scrutiny for all classifications of LGBT people). In *Bostock v. Clayton County*, the Court held that LGBT employees are protected under the sex discrimination provisions of Title VII of the Civil Rights Act. 590 U.S. 644, 659–60 (2020). Yet it is not clear to what extent these protections extend beyond the scope of Title VII, especially because Justice Gorsuch's opinion relied upon a textualist reading of the statute. *See generally* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021) (critiquing *Bostock*'s textualist approach). The next term after *Bostock* was decided, the Court denied certiorari for a Title IX suit over access to bathrooms for transgender students. *See* Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (mem.); *see also* Amy Howe, *Justices Won't Intervene in Dispute over Transgender Rights and Bathrooms*, SCOTUSBLOG (June 29, 2021, 9:40 AM), https://www.scotusblog.com/2021/06/justices-wont-intervene-in-dispute-over-transgender-rights-and-bathrooms/ [https://perma.cc/H8V7-XJK2].

117. *See* Marianne Campbell, Jordan D. X. Hinton & Joel R. Anderson, *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-Variant People*, 20 INT'L J. TRANSGENDERISM 21, 33 (2019) (surveying studies and finding "consistent evidence . . . that religious identification . . . is associated with more negative attitudes toward transgender people and higher levels of transphobia"); Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/ [https://perma.cc/KME4-6J5M] (discussing survey data showing that a majority of white evangelicals in particular "say that society has gone too far in accepting transgender people" and that religion has "a fair amount" or "'a great deal' of influence on their views toward gender and sex"); *see also*

organizations have taken official stances in support of gender-affirming care, with some religious leaders on the front lines of opposition to this legislation in statehouses across the country.[118] Moreover, other religions have conceptions of gender which go beyond a male–female binary and may be translated into present-day support for providing gender-affirming care.[119] Lastly, at the individual level, one may possess a religious belief that those who need gender-affirming care must receive it, regardless of whether that belief clashes with an official stance taken by one's church. Each approach is explored in turn below.

On an institutional level, several religions have embraced transgender rights and gender-affirming care publicly. Reform Judaism has embraced trans and non-binary individuals publicly and has had a lengthy history of advocating for the LGBTQ+ community.[120] The Union for Reform Judaism's Resolution on the Rights of Transgender and Gender Non-Conforming People "[a]ffirm[ed] its commitment to the full equality, inclusion and acceptance of people of all gender identities and gender expressions."[121] The same resolution urged "equal access to medical and social services."[122] In Missouri, Rabbi Daniel Bogard testified in opposition to a proposed bill that would prevent individuals from changing the gender marker on one's birth certificate, stating publicly that such a bill would deprive him of his rights under the Free Exercise Clause.[123]

The Episcopal Church has taken a stance similar to Reform Judaism in recent years.[124] Last year, during the Episcopal Church's Eightieth General Convention, a resolution was passed calling "for the Episcopal Church to advocate for access to gender affirming care in all forms (social, medical, or any other) and at all ages as part of our Baptismal call to 'respect the dignity of every human being'" and affirming "that all Episcopalians should be able to partake in gender affirming

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Contreras, *supra* note 10 (analyzing the "multimillion-dollar effort" by conservative religious groups to "shape policy based on their theological and conservative beliefs around sex, gender and family").

118. *See, e.g.*, Cha, *supra* note 2; Emily McFarlan Miller, *Clergy Protest Legislation Targeting Transgender Children in Missouri*, WASH. POST (Feb. 4, 2023, 8:00 AM), https://www.washingtonpost.com/religion/2023/02/04/transgender-children-legislation-missouri/; Greg Garrison, *Alabama Clergy Sign Letter of Support for Transgender Children*, AL.COM (May 6, 2022, 12:45 PM), https://www.al.com/news/2022/05/alabama-clergy-sign-letter-of-support-for-transgender-children.html [https://perma.cc/3TLQ-FSVQ].

119. *See, e.g.*, Elliot Kukla, *Ancient Judaism Recognized a Range of Genders. It's Time We Did, Too.*, N.Y. TIMES (Mar. 18, 2023), https://www.nytimes.com/2023/03/18/opinion/trans-teen-suicide-judaism.html.

120. *See* Emma Green, *Reform Jews: Transgender People Are Welcome Here*, ATLANTIC (Nov. 5, 2015), https://www.theatlantic.com/politics/archive/2015/11/reform-jews-transgender-people-are-welcome-here/414415/ (noting that Reform Judaism's first transgender rabbi was ordained in approximately 2005).

121. *Resolution on the Rights of Transgender and Gender Non-Conforming People*, UNION FOR REFORM JUDAISM, https://urj.org/what-we-believe/resolutions/resolution-rights-transgender-and-gender-non-conforming-people [https://perma.cc/4FP4-23DU] (last visited Jan. 7, 2024).

122. *Id.*

123. *See* Daniel Bogard (@RavBogard), X (Feb. 6, 2023, 9:08 PM), https://twitter.com/RavBogard/status/1622779334342725632; Bogard, *supra* note 3.

124. *See* Anna Skinner, *Church Endorses Transitions for Transgender Children 'at All Ages,'* NEWSWEEK (Aug. 18, 2022, 10:47 AM), https://www.newsweek.com/church-endorses-transitions-transgender-children-all-ages-1734866 [https://perma.cc/9FWN-3C2U].

care with no restriction on movement, autonomy, or timing."[125] The explanation for the resolution further elaborated, "As a Church we celebrate the diversity and glory of God as reflected in every human being."[126]

The Unitarian Universalist Association (UUA) has joined in these beliefs and advocacy as well. In reaction to the passage of S.B. 184 in Alabama, which sought to criminalize provision of gender-affirming care to transgender youth in the state, the UUA's President, Dr. Susan Frederick-Gray, stated, "The Unitarian Universalist faith calls us to respect the interdependent web of the human family, to which we all belong. Trans youth are a part of that web, and they deserve to live in welcoming communities that hold them in love and care, and where they can thrive."[127] In addition, the UUA joined an amicus brief, along with the Union for Reform Judaism and others, arguing against the Alabama law as a violation of the Equal Protection Clause and an infringement upon parental right.[128]

The preceding examples are just a sampling of organized religious efforts aimed at protecting transgender youth and opposing legislation which would limit the accessibility of gender-affirming care. Many clerics have publicly opposed such legislation in connection with their religious beliefs through public advocacy and protests at state capitols throughout the country.[129]

In addition to these clear doctrinal stances, there are also more individualized religious arguments that adherents can make in favor of access to gender-affirming care on religious grounds. A pervasive perception of a male–female binary in the United States might readily be attributed to the high percentage of Christians in the country,[130] and in particular, Christians' dominant presence and influence in

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125. *The Acts of Convention: 2022-D066, Advocate for Access to Gender Affirming Care*, ARCHIVES EPISCOPAL CHURCH, https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resol ution=2022-D066 [https://perma.cc/24Q4-YNRR] (last visited Jan. 7, 2024).

126. *General Convention of the Episcopal Church 2022 Archives Research Report: 2022-D066*, ARCHIVES EPISCOPAL CHURCH, https://www.episcopalarchives.org/sites/default/files/gc_resolutions/2022-D066.pdf [https://perma.cc/8TRD-SA4M] (last visited Jan. 8, 2024).

127. Press Release, Unitarian Universalist Ass'n, Alabama's Anti-Trans Legislation Is Dangerous and Dehumanizing (Apr. 7, 2022), https://www.uua.org/pressroom/press-releases/antitrans-legislation-dangerous [https://perma.cc/J2YV-G2AM].

128. Brief for *Amici Curiae* Unitarian Universalist Association, Union for Reform Judaism, Central Conference of American Rabbis, Southeast Conference of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, *et al.* in Support of Plaintiffs-Appellees at 9, 14, Eknes-Tucker v. Alabama, 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707).

129. *See* Cha, supra note 2; Katie Balevic, *Some Christian Leaders Say It's an 'Abomination' to Use the Bible to Cause Harm with Anti-Trans Laws*, BUS. INSIDER (May 13, 2023, 11:22 AM), https://www.businessinsider.com/christian-leaders-unhappy-abomination-religion-justify-anti-trans-l aws-2023-5 (quoting Rev. Dr. Serene Jones, the president of the Union Theological Seminary, as saying "[a]s a Christian leader, it's horrifying to me that Christianity and the Bible are being used by the religious right to bludgeon people through these many bills"); David Crary, *Wave of Anti-Transgender Bills in Republican-Led States Divides US Faith Leaders*, AP (May 12, 2023, 8:10 AM), https://apnews.com/article/religion-transgender-lgbtq-catholic-southern-baptist-94baa3125be7be46057fa398783509f4 [https://perma.cc/GG3A-54U6] (highlighting an interfaith gathering of Christian, Jewish, and Muslim leaders to show trans youth that "there are faith leaders who've got their back").

130. *See* Yonat Shimron, *Poll: Most Religious Americans Believe There Are Only Two Genders*, RELIGION NEWS SERV. (June 8, 2023), https://religionnews.com/2023/06/08/poll-most-religious-americans-believe-there-are-only-two-genders/ [https://perma.cc/6BGS-X49W] (discussing survey data

policymaking bodies across the country and throughout time.[131] Yet in other cultures and other religions, gender is not merely a binary. For instance, Islam has recognized the presence of third-gender people, known as *Hijra*, for hundreds of years.[132] Hinduism too has recognized a wider range of genders than Western Christianity has.[133] Lastly, Judaism too has a lengthy tradition of acknowledging and embracing genders beyond the male–female binary.[134]

The patterns documented above thus are not merely the result of modern times; rather, they are a part of long-standing tradition of many different religious groups throughout the United States. While the argument advanced in this Note may seem novel in certain respects, there is increasing recognition that American courts' perceptions of what precisely is religion and is worthy of constitutional protection has been an evolving process, moving away from a Christianity-centric framework.[135] With courts increasingly receptive to recognizing the religious free exercise claims of minority religions, those whose religions recognize genders beyond a male–female binary have an effective path forward in arguing that their right to seek gender-affirming care is a part of their religious exercise.

Lastly, there are individualized arguments available to potential religious litigants seeking gender-affirming care. For many, religious belief is highly individualized.[136] Often, religious believers do not fully ascribe to every belief of their particular sect with perfect accuracy, and this is often the case for LGBTQ+ individuals.[137] While courts may inquire into the sincerity of an individual's beliefs,

showing that a majority of Christians in the U.S. believe there are only two genders, along with majorities of Muslims, Buddhists, and Hindus).

131. *See generally* RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE PRESENT (Mark A. Noll & Luke E. Harlow eds., 2d ed. 2007) (surveying the relationship between religion and politics throughout American history).

132. *See* MUSLIM YOUTH LEADERSHIP COUNCIL, I'M MUSLIM AND MY GENDER DOESN'T FIT ME: A RESOURCE FOR TRANS MUSLIM YOUTH, https://advocatesforyouth.org/wp-content/uploads/2019/05/Im-Muslim-My-Gender-Doesnt-Fit-Me.pdf [https://perma.cc/RF3Y-7Q32] (last visited Jan. 7, 2024).

133. *See Hinduism Case Study – Gender*, HARV. DIVINITY SCH. RELIGIOUS LITERACY PROJECT (2018), https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf?m=1597338930 [https://perma.cc/2WR4-9BSL] (last visited Jan. 7, 2024).

134. *See* Kukla, *supra* note 119.

135. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 528, 547 (1993) (siding with a Santería church in its challenge of a local ordinance targeted against its ritual animal sacrifices, and recognizing that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices"); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1023 (2005) (finding no empirical support for "the proposition that minority religions are significantly less likely to secure a favorable hearing from federal judges in the modern era").

136. *See* CLAIRE WANLESS, INDIVIDUALIZED RELIGION: PRACTITIONERS AND THEIR COMMUNITIES 29 (2021) (discussing scholarly documentation of an increased trend of individualized religious belief and practice in recent years).

137. *See, e.g.*, Melissa M. Wilcox, *When Sheila's a Lesbian: Religious Individualism Among Lesbian, Gay, Bisexual, and Transgender Christians*, 63 SOCIO. RELIGION 497, 510 (2002) (discussing "religious individualism" and arguing it "would seem to be an essential strategy for those who value both their LGBT identity and their religiosity").

they may not inquire into the veracity of those beliefs themselves.[138] Therefore, it is possible an individual's interpretation of the dictates of their religion, and what it might require in terms of autonomy, dignity, and respect, for instance, might lead that individual to conclude that their sincerely held religious beliefs require them to obtain gender-affirming care to comply with their religion.

For instance, at an institutional level, the Catholic Church has staunchly opposed gender-affirming care for all individuals, and for minors in particular.[139] However, there is ample dissent within Catholicism regarding such a stance.[140] On Trans Day of Visibility 2023, thousands of Catholic nuns signed onto a statement urging other Catholics "to ensure that the dignity of our trans, nonbinary, and gender-expansive siblings are acknowledged, boldly accepted, and celebrated" and affirming that "[t]he Gospel call of unifying love compels us to actively interrupt harmful interactions in daily life and dismantle the systems that reinforce this rhetoric and violence in society."[141] Individual Catholic youth who seek gender-affirming care thus might conclude for themselves that such care is encouraged, if not required, by their own religious beliefs.

III. ASSERTING RELIGIOUS LIBERTY CLAIMS

In light of the many religious individuals whose free exercise rights are burdened by bans on gender-affirming care, it is important to understand the legal landscape of the Free Exercise Clause as it exists now. Section III.A first explores the history of Free Exercise Clause jurisprudence, from its dramatic narrowing in *Employment Division v. Smith* to its apparent resurgence in the wake of *Fulton v. City of Philadelphia*. Then, Section III.B considers the doctrines of parental right and the mature minor, both of which are eligible for the "hybrid right" exception to *Smith*, making them significant potential tools for religious litigants seeking to challenge bans on gender-affirming care. Lastly, Section III.C analyzes legislative responses to *Smith*—states that adopted religious freedom restoration acts post-*Smith* offer one more avenue to assert a religious liberty claim for potential litigants.

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138. *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1203–04 (2017).

139. *See* COMM. ON DOCTRINE, U.S. CONF. OF CATH. BISHOPS, DOCTRINAL NOTE ON THE MORAL LIMITS TO TECHNOLOGICAL MANIPULATION OF THE HUMAN BODY 10–11, 13 (2023), https://www.usccb.org/resources/Doctrinal%20Note%202023-03-20.pdf [https://perma.cc/3VKU-MEJQ].

140. *See* David Crary, *Rejection or Welcome: Transgender Catholics Encounter Both*, AP (Feb. 26, 2022, 9:49 AM), https://apnews.com/article/lifestyle-religion-united-states-gender-identity-marquette-368a622737d78df1f1f254a1e8e68aaf [https://perma.cc/3LHA-EB7L].

141. Statement, U.S. Fed'n of the Sisters of St. Joseph, Sisters of Providence of Saint Mary-of-the-Woods, Ind. & Sisters of Charity of Leavenworth, In Solidarity: Vowed Catholic Religious Honor Trans Day of Visibility (Mar. 31, 2023), https://cssjfed.org/wp-content/uploads/2023/03/Transgender-Day-of-Visibility-Statement.pdf [https://perma.cc/S4X4-JWND]; *see* Jack Jenkins, *In Letter, Thousands of Catholic Nuns Declare Trans People 'Beloved and Cherished by God*,' WASH. POST (Mar. 31, 2023, 12:14 PM), https://www.washingtonpost.com/religion/2023/03/31/letter-thousands-catholic-nuns-declare-trans-people-beloved-cherished-by-god/ (noting the letter was released after the U.S. Conference of Catholic Bishop's doctrinal statement opposing gender-affirming care).

A. THE RESURGENCE OF THE FREE EXERCISE CLAUSE

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[142] The Free Exercise Clause was considered essential by many of the Founders and a crucial part of debates surrounding the ratification of the Constitution.[143] Yet for many observers, policymakers, and judges, the Free Exercise Clause seems fundamentally at odds with both the Establishment Clause's mandate and other, secular laws.[144] And religious exemptions can especially complicate this delicate balance.[145] This tension has been especially apparent in recent collisions between LGBTQ+ rights and religious objections.[146] What happens when law and religion conflict?

The evolving jurisprudence of the Free Exercise Clause has been a continual push and pull between competing standards of review: minimal rational basis review as compared to strict scrutiny. In general, religious adherents typically seek the higher standard of review, strict scrutiny, for laws which they assert

142. U.S. CONST. amend. I.

143. *See* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 616–22 (2006) (discussing Anti-Federalists' objections to the lack of protection for religious free exercise and the development of the First Amendment's religion clauses in response to these concerns).

144. *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures."). *But see* Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1127–29 (1990) (observing that the Court often ignores that the principles of the Free Exercise and Establishment Clauses are "mutually inconsistent," and arguing that the clauses can be reconciled because "the traditional free-exercise test defines the permissible limits of state accommodation of religion under the establishment clause"). *See generally* KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT (2017) (analyzing the tensions which exist between the Free Exercise Clause and the Establishment Clause in various contexts); Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181 (2018) (exploring the difficulty of reconciling religious freedom protections with nondiscrimination laws).

145. *See, e.g.*, Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1377–81 (2016) (analyzing how religious exemptions can harm third parties, and suggesting factors courts should consider while balancing these competing interests); Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1557–58 (2014) (analyzing the difficulties posed by religious exemptions for vaccine mandates); *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (arguing that exemptions under the Free Exercise Clause lack historical support). *But see* Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. CIN. L. REV. 396, 399 (2022) ("*Smith* rests on a false policy argument: to prevent anarchy the Court must jettison religious liberty. This argument is untrue. . . . [R]eligious freedom does not create anarchy. Far from it, it allows individuals to live together in peace." (footnotes omitted)).

146. *See, e.g.*, Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 729–30 (2019) (observing that "we now have two fairly sizable, competing groups with sharply divergent understandings of the beneficence of traditional religious commitments, especially with respect to sexuality—and neither group seems especially interested in compromise"); Bradley J. Lingo & Michael G. Schietzelt, Fulton *and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 28 (2020) (observing tensions within the Free Exercise Clause "as neutral and generally applicable laws increasingly come into tension with orthodox beliefs of mainstream religious groups").

impair their religious free exercise, while others seek rational basis review, arguing that a lower standard is necessary in ensuring that laws exist to shape and govern a secular society.[147] As the evolution below shows, while today's Court now appears much friendlier to free exercise claims, this was not always the case.

One of the earliest cases in which the Court reached this question was in *Reynolds v. United States*, where a member of the Church of Jesus Christ of Latter-Day Saints who was prosecuted under a state anti-polygamy statute argued that his violation was justified because of his religious beliefs.[148] The Court found that he was not entitled to a religious exemption, arguing that "[t]o permit [plural marriages] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[149] *Reynolds* provided early insight into what happens when religion and law clash.

The Court's next notable encounter with the Free Exercise Clause came in *Sherbert v. Verner*, where the Court entertained a claim by a Seventh Day Adventist who was denied unemployment benefits by the South Carolina state government because she refused to work on Saturdays (the Sabbath of her religion).[150] The Court found that the disqualification from benefits constituted a burden on the claimant's free exercise of religion because she was forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[151] Applying strict scrutiny, the Court found that South Carolina lacked a compelling interest—worries about fraudulent claims by other potential claimants were deemed inadequate.[152]

Next, *Employment Division v. Smith* marked an important turning point for the Supreme Court's free exercise jurisprudence. In *Smith*, two members of the Native American Church, Alfred Smith and Galen Black, were fired from their jobs and denied unemployment benefits because they had ingested peyote for sacramental purposes at a religious ceremony.[153] On appeal, Smith and Black argued that the Oregon statute which resulted in the denial of their benefits violated their First Amendment free exercise rights by making no exception for the sacramental use of peyote, relying upon *Sherbert v. Verner*.[154] However, the Court, in a majority opinion by Justice Scalia, ultimately found they were not entitled to an exception and denied relief.[155]

147. *See, e.g.*, Note, *supra* note 19, at 1178, 1181 (speculating that "clever litigants can and will weaponize religious exemption claims against unpopular laws and regulations," which will be analyzed under strict scrutiny).

148. 98 U.S. 145, 161–62 (1878).

149. *Id.* at 167.

150. 374 U.S. 398, 399–401 (1963).

151. *Id.* at 404.

152. *Id.* at 406–07.

153. Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 874 (1990).

154. *See id.* at 875–76.

155. *Id.* at 890.

In its opinion, the Court confronted the fundamental tension between the Free Exercise Clause and existence in a secular society and observed that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[156] The Court went on to clearly assert that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[157]

The Court emphasized a key exception for the "application of a neutral, generally applicable law to religiously motivated action" where a claim is made under "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."[158] Otherwise, for free exercise claims unconnected to the assertion of another constitutional right, there was no exception to a neutral and generally applicable law.[159]

Overall, *Smith*, though it has less bite today than it did then, remains a key component of understanding the Free Exercise Clause and has not yet been overruled, despite its holding being somewhat weakened.[160] As a result, many commentators are eager to see *Smith* overturned.[161] The most notable recent development of the post-*Smith* landscape came just three years ago. In *Fulton v. City of Philadelphia*, the Court considered a lawsuit by a Catholic foster care agency against the City of Philadelphia.[162] The foster care agency refused to certify same-sex couples to be foster parents on the basis of its religious beliefs in

156. *Id.* at 878–79.

157. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

158. *Id.* at 881 (citations omitted).

159. *Id.* at 882. Notably, the Court took pains to distinguish *Sherbert* and other unemployment insurance cases related to the Free Exercise Clause, emphasizing that the *Sherbert* test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. That series of cases merely "stand[s] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason," thus carving out a second, albeit narrow, limit to *Smith*. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

160. *See, e.g.*, Bradley J. Lingo & Michael G. Schietzelt, *A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise After* Fulton, 57 WAKE FOREST L. REV. 711, 720–23 (2022) (highlighting numerous cases that have "sidestepped" *Smith*).

161. *See, e.g.*, Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 202 ("Either overruling *Smith* or enforcing a serious requirement of general applicability would lead to much better protection for religious liberty."); Holly M. Randall, Note, *From Peyote to Parenthood: Why* Employment Division v. Smith *Must (and Might) Go*, 45 OKLA. CITY U. L. REV. 66, 67 (2020) ("Restoring the Free Exercise Clause would require the Court to overrule *Employment Division v. Smith* – 'one of the most heavily criticized constitutional decisions of recent times.'" (quoting MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 145 (Vicki Been et al. eds., 2d ed. 2006))); Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 875 (2022) ("*Smith* is indeed broken and it needs fixing, and it cannot be satisfactorily fixed from the inside.").

162. 593 U.S. 522, 526–27 (2021).

violation of a nondiscrimination requirement in its contract, prompting Philadelphia to stop referring children to the agency and condition the renewal of its contract with the agency on the agency's agreement to begin certifying same-sex couples.[163] The agency sued for a violation of its First Amendment rights under the Free Exercise Clause.[164] Ultimately, in a majority opinion by Chief Justice Roberts, the Court found that the nondiscrimination requirement in the contract was not "generally applicable" because it included individualized exemptions, to be made available at the "sole discretion" of a government official.[165] As a result, the Court applied strict scrutiny and found that Philadelphia's asserted interests of "maximizing the number of foster parents, protecting the city from liability, and ensuring equal treatment of prospective foster parents and foster children" were not sufficiently compelling to withstand strict scrutiny, particularly since the contract provided for secular exemptions from the nondiscrimination provision.[166]

The aftermath of *Fulton* has led commentators to speculate that religious exemptions may be a renewed litigation strategy against laws that litigants wish to oppose or undermine.[167] Zalman Rothschild has observed that *Fulton* has transformed the Free Exercise Clause into a "religious equality" question that is "potentially more powerful than free exercise ever was when it was treated as a liberty right protecting against incidental burdens on religion," suggesting significant opportunities for religious litigants who wish to make use of *Fulton*'s holding.[168] Ultimately, the crucial takeaway for potential religious litigants appears to be that the result of *Fulton* indicates that while *Smith* has not yet been overturned, its reach appears to be far less than it once was.[169] Policymakers must keep a careful eye to secular exemptions in their laws, setting up the landscape for a potentially tumultuous series of free exercise claims, as is explored *infra* in Part IV.[170]

B. ASSERTING A HYBRID RIGHT UNDER *SMITH*

Minors and their parents alike have the potential to assert hybrid rights under *Smith* by pairing their assertions of a religious liberty claim "in conjunction with other constitutional protections."[171] This Section first discusses the background

163. *Id.* at 530–31.

164. *Id.* at 531.

165. *Id.* at 535–36.

166. *Id.* at 541–42.

167. *See, e.g.*, Block, *supra* note 110, at 127.

168. Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1106 (2022).

169. However, it does not appear that a majority of the Court is ready to overturn *Smith* at this particular time. *See Fulton*, 593 U.S. at 543 (Barrett, J., concurring) ("I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime . . . ."); *see also* Gader Wren, Comment, *A Continued Sign of the Court's Unwillingness to Overrule* Smith, 7 NEV. L.J.F. 1, 3–5 (2023) (noting Justice Barrett and Justice Kavanaugh's reluctance to overturn *Smith* in *Fulton*, and suggesting that their questions during oral arguments in *303 Creative LLC v. Elenis* "further suggest that [they] remain reluctant" to overturn).

170. *See* Block, *supra* note 110, at 127–32; Note, *supra* note 19, at 1178.

171. Emp. Div., Dept. of Hum. Res. v. Smith, 494 U.S. 872, 881 (1990).

and development of the doctrine of parental right, and next the doctrine of the mature minor in medical decisionmaking, to show how each of these doctrines creates a hybrid right enabling litigants to obtain strict scrutiny review under *Smith*.

1. Parental Right

The doctrine of parental right is a crucial tool for litigants: under *Smith*, pairing a claim under the Free Exercise Clause with an assertion of parental right means that courts must apply strict scrutiny, boosting their chances of success. Parental right is deeply rooted in the Fourteenth Amendment's Due Process Clause.[172] The doctrine of parental right has enjoyed a recent resurgence in the context of education, with several states codifying parental bills of rights.[173] However, here, in the context of medical decisionmaking, parental right is a murky doctrine, with most cases arising out of a parental refusal to provide needed medical care to a child.[174] There, parental right is arguably at its weakest. However, overall, there is a long-standing tradition of parental right that has been consistently recognized by the Court. In *Pierce v. Society of Sisters*, the Court observed, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[175] When coupled with a parent's assertion of a First Amendment free exercise right, the parent creates the hybrid right recognized in *Smith* that enables parents to challenge generally applicable and facially neutral laws which adversely affect their religious liberties.[176]

Perhaps the most important encapsulation of parental right comes from *Wisconsin v. Yoder*, in which Amish parents argued that their criminal convictions, which resulted from failure to comply with a Wisconsin compulsory school attendance statute, violated their rights under the Free Exercise Clause.[177] The Court recognized that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now

172. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that the Due Process Clause's liberty protections extend to the right "to direct the education and upbringing of one's children" (first citing Meyer v. Nebraska, 262 U.S. 390 (1923); and then citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925))); *see also* Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 133–37 (2018) (discussing the Court's parental right jurisprudence, and critiquing its failure to specify a level of scrutiny); Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2531 (2022) (observing that "[t]he Court rationalized [parental] right in terms of individual liberty: citizens' freedom from excessive state intrusion in their private lives").

173. Samantha R. Foran, Comment, *Parents' Rights or Parents' Wrongs?: The Political Weaponization of Parental Rights to Control Public Education*, 2022 WIS. L. REV. 1513, 1523–25.

174. *See* B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After* Employment Division v. Smith, 32 CARDOZO L. REV. 1857, 1861 (2011) ("Sometimes courts will order the [medical] intervention and sometimes not, and it is difficult to discern any principle that dictates which course a court will follow.").

175. 268 U.S. 510, 535 (1925).

176. *See Smith*, 494 U.S. at 881.

177. 406 U.S. 205, 207–09 (1972).

established beyond debate . . . ."[178] Applying strict scrutiny, the Court ultimately held in the parents' favor, finding that the state's *parens patriae* interest in ensuring that children received a formal education until age sixteen was insufficiently compelling in the face of the Amish parents' religious interests.[179]

As debates around parental right intensify with increased focus on the content of education children receive in American public schools, *Yoder* remains a significant case. Some commentators have observed and criticized the pedestal upon which the Court seems to elevate the Amish faith and the lack of inquiry into the Amish children's interests at stake, questioning whether a less favored religion would have received such deferential treatment.[180] While those concerns are notable, the recognition of the central role that parents have in shaping the lives of their children remains a key principle in potential assertions of parental right.

2. The Mature Minor

A mature minor may also assert a hybrid right under *Smith*: bodily autonomy in medical decisionmaking,[181] coupled with an assertion of a free exercise claim. Medical decisionmaking does not always fall to the parents. Courts have recognized a mature minor doctrine, understanding that some minors are capable of making important, even life-or-death medical decisions for themselves, without their parents' consent.[182] In contrast to the notion of parental right typified in *Yoder*, courts have also recognized the rights of mature minors in certain instances in the context of medical decisionmaking, illustrating the many competing

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178. *Id.* at 232.

179. *Id.* at 234.

180. *See, e.g.*, Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 134–36 (William Aiken & Hugh LaFollete eds., 1980); David Gan-wing Cheng, Wisconsin v. Yoder*: Respecting Children's Rights and Why* Yoder *Should Be Overturned*, 4 CHARLOTTE L. REV. 45, 48 (2013); Richard J. Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of* Wisconsin v. Yoder, 38 NOMOS 365, 386 (1996) ("When Christian Scientists go to court to try to get permission to withhold vital medical care from their children on religious grounds they appropriately lose, and that does not trouble our intuitions either . . . . *Yoder* presents the same kind of issue."); Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 806 (1996) (observing that critics of *Yoder* argue that the opinion is "not neutral toward[] religion, and it does not appear to be 'principled'").

181. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (observing "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," which "may be inferred" from the Court's past decisions).

182. *See, e.g.*, *In re* Green, 307 A.2d 279, 280 (Pa. 1973) (upholding a seventeen-year-old's decision to refuse a spinal fusion treatment due to a combination of his religious beliefs, the length of his hospital stay, and the uncertainty that treatment would be successful); Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827, 837 (W. Va. 1992) (recognizing that "the mature minor exception is part of the common law rule of parental consent of" West Virginia, but that "there is no 'hard and fast' rule that would provide a particular age for determining a mature minor"); Cardwell v. Bechtol, 724 S.W.2d 739, 755 (Tenn. 1987) ("Addition of the mature minor exception . . . is consistent with the evolution of the common law of torts in this State . . . .").

interests that may be at stake in a single case. For transgender youth who are at odds with their parents over what the most appropriate course of medical treatment may be, this doctrine is especially important.[183]

Minor decisionmaking in medical cases stems from the Supreme Court's holding in *Bellotti v. Baird*, where the Court struck down a Massachusetts statute that required a minor to obtain the consent of both her parents before receiving an abortion.[184] In its opinion, the Court acknowledged that minors' constitutional rights are weaker than adults, highlighting three rationales in particular: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[185] Yet minors are not entirely lacking in constitutional rights. Ultimately, the Court struck down the statute because it required parental consent even "if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision."[186] In such circumstances, the minor "is entitled to make her abortion decision independently."[187]

In the aftermath of *Bellotti*, mature minor cases have often emerged in the context of minors refusing life-saving treatment for religious reasons. For instance, in the case *In re E.G.*, a minor chose to refuse life-saving blood transfusions on the basis of her beliefs as a Jehovah's Witness, and a court found her to be a mature minor capable of making such a decision.[188] In other cases, however, minors have been found not to be mature in their right to make medical decisions, even when their objections were based in religion.[189]

It is important to note the life-or-death context in which many mature minor medical cases occur, raising the stakes of the litigation and potentially prompting judges to err on the side of preserving life, even over that minor's objection.[190] In other cases, where the medical decision to be made is not life-or-death and may more readily be recognized as in the minor's best interest from the perspective of the courts, it is possible that courts may impose a lower bar.[191] For instance, in *Bellotti* the Court made a point of emphasizing that an abortion was most likely in the minor's best interest even if she was immature, due to the highly detrimental effects of becoming a teenage mother, and of course, the hypocrisy of

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183. *See* Emily Ikuta, Note, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 182–83 (2016) ("[T]he mature minor doctrine . . . is the best option by which transgender adolescents can obtain treatment for their gender dysphoria.").

184. 443 U.S. 622, 625, 651 (1979).

185. *Id.* at 634.

186. *Id.* at 650.

187. *Id.*

188. 515 N.E.2d 286, 287, 291 (Ill. App. Ct. 1987).

189. *See, e.g.*, *In re* Long Island Jewish Med. Ctr., 557 N.Y.S.2d 239, 243 (Sup. Ct. 1990).

190. *See, e.g.*, Josh Burk, Note, *Mature Minors, Medical Choice, and the Constitutional Right to Martyrdom*, 102 VA. L. REV. 1355, 1367–68 (2016) (discussing varying approaches across state courts regarding life-and-death situations in minors' medical decisionmaking).

191. *See, e.g.*, Leigh Johnson, Comment, *My Body, Your Choice: The Conflict Between Children's Bodily Autonomy and Parental Rights in the Age of Vaccine Resistance*, 89 U. CHI. L. REV. 1605, 1640 (2022) (arguing that minors have "a qualified autonomy right to consent to vaccines" but that "a child does not have a right to *refuse* vaccines against the wishes of parent and state").

imposing teenage motherhood and the responsibilities of child-rearing on a teenager deemed too immature to decide whether to obtain an abortion.[192]

From this perspective under the mature minor doctrine, courts should favor permitting transgender minors to decide to obtain gender-affirming care, even in the absence of parental consent, because the consequences of withholding gender-affirming care can be so detrimental.[193] While not every minor will satisfy the requirements of the mature minor doctrine, for those who do, assertion of their rights to choose gender-affirming care coupled with their religious free exercise claims can provide an avenue to obtaining healthcare even over the objection of their parents.

C. USING STATE RELIGIOUS FREEDOM RESTORATION ACTS POST-*SMITH*

A last tool for litigants exists in statute. When *Smith* was handed down, it upended Free Exercise Clause jurisprudence. The backlash to *Smith* was swift and intense, with Congress launching a bipartisan effort to reinstate a strict scrutiny standard for free exercise claims with the Religious Freedom Restoration Act (RFRA).[194] While RFRA was soon struck down as it applied against the states due to a lack of congressional authority to implement it under the Fourteenth Amendment,[195] RFRA remains in effect as it pertains to the federal government, and many states went on to adopt their own versions of RFRA under their respective state constitutions.[196]

Notably, seventeen of the twenty-two states that currently have bans on gender-affirming care have a state-level version of RFRA.[197] These state-level RFRAs have been an important tool in bolstering the rights of religious minorities in particular.[198] In the years since the immediate aftermath of *Smith*, state RFRAs have devolved into "contentious and well-publicized battles" that "have

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192. *See Bellotti*, 443 U.S. at 642 ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . [H]aving a child brings with it adult legal responsibility . . . ." (citation omitted)).

193. *See supra* notes 37–39 and accompanying text; *see also* Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and* Roper v. Simmons, 56 UCLA L. REV. 725, 741–42 (2009) (arguing that the Court's criminal law jurisprudence respecting adolescents "supports a presumption in favor of respecting a medical provider's decision to provide hormone treatment to a minor without parental consent" under the mature minor doctrine).

194. *See generally* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531 (1993) (describing responses to *Smith* by various interest groups and Congress, including the passage of RFRA).

195. *See* City of Boerne v. Flores, 521 U.S. 507, 511–12 (1997).

196. *See supra* Section II.A; *see also Federal & State RFRA Map*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/2PMY-C96G] (last visited Jan. 8, 2024) (tracking state RFRAs, as well as states which require strict scrutiny review in their state constitutions).

197. The seventeen states are Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *See supra* Section II.A.

198. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165 (2016) ("RFRA and state RFRAs have been valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations.").

fluctuated from universal acclaim to extreme toxicity," but notwithstanding recent political tensions, RFRAs remain an important tool for religious litigants in states where they exist.[199]

IV. SEEKING RELIGIOUS EXEMPTIONS FROM GENDER-AFFIRMING-CARE BANS

What would a free exercise claim against a ban on gender-affirming care look like? With litigants' ultimate goal being to gain exemptions from these bans, the best route forward is to obtain the highly deferential strict scrutiny standard of review. First, Section IV.A explores three potential paths to strict scrutiny: using statutory exemptions pursuant to *Fulton*, asserting the hybrid rights of parental right or the mature minor in conjunction with a free exercise claim pursuant to *Smith*, and challenging under state RFRAs. Ultimately, all three approaches provide viable routes to strict scrutiny, and moreover, the bans are unlikely to withstand the heavy burden that the government must meet under strict scrutiny. Next, Section IV.B considers the potential shortcomings of this approach and how litigants might avoid them, concluding that using the hybrid rights exception of *Smith* may be a more stable foundation for litigants than pursuing exemptions under *Fulton*.

A. GETTING TO STRICT SCRUTINY

Transgender youth and their parents who have had their religious free exercise infringed by bans on gender-affirming care have three potential routes to obtaining a review under the favorable strict scrutiny standard: first, by showing that they are entitled to an exemption under *Fulton* due to the presence of other secular exemptions in the disputed statutes; second, by asserting a hybrid right under the Free Exercise Clause in conjunction with either the doctrines of parental right or the mature minor; and last, by making a claim under state RFRAs which replicate the high bar of strict scrutiny. Once litigants manage to arrive at strict scrutiny through one of these routes, a challenge to these bans is likely to be successful—strict scrutiny is an especially high bar, and courts are unlikely to find that states have a compelling interest in banning gender-affirming care, particularly in light of the factual misapprehensions upon which many of the bans are founded.

First, minors and their parents alike can obtain strict scrutiny by arguing that they are entitled to a Free Exercise Clause exemption from the ban because the ban makes exceptions for others. Under *Fulton*, a law is not neutral and generally applicable where discretionary, individualized, secular exemptions are permitted.[200] Here, these bans on gender-affirming care single out transgender youth not to receive such healthcare, while continuing to make exceptions for nontransgender

199. Paul Baumgardner & Brian K. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 ALB. L. REV. 1385, 1408 (2018).

200. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 535 (2021).

youth.[201] For instance, taking Tennessee's law as a typical example, the law permits medical procedures "to treat a minor's congenital defect, precocious puberty, disease, or physical injury."[202] It moreover permits such procedures if the administration of a medical procedure began prior to the law's effective date and "in the physician's good-faith medical judgment, based upon the facts known to the physician at the time, ending the medical procedure would be harmful to the minor."[203] Therefore, individualized, circumstance-specific exceptions are made, further bringing the law into the ambit of *Fulton*. The disparities which the law creates mean that the law is no longer neutral and generally applicable, thus falling outside of the realm of *Smith* as narrowed by *Fulton*.[204] Therefore, strict scrutiny applies to minor litigants' religious claims against these bans.

For parents whose support of their transgender child is motivated by religious belief, the opportunity to assert a "hybrid" parental–religious right as recognized in *Smith* and discussed *supra* in Part III.B can also be a means to obtain strict scrutiny of these bans on gender-affirming care and ultimately obtain treatment for their child.[205] While latitude in parental decisionmaking for children's medical decisions is not unlimited, it is broad.[206] Here, gender-affirming care is consistently endorsed by leading pediatric medical authorities in the United States and thus likely falls within a permissible scope for parental decisionmaking.[207] Therefore, parental litigants will likely be able to obtain strict scrutiny before a court as well. Then, the analysis becomes the same as it is for the minor litigants above—the laws are unlikely to withstand strict scrutiny.

For minor litigants who may satisfy the strictures of the mature minor doctrine, the path forward largely resembles assertions of parental rights, although minors may face heightened skepticism from courts about their maturity to engage in medical decisionmaking for themselves. In many cases where minors asserted their maturity to decide for themselves with respect to medical treatment, courts have found them to be immature. To successfully use this route, a minor litigant will likely need to be able to demonstrate a strong grasp of the treatment sought and its potential effects, as well as be able to articulate to the court their independent reasoning for seeking gender-affirming care. It is likely many minors will not meet this burden, and thus will have to rely on the other paths highlighted in this Part, but for those who have unsupportive parents or guardians, the mature minor doctrine offers a helpful route toward obtaining strict scrutiny review.

One final avenue to strict scrutiny for religious litigants (both minors and their parents) is the use of state RFRAs. In all but five states that have enacted bans on

201. *See supra* Section II.A. Generally, state bans on gender-affirming care contain exceptions for minors with congenital birth defects or a physical injury.

202. TENN. CODE ANN. § 68-33-103(b)(1)(A).

203. *Id.* § 68-33-103(b)(1)(B), (b)(3).

204. *See Fulton*, 593 U.S. at 544 (Barrett, J., concurring) ("[T]he government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny.").

205. *See* Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 881 (1990).

206. *See supra* notes 182–83 and accompanying text.

207. *See supra* Section I.A.

gender-affirming care, the states have also enacted a state-level RFRA.[208] Aside from Georgia, Iowa, Nebraska, North Carolina, and Utah, which lack RFRAs,[209] religious litigants in the affected states can assert a cause of action under their state's RFRA, arguing that their religious free exercise has been substantially burdened and the law requires an exemption. This tactic has also recently been used by litigants challenging states' abortion bans, with several cases currently pending and one recently succeeding.[210] Using this abortion litigation as a roadmap, religious litigants may potentially be successful asserting claims under these state RFRAs.

After litigants arrive at a strict scrutiny standard of review, it is highly unlikely that a disputed ban will survive intact. According to the Court, "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests."[211] Because secular exceptions are made, it is likely that these bans will not withstand strict scrutiny under the principles espoused by *Lukumi*.[212] There, the Court clarified that under its "strict scrutiny jurisprudence . . . 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[213] Montana's law, taken as an example based on its similarity to outside groups' model legislation, permits exceptions to its general ban on gender-affirming care for nontransgender youth.[214] In short, the law permits the same conduct that it would otherwise characterize as deeply

208. *See supra* Table 1.

209. *See supra* Table 1; BECKET, *supra* note 196.

210. *See* Brandon Smith, *Lawsuit Uses Religious Freedom Restoration Act to Challenge Indiana's Abortion Ban*, WFYI INDIANAPOLIS (Sept. 8, 2022), https://www.wfyi.org/news/articles/lawsuit-uses-religious-freedom-restoration-act-to-challenge-indianas-abortion-ban [https://perma.cc/9YF2-2C3J]; Yonat Shimron, *Jewish Women Sue Over Kentucky Abortion Laws, Citing Religious Freedom*, WASH. POST (Oct. 14, 2022, 4:30 PM), https://www.washingtonpost.com/religion/2022/10/10/kentucky-abortion-law-2022-jewish-lawsuit/. In the Indiana case, the Indiana court of appeals in April 2024 affirmed the trial court's preliminary injunction to prevent enforcement of the abortion ban against the plaintiffs, concluding "that Plaintiffs' abortion when directed by their sincere religious beliefs is their exercise of religion" under the state's RFRA. Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, No. 22A-PL-2938, 2024 WL 1452489, at *23, 30 (Ind. Ct. App. Apr. 4, 2024); *accord* Marilyn Odendahl, *Injunction Upheld: Indiana Court of Appeals Affirms RFRA Challenge to Abortion Ban, Seeks Narrower Ruling*, IND. CITIZEN (Apr. 5, 2024), https://indianacitizen.org/injunction-upheld-indiana-court-of-appeals-affirms-rfra-challenge-to-abortion-ban-seeks-narrower-ruling/ [https://perma.cc/TS7N-9XPR]. For further background on this litigation strategy, see Alice Miranda Ollstein, *The Sleeper Legal Strategy That Could Topple Abortion Bans*, POLITICO (June 21, 2023, 7:30 PM), https://www.politico.com/news/2023/06/21/legal-strategy-that-could-topple-abortion-bans-00102468 [https://perma.cc/R7JF-UPXH] (noting that "legal experts see the state-level religious challenges as one of the best chances abortion-rights advocates have to chip away at [abortion] bans").

211. Fulton v. City of Philadelphia, 593 U.S. 522, 541 (2021) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

212. *Lukumi*, 508 U.S. at 546–47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

213. *Id.* at 547 (second omission in original) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and in judgment)).

214. *See supra* notes 97–100 and accompanying text.

harmful to minors, seriously undermining the state's asserted compelling interest. Thus, religious youth and their parents have an effective case against these bans on gender-affirming care under the Free Exercise Clause through any of these three routes.

B. POTENTIAL SHORTCOMINGS OF FREE EXERCISE CLAIMS

While Free Exercise Clause claims could prove a robust vehicle for preserving access to gender-affirming care for transgender youth, there are also drawbacks to this potential approach that are worth addressing. This Note considers first that this strategy will be inaccessible to those who are not religious or whose religion does not support gender-affirming care. Next, states may remove exemptions from the statutes which would otherwise draw them within the ambit of *Fulton*. Lastly, although strict scrutiny is a high bar, it is possible that the bans may withstand strict scrutiny. Potential litigants will need to be aware of these potential pitfalls in order to effectively strategize.

First, and perhaps most obviously, a free exercise claim can only be asserted if one has a religious belief or practice that is being violated. Philosophical, social, and ethical beliefs generally are insufficient to assert a free exercise claim.[215] For transgender youth and their parents who are non-religious, or who do not perceive a connection between their religious beliefs and seeking out gender-affirming care, they may lack a claim under this theory.

Next, with regard to claims of minors and their parents asserting their religious free exercise rights under the *Fulton* analysis, which looks for discretionary exemptions and exceptions, states potentially have a straightforward workaround—removing the exemptions which laws potentially make available.[216] Legislators may be reluctant to remove these exemptions and for valid reasons—they would harm minors who require hormone therapy and other medical care (though of course, these are the same needs that transgender youth possess, underscoring the discriminatory, hypocritical nature of these laws in the first place).[217] While removal of such exemptions may make revisions to these laws a difficult if not impossible task, it remains one potential danger of proceeding under a minor's assertion of their rights under *Fulton*. Therefore, assertions of parental right, the mature minor doctrine, and the use of state RFRAs may be more effective strategies to challenge these bans successfully, since they apply regardless of whether a disputed statute contains a secular exemption.

Lastly, there remains the danger that bans on gender-affirming care would simply be upheld even with the application of strict scrutiny as the least restrictive means for a compelling state interest. Though strict scrutiny is a high bar to clear,

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215. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165 (1965).

216. *See Fulton*, 593 U.S. at 536.

217. *See* Jessica Kremen, Coleen Williams, Ellis P. Barrera, Rebecca M. Harris, Kerry McGregor, Kate Millington, Carly Guss, Sarah Pilcher, Amy C. Tishelman, Charumathi Baskaran, Jeremi Carswell & Stephanie Roberts, *Addressing Legislation That Restricts Access to Care for Transgender Youth*, PEDIATRICS PERSPS., May 2021, at 1, 2.

it is not insurmountable, and courts have denied religious exemptions even under strict scrutiny review in other circumstances.[218] State legislators' assertions of dangers to children and irreparable harms from gender-affirming care have been discredited by many, but it is possible for a court to lend such claims more credence than they deserve.[219] In such an instance, defenders of the bans will argue that a minor can simply seek gender-affirming care upon turning eighteen years old, despite the harms inflicted during the time that the minor waits and the benefits of providing gender-affirming care as early as desired.[220] The best strategy to minimize this danger is likely a proactive one. By relying upon the scientific consensus in favor of gender-affirming care, as discussed *supra* in Section I.A, litigants and their advocates will have powerful arguments available to them to rebut any such compelling interest arguments.

Overall though, despite the difficulties that may exist with asserting a free exercise claim against bans on gender-affirming care, it remains a worthwhile avenue for vindication of rights for advocates and families to explore. Being cognizant of these potential pitfalls and minimizing these risks by relying upon the assertion of hybrid rights and state RFRA claims may help to shore up this litigation. Ultimately, attempts to restrict the rights of transgender youth are unlikely to stop any time soon, and making use of the Free Exercise Clause as a way to preserve these religious beliefs may prove to be an important tool in the future.

CONCLUSION

Efforts to restrict access to gender-affirming care for minors in state legislatures throughout the country are a disturbing trend with devastating potential consequences. As groups undertake litigation efforts to halt these bans, religious liberty claims under the Free Exercise Clause may offer a powerful avenue for religious LGBTQ+ youths and their parents to assert their rights and obtain the medical care they need. Through minor litigants' use of secular exemptions in statutes and parents' assertions of parental rights in conjunction with Free Exercise Clause claims, courts will have to apply strict scrutiny and will be unlikely to find the statutes to be sufficiently narrowly tailored to a compelling governmental interest. For transgender youth and their parents, this may offer one possible path forward. Rabbi Daniel Bogard, who has advocated against

218. *See* Shlomo C. Pill, *The False Promise of Expanded Religious Liberty Rights After the COVID-19 Cases and* Fulton v. City of Philadelphia, 31 WM. & MARY BILL RTS. J. 825, 836 (2023).

219. *See, e.g.*, Samuel Dubin, Megan Lane, Shane Morrison, Asa Radix, Uri Belkind, Christian Vercler & David Inwards-Breland, *Medically Assisted Gender Affirmation: When Children and Parents Disagree*, 46 J. MED. ETHICS 295, 295–96 (2020).

220. *See, e.g.*, Roberto L. Abreu, Jules P. Sostre, Kirsten A. Gonzalez, Gabriel M. Lockett, Em Matsuno & Della V. Mosley, *Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures' Perspective*, 36 J. FAM. PSYCH. 643, 644 (2022); Kacie M. Kidd, Gina M. Sequeira, Taylor Paglisotti, Sabra L. Katz-Wise, Traci M. Kazmerski, Amy Hillier, Elizabeth Miller & Nadia Dowshen, *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. ADOLESCENT HEALTH 1082, 1085–86 (2021).

antitrans bills in Missouri and is raising a transgender son, has said that he once believed that "progress was possible, and even if we weren't winning, we would win eventually," but now, "[i]t feels like we've lost and the levers of power have been stolen."[221] While religious liberty claims cannot alone defeat the onslaught of anti-LGBTQ+ bills overtaking policymaking bodies throughout the United States, this Note shows how these claims can be a helpful tool in preserving individual rights and liberties.

221. Cha, *supra* note 2.