THE RIGHT TO "BE WHOLE": A JEWISH RELIGIOUS LIBERTY ARGUMENT FOR GENDER AFFIRMING CARE FOR MINORS

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INTRODUCTION

Religious freedom is at the core of American democracy. It is considered so basic of a right that it is enshrined explicitly in the First Amendment of the United States Constitution, namely, the Free Exercise and Establishment Clauses. These clauses guarantee, respectively, the freedom to exercise one's religious beliefs and freedom from government establishment of religion.[1] While there are limitations to these clauses, particularly as they interfere with other rights and freedoms, they persist as fundamental principles of freedom in our nation. Further, many states, such as Florida, maintain their own laws to ensure all American citizens may abide by the religious beliefs and practices of their choosing, free from state interference.[2]

A developing argument suggests that religious liberty includes the ability to restrict the practices of some religions. Most notably, fundamentalist Christian groups have utilized their significant political power to further political agendas that align with their worldview, even at the expense of the rights and freedoms of other groups and individuals.[3] Reproductive liberty and LGBTQ+ rights are some of the more significant legal issues that have been mischaracterized as in tension with religious freedom.[4] While both issues are often viewed as "at odds" with religious liberties, particularly the Free Exercise Clause,[5] this is a fallacy. Faith, as a concept, is not a barrier to the rights of women, LGBTQ+ individuals, or any other minority groups. In fact, the interests of communities of faith are often injured, rather than supported, by policies purported to protect religious interests.[6] Religion serves to provide individuals with guiding principles through which to live their lives and make sense of the world. For many, their faith offers a strong moral compass that drives their life, service, and work. Faith unites communities in worship and service, offering outlets for dealing with some of life's greatest challenges. It follows that different religions, or even groups within the same faith, represent a wide range of

[1] U.S. CONST. amend. I.

[2] FLA. STAT. § 761.03 (West 2025).

[3] Kyle J Palmer, *Conscience-Based Objections to Transgender Health Care in Ohio* 48 DAYTON L. REV. 149, 176-77 (2023); *see also* Phoebe Petrovic, *The Genesis of Christian Nationalism*, PROPUBLICA (Oct. 26, 2024), https://projects.propublica.org/christian-nationalism-origins/ [https://perma.cc/J9RE-KJ59].

[4] *See e.g.,* Jamie Reinah, *LGBTQIA+ Public Accommodation Cases: The Battle Between Religious Freedom and Civil Rights*, 90 FORDHAM L. REV. 261 (2021).

[5] *See e.g.,* Masterpiece Cakeshop Ltd., v. Colo. C. R. Comm'n, 584 U.S. 617 (2018).

[6] *See e.g., The Interfaith Alliance*, INTERFAITH ALLIANCE, https://www.interfaithalliance.org [https://perma.cc/ZE4Y-WAH6]. *See also* Anonymous v. Individual Members of the Med. Licensing Bd. of Ind. 2022 Ind. Super. LEXIS 898 (Ind. Super. Ct. 2022) (arguing that the Indiana abortion ban violates Jewish religious Free Exercise.).

thoughts, perspectives, and interpretations of the rules and principles laid out by their respective beliefs. Many religions, including Christianity, boast long and storied histories of fighting for the rights of the marginalized.[7] Further, many religions, Judaism included, have within both their history and modern practice, a more expansive view of gender and sex than is defined by laws and executive orders purportedly establishing rigid and immutable gender categories.[8] However, modern interpretations of the true meaning and purpose of "religious freedom" have become warped by the diffuse institution of "Christian Nationalism," which has a significant impact on the United States government.[9] Many groups claim to support "religious freedom," when in actuality they use it as a pretext to promote a highly specific agenda.[10] These groups do not genuinely support the freedom of all people to freely practice their religion, but instead seek to deny the rights of others to practice (or refrain from practicing) their own systems of beliefs,[11] and enforce their own values and faith where it is unwelcome.

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[7] *See e.g., The Interfaith Alliance*, OUR PRESIDENT AND CEO, https://interfaithalliance.webflow.io/team/rev-paul-brandeis-raushenbush [https://perma.cc/XYA8-52HK]. Reverend Brandeis Raushenbush, the current President and CEO of the Interfaith Alliance, is a direct descendant both of Supreme Court Justice Louis Brandeis and Walter Rauschenbusch, a Christian reverend and theologian famous for his beliefs in social justice and equality, inspiring the likes of Dr. Martin Luther King Jr. and Desmond Tutu. *Walter Rauschenbusch*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Walter_Rauschenbusch [https://perma.cc/L9N9-QSWD].

[8] *See Trans Halakha Project*, SVARA, https://svara.org/trans-halakha-project [https://perma.cc/5CZR-2848]. *See, e.g.*, *Hinduism Case Study: The Third Gender and Hijras*, HARV. DIVINITY SCH. RELIGIOUS LITERACY PROJECT (2018), https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf?m=1597338930 [https://perma.cc/L3VE-W2R8].

[9] *See generally* Petrovic, *supra* note 3.

[10] *See Legislative Agenda*, FLA. FAMILY ACTION, https://floridafamilyaction.org/legislative-agenda [https://perma.cc/Z5QQ-ZK3F] ("The legislative arm of the Florida Family Policy Council, is committed to protecting and defending life, marriage, family and *religious liberty*.") (emphasis added). Family and religion are two of the seven spheres that the New Apostolic Reformation ("NAR") has called for Christians to "conquer", also known as the "Seven Mountains Mandate." *Petrovic*, *supra* note 3.

[11] *See e.g.*, Gerald Thompson, *A Christian Nation*, LONANG INSTITUTE, https://lonang.com/commentaries/foundation/framework-of-law/studies/a-christian-nation [https://perma.cc/G663-ZGC6]. LONANG institute is one of the cosigners of an amicus brief filed in favor of Florida Bill SB 254, which is the subject of this Note. In response to the question "should we establish religion?" Thompson writes:

> Both England and America have a history of religious establishments. But, what is an 'establishment' of religion? For present purposes, let us use the definition of an establishment as where a nation legally prescribes matters of redemption law. This legal prescription is often referred to as making a particular religion the official national religion, but in fact, it may take a variety of forms, any number of which may be used in combination with each other. Some examples of religious establishments used in England and America include the following: 1) the nation has a legally prescribed religious faith, that is, civil law prescribes what people must believe about God; 2) the national welfare is said to depend on the maintenance and preservation, or avoidance, of a particular religious faith (in the case of England, the denial of papism); 3) civil privileges (such as voting or holding public office) are accorded to citizens professing a specific religious faith, but denied to others; or

One of several laws touted by so-called "religious freedom" activists is Florida Senate Bill 254 ("SB 254"), which has been described as an "extreme gender affirming care ban" by the Human Rights Campaign.[12] Despite the medical community's consensus that gender-affirming care is in the best interest of transgender patients,[13] this law would criminalize doctors for providing this care to transgender patients of all ages.[14] SB 254 has already faced several legal challenges, notably from parents of transgender youths who fear for the mental and physical well-being of their children.[15] These parents argue that the law forces children to go through puberty in a manner that runs counter to their understanding of themselves and leaves them without access to life-saving medical care.[16] The negative impact of banning healthcare for transgender youth is dire. Gender dysphoria[17] can be debilitating: 56% of gender non-conforming youth report suicidal thoughts, and 31% have attempted suicide.[18] Studies from Columbia and Harvard

> 4) there is a jurisdictional merging of church and civil spheres (that is, civil punishments are meted out for religious offenses).Of course, the main problem with legal establishments of religion in America is that they have been utterly rejected as a means of promoting public virtue. All of the states which formerly had established religions abandoned them by the 1830's. Further, the First Amendment to the U.S. Constitution expressly denies that Congress may make any law 'respecting an establishment of religion.' But, what does LONANG say?" this passage is proceeded by several readings and ideological questions from Christian scripture, including whether the First Amendment is "unbiblical."

Id. Further, the same document makes oblique, inconclusive statements regarding whether a "Christian nation" can or should be "tolerant" of other religions. *Id.*

[12] HRC Staff, *Gov. DeSantis Signs Slate of Extreme Anti-LGBTQ+ Bills, Enacting a Record-Shattering Number of Discriminatory Measures Into Law*, HUM. RTS. CAMPAIGN (May 17, 2023) https://www.hrc.org/press-releases/gov-desantis-signs-slate-of-extreme-anti-lgbtq-bills-enacting-a-record-shattering-number-of-discriminatory-measures-into-law [https://perma.cc/Z8WT-W66T]. HB 1069, known colloquially as the "Don't Say LGBTQ+" bill, has faced considerable backlash from both parents and publishers alike. *Id.* HB 1521 criminalizes the use of restrooms matching their gender identity by transgender individuals, further prohibiting gender inclusive restrooms in schools, jails, public shelters, and healthcare facilities. *Id.* The same framework may be offered to challenge these laws, however, such analysis is outside the scope of this Note.

[13] Doe v. Ladapo, 737 F. Supp. 3d 1240, (N.D. Fla. 2024).

[14] S.B. 254, 2023 Reg. Sess. (Fla. 2023) (Treatments for Sex Reassignment).

[15] *Doe,* 737 F. Supp. 3d. This lawsuit brought by parents of transgender children in Florida has resulted in a temporary injunction regarding the implementation of SB 254. *See* Samy Nemir, *Advocates Hail Court Order Blocking Florida's Ban on Gender-Affirming Care for Trans Youth*, LAMBDA LEGAL (June 6, 2023), https://lambdalegal.org/newsroom/fl_20230606_advocates-hail-court-order-blocking-ban-on-gender-affirming-care [https://perma.cc/67HA-S4HJ].

[16] *See, e.g.,* Caroline Salas-Humara, Gina M. Sequeira, Wilma Rossi & Cherie Priya Dhar, *Gender Affirming Medical Care of Transgender Youth*, 49 CURRENT PROBS PEDIATRIC AND ADOLESCENT HEALTHCARE 9 (2019).

[17] *Gender Affirming Care and Young People*, OFF. OF POPULATION AFFAIRS, U.S. DEP'T HEALTH AND HUM. SERV. (August 2023), https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf [https://perma.cc/8EDX-485W] (defining gender dysphoria as "Clinically significant distress that a person may feel when sex or gender assigned at birth is not the same as their identity").

[18] Claire McCarthy, *The Care That Transgender Youth Need and Deserve*, HARV. HEALTH PUBL'G (Mar. 14, 2022),

show transgender individuals face significantly higher rates of more generalized mental health struggles and a higher susceptibility to developing substance abuse disorders compared to their cisgender peers.[19] Research shows that these symptoms are most effectively treated by gender affirming care—including social transition, puberty blockers, hormone replacement therapy, and surgical interventions—which are considered in relation to the needs of the individual and determined by a medical professional.[20] Permitting younger transgender individuals to access "evidence based, developmentally appropriate healthcare" is crucial for combatting the worst elements of gender dysphoria, as it is empirically shown to prevent the significant damage caused by experiencing a puberty that is misaligned with their own understanding of their gender.[21] Early interventions allow transgender youth to avoid the traumatic and irreversible changes caused by the introduction of unwanted hormones, and can negate the need for more invasive treatments later in life.[22]

On June 18, 2025, the Supreme Court rejected an equal protect challenge to a bill similar to SB 254, making alternative challenges to anti-transgender legislation more necessary than ever to protect the lives of transgender youth.[23] This Note argues that the First Amendment's Establishment and Free Exercise Clauses and, more promisingly, state-level

https://www.health.harvard.edu/blog/the-care-that-transgender-youth-need-and-deserve-202203142704 [https://perma.cc/JYR3-GPVZ]. *See also* Kareen Matouk & Melina Wald*, Gender-affirming Care Saves Live*s, COLUM. UNIV. DEP'T OF PSYCHIATRY (2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/KQ29-47XY].

[19] McCarthy, *supra* note 18; Matouk & Wald*, Gender-affirming Care Saves Live*s, *supra* note 18.

[20] *See generally* Stephanie Budge, Roberto L. Abreu, Ryan E. Flinn, Jay Bettergarcia, Richard A. Sprott & Brittany J. Allen, *Gender Affirming Care Is Evidence Based for Transgender and Gender-Diverse Youth*, 75 J. FOR ADOLESCENT HEALTH 6, (2024).

> Existing research demonstrates the effectiveness of medical GAC interventions through the alleviation of distress and improvement in well-being and quality of life. Cisgender youth receive pubertal suppression treatments and hormone therapy treatments for a host of medical disorders, and these medications are considered safe and effective in these contexts (albeit with side effects, as is the case for almost all medical treatments).

Id. See also Salas-Humara et al., *supra* note 16 ("Timely administration of gender affirming medical care correlates with improved mental health outcomes and, conversely, a delay in medical care may lead to worse mental health outcomes.").

[21] McCarthy*, supra* note 18 ("We cannot change who we are — nor should we, especially when trying to change who we are comes at such a clear and terrible cost. It is a fundamental human right to be who we are, and to get the care we need.").

[22] *See generally Puberty Blockers for Transgender and Gender-diverse Youth*, MAYO CLINIC (June 14, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/8KRP-RXVJ]. *See also* Carly Guss & Catherine Gordon, *Pubertal Blockade and Subsequent Gender-Affirming Therapy,* 5 JAMA NETWORK OPEN 11 (Nov. 1, 2022), https://doi.org/10.1001/jamanetworkopen.2022.39763.

[23] United States v. Skrmetti, 605 U.S. 495 (2025).

laws expanding these rights, offer salient pathways to protecting the life and liberty of transgender people.

This Note advances a religiously framed Judaic argument for access to transgender healthcare. I will first give an overview of arguments for religious freedoms, and the contours of such a challenge established by federal case law. Next, I will evaluate a similar legal challenge, arguing that Florida's House Bill 5, an abortion ban, violates the Free Exercise of Jewish religious practice, providing a loose framework for what a challenge against SB 254 on religious freedom grounds could look like. Finally, I will evaluate the efficacy of this challenge at the state and federal level finding that while a federal suit may face significant barriers, Florida's permissive religious freedom laws would likely allow this challenge to succeed.

I. BACKGROUND: WHAT, EXACTLY, IS RELIGIOUS FREEDOM?

A. Establishment Clause

The Establishment Clause is, often colloquially, referred to as "the separation of Church and State," and represents the fundamental notion that America is a nation where a variety of religious beliefs and backgrounds are accepted and celebrated, and no single one is codified above others.[24] This concept is explicitly stated in the Constitution as "Congress shall make no law respecting an establishment of religion."[25] At first glance, this seems like a straightforward command against codifying religion into law, at least as applied to the federal government. Courts and legislatures, however, have sought to shape this language in their own, ever-changing images. First and foremost is the question of whether the ban is intended to extend solely to the federal government. This was answered in *Cantwell v. Connecticut*[26] and *Everson v. Board of Education,*[27] where the Supreme Court extended the Free Exercise and Establishment Clauses, respectively, to the states through the Fourteenth Amendment's Due Process Clause.

[24] Daniela Cecilia Pachon, *Resolving Establishment Clause Issues Is No Longer "Easy-Peasy, Lemon-Squeezy,"* 36 ST. THOMAS L. REV. 1, 53 (2023). Even prior to the Constitutional requirement, the Framers of the Constitution espoused these ideas in state-level legislation and considered them crucial enough to include in the founding documents of the nation. Pachon references the Virginia Statute for Religious Freedom, written by Thomas Jefferson and supported by James Madison, also quoting Jefferson's assertion that a "wall of separation" between church and state need be "kept high and impregnable."

[25] U.S. CONST. amend. I.

[26] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[27] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

Lemon v. Kurtzman initially offered the definitive substantive interpretation of the Establishment Clause.[28] This case concerned state statutes in Pennsylvania and Rhode Island that provided financial aid to church-related elementary and secondary schools.[29] Ultimately, the Supreme Court said that the First Amendment is more than a prohibition on laws establishing religion, but on laws "respecting" this establishment.[30] This amalgamation of prior case law became known as the *Lemon* test.[31] This test has three prongs: (1) the "purpose prong," ensuring the statute has a secular purpose; (2) the "effect prong," requiring the statute to neither advance nor inhibit religion; and (3) the "entanglement prong," prohibiting excessive entanglement with religion.[32]

For a statute to be considered legitimate. all three prongs must be met. Some later cases added an additional element, the "Endorsement Test," which prohibits government endorsement or disapproval of any individual religion.[33] The test was controversial, particularly among conservative judges, who have characterized the test as a "ghoul haunting the Establishment Clause"[34] and consider it a relic of a "freewheeling" era of constitutional interpretation.[35]

Lemon remained good law until 2022.[36] In *Kennedy v. Bremerton School District*, a football coach at a public high school was suspended for leading a prayer during a football game because the school district believed his actions constituted a violation of the Establishment Clause.[37] While the majority depicts Kennedy's prayers as a "private," singular incident for which he was wrongly chastised, Justice Sotomayor, in her dissent, highlights that Coach Kennedy had a history of conducting demonstrative prayers on

[28] Lemon v. Kurtzman 403 U.S. 602 (1971).

[29] *Lemon*, 403 U.S.

[30] Pachon, *supra* note 24, at 60-61 (citing *Lemon*, 403 U.S.at 602); *see also* John Witte Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment*, 47 B.Y.U.L. REV. 1303, 1358 (2022).

[31] Pachon, *supra* note 24, at 62 (citing *Lemon* 403 U.S. 602).

[32] Pachon, *supra* note 24 at 60-61 (citing *Lemon,* 403 U.S.at 602).

[33] Pachon *supra* note 24 at 62. *See also* Mark A. Cuthbertson & Matthew DeLuca, *SCOTUS Finally Drives a Stake Through the Heart of 'Lemon,'* 269 N.Y. L. J. 66 (2023).

[34] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist. 508 U.S. 384, 398 (1993) (Scalia, dissenting) ("Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again.").

[35] *See* Shurtleff v. City of Boston, 596 U.S. 243, 276 (2022) (Gorsuch, J., concurring) ("[Lemon was i]ssued during a 'bygone era' when this court took a more freewheeling approach to interpreting legal texts.").

[36] Kennedy v. Bremerton Sch. Dist, 597 U.S. 507 (2022).

[37] *Id.* at 513.

the fifty-yard line, causing significant disruption.[38] The majority utilizes *Kennedy* to replace the *Lemon* Test with the "history and tradition" test, stating that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[39] As part of this decision, the majority mentions a desire to promote Free Exercise and tolerance of a diversity of religious thought and practices.[40] The Supreme Court has not clarified the true meaning of this new, difficult-to-interpret, test.

Detractors across federal and state courts have, understandably, pushed back against the *Kennedy* decision, with some describing it as an overt example of right-wing judicial activism.[41] The current history and tradition test provides the framework for analyzing SB 254 and assessing both the Establishment Clause challenges and the potential expansion of the Free Exercise Clause

B. Free Exercise Clause and the Religious Freedom Restoration Act

The second part of the Constitution's protection of religion is understood through the Free Exercise Clause, stating that "Congress shall make no law . . . prohibiting the Free Exercise [of religion]."[42] This clause works alongside the Establishment Clause, ensuring not only that no individual has religious requirements wrongly imposed upon them, but also ensuring their freedom to practice the commandments of their own religion.[43]

Despite the two clauses working in harmony, this portion is sometimes treated as more important than the establishment clause, as most recently

[38] *Id.* at 547-48 (Sotomayor, J., dissenting).

[39] *Id.* at 535.

[40] *Id.* at 540 ("Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice . . . .").

[41] Pamela Paul, *In the Face of Fact, the Supreme Court Chose Fait*h, N. Y. TIMES, (July 17, 2022), https://www.nytimes.com/2022/07/17/opinion/kennedy-bremerton-supreme-court.html [https://perma.cc/3FDA-RRC9]. *See generally* Linda Greenhouse, *This Is What Judicial Activism Looks Like on the Supreme Court*, N.Y. TIMES, (Apr. 8, 2021), https://www.nytimes.com/2021/04/08/opinion/Supreme-Court-religion-activism.html [https://perma.cc/5CPZ-KP5E]. See Kate Zernike, *How Did Roe Fall? Before a Decisive Ruling, a Powerful Red Wave*, N.Y. TIMES, (June 25, 2022), https://www.nytimes.com/interactive/2022/06/25/us/how-roe-ended.html [https://perma.cc/Q7TT-9MLP] for relation to the overturn of Roe v. Wade. See also Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y. REV. 195 (2015) for an example of further conservative judicial activism as it has manifested in the corporate interest sphere.

[42] U.S. CONST. amend. I.

[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof." *Id.*

pointed out in Justice Sotomayor's dissent in *Kennedy*.[44] But it is not a new practice altogether. One of the earliest cases prioritizing the Free Exercise Clause is the 1878 case, *Reynolds v. United States*.[45] *Reynolds* concerned a man who violated bigamy laws. His defense argued that his plural marriages were explicitly required by his faith as a member of the Church of Jesus Christ of Latter Day Saints.[46] The majority ruled that Mr. Reynold's religious belief was insufficient to permit his bigamy.[47] As they put it, "[l]aws . . . while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[48] *Reynolds* acknowledges an inherently religious root to the institution of marriage, and drawing on the beliefs of the drafters of the Constitution, the Court stresses the need for freedom of religious practice within reasonable limits.[49] Like human sacrifice, the Court in *Reynolds* asserts that bigamy is an evil that should be prevented by law, even if a religion commands it.[50]

Another cornerstone Supreme Court case addressing the limits of the Free Exercise doctrine came in 1990, in the case *Employment Division v. Smith*.[51] In this case, two members of the Native American Church sued the state of Oregon for denying their unemployment benefits.[52] The plaintiffs were fired for ingesting Peyote, a controlled substance, as a part of a religious ceremony.[53] At the time, no exception existed permitting religious use.[54] Thus, the plaintiffs were discharged for "misconduct" and thus were denied

[44] *Kennedy*, 597 U.S. at 547 (Sotomayor, J., dissenting) ("The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion.").

[45] Reynolds v. United States, 98 U.S.145 (1879).

[46] *Id.* at 162.

[47] *Id.* at 168.

[48] *Id.* at 162-63.

[49] *Id.* at 163-64.

[50] The Court acknowledges a distinction between an affirmative act for a religious belief (like polygamy) versus an omission, like that of *Regina v. Wagstaffe*, 10 Cox C. C. 530 (Eng. 1868), where parents refused a medical treatment for their child on religious grounds. *Reynolds*, 98 U.S. 145 at 168.

[51] Caroline Mala Corbin, *Religion Clause Challenges to Early Abortion Bans*, 104 BOS. UNIV. L. REV. ONLINE 37, 49-50 (2024) (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)).

[52] *Smith*, 494 U.S. at 874.

[53] *Id.* at 875.

[54] *Id.* at 876. Oregon law now provides for such exceptions, "It is an affirmative defense in any prosecution under this section for manufacture, possession or delivery of the plant of the genus Lophophora commonly known as peyote that the peyote is being used or is intended for use:(a) In connection with the good faith practice of a religious belief; (b) As directly associated with a religious practice . . . ." OR Rev Stat § 475.752 (2023).

unemployment benefits.[55] The case turned on the issue of whether the lack of exception for "sacramental" use of peyote constituted a violation of the Free Exercise clause.[56] Justice Scalia, writing for the majority, rules that no such exception is required.[57] Citing *Reynolds*, he lays out that such an expansive view of religious liberty would "make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[58] Under *Smith*, any generally applicable law with "incidental" impacts on religious practice remained Constitutional.[59]

Only three years after Smith, Congress passed the Religious Freedom Restoration Act ("RFRA") with the purpose of "provid[ing] very broad protection for religious liberty."[60] This law allows the government to "substantially burden" the Free Exercise of religion only if the "generally applicable" law "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[61] Subsequent case law distills from this law a more succinct test. *Burwell v. Hobby Lobby* determined that if a law is neutral and generally applicable but still places a substantial burden on a sincere religious belief, then the RFRA requires the law to be tailored narrowly to its purported ends.[62] When applied to judicial review, such an analysis is referred to as "strict scrutiny."[63]

The Supreme Court would greatly limit the application of the RFRA in 1997 with its ruling in *City of Boerne v. Flores*, restricting its application only to federal statutes and exempting states.[64] More pertinently, the *Flores* case paved the way for the subsequent passage of state-level RFRAs, many of which provide even more stringent tests than the federal law.[65] One state with such a law is Florida, which will be further examined later in this Note.[66]

What is far more relevant to SB 254 is the subsequent cases, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018 and

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55 *Smith* 494 U.S. at 876.

56 *Id.* at 876.

57 *Id.* at 890.

58 *Id*. at 879 (quoting *Reynolds*, 98 U.S. 145 at 166-67).

59 *Id.* at 886.

60 Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014) (citing 42 U.S.C. § 2000bb-1) ("[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise.").

61 § 2000bb-1.

62 *Id.*

63 *Id.*

64 City of Boerne v. Flores, 521 U.S. 507 (1997).

65 *See, e.g.* Fla. Stat. Ann. § 761.03 et seq. (West 2025);

66 *Id*; *see* Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

Fulton v. City of Philadelphia in 2021, which demonstrate a substantial shift in the Supreme Court's willingness to expand the Free Exercise Clause to states, although they have still done so within the parameters of *Flores*, and found state laws in violation of the Constitution merely under the Free Exercise clause. In *Masterpiece Cake Shop*, the Court deemed a state-level anti-discrimination law, as applied, violated Free Exercise.[67] Colorado's public accommodations law prohibited businesses open to the public from discriminating against members of protected classes, which included sexual orientation.[68] The Supreme Court found that although this law was neutral and generally applicable, the review conducted by the Civil Rights Commission, which drew allusions to slavery and the Holocaust, claiming this application of the law exhibited "religious hostility on the part of the State itself."[69] Here, the animus from the commission was, in the Court's view, so strong that it overcame the laws neutrality and constituted a violation of religious freedom, even outside the scope of the RFRA.[70]

In *Fulton v. City of Philadelphia*, the Supreme Court ruled that the City of Philadelphia could not deprive Catholic Social Services a contract due to their refusal to certify same sex foster parents.[71] The Court distinguished this case from *Smith*, stating that foster-care contracting was not "neutral and generally applicable," under the threshold test laid out in another case, *Church of Lukimi Babalu Aye v. City of Hialeah*.[72] Thus, because the broad goals of the non-discrimination policy were not sufficiently tailored, the City of Philadelphia violated the Free Exercise Clause.[73]

These two Supreme Court decisions resulted in significant broadening of federal protections for "religion." The frameworks laid out by these cases offer avenues to challenge SB 254 at a federal level.

C. Congregation L'Dor Va-Dor Case

In June of 2022, a Jewish synagogue, L'Dor Va-Dor Congregation (d/b/a Generation to Generation Inc.,)[74] sued the state of Florida over H.B. 5.

[67] Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n 584 U.S. 617 (2018).

[68] *Id.* at 627-28.

[69] *Id.* at 625.

[70] *Id.* at 617.

[71] Fulton v. City of Philadelphia, 585 U.S. 1056 (2018).

[72] *Id.* (quoting Church of the Lukami Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 522 (1993)).

[73] *Id.*

[74] L'Dor Va Dor is a Hebrew phrase meaning "generation to generation." This translation is where the Congregation derives its corporate name, Generation to Generation Inc., which is used in its pleading. The multigenerational and familial connections of this synagogue are highlighted throughout the pleading, used to strengthen the argument that the Congregation is founded by a mother and son, and offers free membership to couples married by the Rabbi, many of whom have or intend to have children. Amended

This bill bans abortion after fifteen weeks with no exceptions for rape or incest, but with carve-outs for "substantial risk to the woman's life," fatal conditions in the fetus, or concern serious bodily harm to the pregnant person.[75] L'Dor Va-Dor Congregation argued that this violated the rights of its congregants, among other similarly situated Jewish Floridians.[76] Its arguments were rooted in what they purported to be core Jewish values of family and the sanctity of life, both of which, the plaintiffs state, are violated by preventing access to abortion care.[77] They alleged that this law fails to maintain the separation of church and state by "imposing the laws of other religions upon Jews."[78] In addition, they cite Florida's Religious Freedom Restoration Act ("FRFRA").

The pleading of *Generation to Generation v. Florida* states that H.B. 5 violated the religious freedom of the congregants of Congregation L'Dor-Va-Dor, along with people of any faith (or no faith) who feel their liberties are transgressed by HB 5.[79] The Congregation places heavy emphasis on its values of family[80] They state that "[i]n Jewish law, abortion is required if necessary to protect the health and physical well-being of the woman, or for many other reasons not permitted under the act."[81] They argue both that the law constitutes a violation of the prohibition of the establishment of religion and that it inhibits the ability of Jewish people to exercise their religious liberties in connection with their bodily autonomy and promote their health and wellbeing.[82] To this end, the complaint states:

> The most important institution in Jewish life is the family, which has withstood centuries of persecution and discrimination by clinging to values and ideals which are quintessential to the Jewish faith. By preventing Jews from making intimate, personal decisions about the size of their families, or when and under what circumstances to bring new life into the world, the Act not only threatens the lives, equality and dignity of Jewish women, the Act also threatens the integrity of the Jewish family and denies religious freedom to Jewish women and their families. As such, the Act establishes the religion of its proponents and prohibits the Free Exercise of the Jewish religion by prohibiting Plaintiff's members, congregants and supporters from exercising their religious beliefs in the most intimate decisions of their lives in

Complaint at 6-7, Generation to Generation, Inc., v. Florida, No. 2022-CA-980 (Fla. 2d Cir. Ct. June 16, 2022).

[75] *Id.*

[76] *Id.* at 9-10.

[77] *Id.* at 11-17.

[78] *Id.* at 15.

[79] *Id.* at 1.

[80] *Id.* at 12.

[81] *Id.*

[82] *Id.*

> consultation with their rabbis, medical providers and their family and by penalizing those who dare to practice their Jewish religious faith.[83]

As to the argument based in the Establishment Clause, the amended argument employs the History and Tradition test from *Kennedy*, emphasizing that Florida law bends towards the permissibility of abortion.[84] This is done by pointing to the pre-HB 5 policy of banning abortion only after the fetus reaches a viable stage of development and can be sustained by regular medical interventions.[85] This argument is further bolstered by the 2012 rejection of an amendment to the Florida Constitution which would have narrowed the right to privacy, creating an even stronger showing of historical support for the protection of abortion rights in the area.[86] Given the great deal of discretion granted by the History and Tradition test, it is unclear how persuaded any given court would be to this argument. It is likely, when confronted with the history of Florida's anti-abortion advocacy, the argument made by L'Dor Va Dor here would be unpersuasive. What is significantly more persuasive is the Free Exercise argument, because in addition to the First Amendment religious liberty argument, the complaint cites to Article 1, Section 3 of the Florida Constitution, which goes beyond what is enshrined within the federal Constitution, offering heightened protections of religious exercise. For example, in addition to disallowing laws that "prohibit" the Free Exercise of religion, the Florida Constitution also bans any laws that would "penalize" the Free Exercise of a religion.[87] Congregation L'Dor-Va-Dor alleges that H.B. 5 violates both requirements.[88]

The FRFRA establishes that Florida laws otherwise considered "neutral" towards religion may "burden" the free exercise thereof.[89] Exercise of religion, for the purpose of this law, means an act or refusal to act that is "substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[90] Florida courts have interpreted the requirements of the FRFRA very permissively, further strengthening the utility of this argument.[91]

Ultimately, the case brought by L'Dor Va-Dor was voluntarily dismissed without prejudice.[92] Other similar challenges across the country,

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[83] *Id.*

[84] *Id.*

[85] *Id.* at 9.

[86] *Id.* at 1.

[87] *Id.* at 2 (citing FLA. CONST. art. I, § 3).

[88] Amended Complaint, *supra* note 74

[89] *Id.* at 24-27.

[90] *Id.*

[91] *Infra* p. 22.

[92] Notice of Voluntary Dismissal Without Prejudice at 1, Generation to Generation Inc. v. Florida, No. 2022-CA-980 (Fla. 2d Cir. Ct. April 11, 2023).

however, have been successful. In Indiana, Hoosier Jews for Choice were successful in challenging the State's restrictive abortion laws, primarily relying on the state level protections of the Indiana Religious Freedom Restoration Act.[93] They cite that many religions, including Judaism and Islam, do not recognize fetal personhood at conception, and note how Rabbinic law commands the protection of the mother's life and well-being over that of the fetus.[94] Not only was a preliminary injunction granted by the lower court, but it was further affirmed by the Indiana Court of Appeals.[95] Both cases affirm that the anonymous plaintiffs associated with Hoosier Jews for Choice have made sufficient prima facie claims of substantial burdens on their sincere religious beliefs, and the state has failed to prove countervailing interests in enforcing the anti-abortion policy on these plaintiffs, and that this is the least restrictive means of achieving such goals.[96] While the RFRA and Indiana jurisprudence cited here are not directly applicable to Florida, this line of argumentation, particularly from the Jewish perspective, allows it to thrive where some other religious challenges have failed.[97] Understanding that these grounds exist, and have been successful, is crucial to move forward with such arguments as related to access to transgender medical care.

II. CHALLENGING SB 254 ON RELIGIOUS FREEDOM GROUNDS

A. Why Judaism?

The argument from Judaism is particularly salient, because it highlights how some evangelical groups will facially utilize Judaism for their own gain—a phenomenon rife in many arguments made by those attempting to expand the doctrine of Free Exercise.[98] In *Kennedy*, Jewish religious practices are explicitly analogized to the actions taken by the Christian

[93] Anonymous v. Individual Members of the Med. Licensing Bd. of Ind. No. 49D01-2209-PL-031056.

Slip Op. At 2-3 (Ind. Super. Ct. Dec. 2, 2022).

[94] *Anonymous* Slip. Op. at 9-11.

[95] Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, (Ind. App. Ct. 2024.)

[96] *Anonymous* Slip. Op. at 21, Individual Members of the Med. Licensing Bd. of Ind. 233 N.E.3d at 459.

[97] *See, e.g.*, Cameron Abrams, *Federal Judge Dismisses the Satanic Temple's Lawsuit Challenging Texas Abortion Laws*, THE TEXAN (July 11, 2023), https://thetexan.news/issues/social-issues-life-family/federal-judge-dismisses-the-satanic-temple-s-lawsuit-challenging-texas-abortion-laws/article_064edc77-6f4d-5bc0-8b40-d05906c03c6c.html [https://perma.cc/YE4H-MUSB]

[98] *See Kennedy*, 597 U.S. 507 (2022).

football coach,[99] and as such are utilized to serve the argument that the interests of the religious majority in the United States also serve those of the Jewish minority.[100] This is just one example of the belief in a shared set of "Judeo-Christian values," utilized to sometimes include Judaism where not truly applicable, and at other times to exclude beliefs that do share the same commonalities with both Judaism and Christianity, namely Islam.[101] Judaism and Christianity deviate considerably, with the understanding of the concepts of "sin" and means of "atonement" for said sin being perhaps the most stark.[102]

What offers a much better view of why Judaism is used in this evaluation is the commandments at the core of Judaism. *Pikuach Nefesh*, literally "saving a life" in Hebrew, commands all Jewish people to uphold life, and "is central to [Jewish] tradition, [] society, and [] commandments."[103] Applying a similar notion to what is highlighted by the L'Dor Va-Dor suit, banning access to healthcare for transgender youth is a direct threat to their lives.[104] Of further relevance is the halakhic principle of *Tikkun Olam*, which translates roughly to the "'repair,' 'betterment,' or 'improvement' of the world."[105] For a great number of Jewish individuals in the modern world, this concept commands a commitment to social justice and constant improvement of society, including, "encourag[ing] and lead[ing] others towards goodness" and requiring "active moral responsibility of individuals to protest and dissent against societal

[99] *Id.* at 540 ("Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity . . . schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice . . .").

[100] *Id.*

[101] *See* James Loeffler, *The Problem With the 'Judeo-Christian Tradition,'* ATLANTIC, (Aug. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/08/the-judeo-christian-tradition-is-over/614812/ [https://perma.cc/S5UD-GG23]. "The phrase appears with regularity in rhetorical attacks on Islam and the progressive left, in attempts to restrict immigration and LGBTQ rights, and in arguments in favor of religious freedom that would collapse the wall of separation between Church and state."

[102] Talk of the Nation, *ATONEMENT IN JUDAISM, CHRISTIANITY AND ISLAM,* NPR (Sep. 20, 2012), https://www.npr.org/2012/09/20/161486339/atonement-in-judaism-christianity-and-islam [https://perma.cc/G3UF-KFGS].

[103] Amended Complaint, *Generation to Generation, Inc.,* (No. 2022-CA-980) at 1; *see also* Rabbi Asher Lopatin, *Pikuach Nefesh: The Jewish Value of Saving a Life*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/pikuach-nefesh-the-overriding-jewish-value-of-human-life [https://perma.cc/332Z-47Y5].

[104] 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 (2022).

[105] *"TIKKUN OLAM" HALAKHIC PRINCIPLES*, SEFARIA, https://www.sefaria.org/topics/tikkun-olam?sort=Relevance&tab=notable-sources [https://perma.cc/8TMT-8BDR].

wrongdoing."[106] Especially, again, bringing the vast medical consensus into the picture, and viewing the movement for transgender rights within the broader context of civil rights movements, the Jewish tradition of upholding life and of advocacy for the most marginalized of society offers a uniquely fascinating view into the legal argument for transgender rights.

In addition to *Pikuach Nefesh* and *Tikkun Olam*, there is even further grounds within the history and tradition of Jewish scholarship to show the connection to the issue of transgender healthcare. Judaism has a rich history of gender variance.[107] Elliot Kukla, a nonbinary transgender rabbi, is just one of many Talmudic scholars[108] who have pointed to the six designated sexes or genders (at the time, no distinction was made) mentioned in Jewish law:

> When a child was born in the ancient Jewish world it could be designated as a boy, a girl, a "tumtum" (who is neither clearly male nor female), or an "androgynos" (who has both male and female characteristics) based on physical features. There are two more gender designations that form later in life. The "aylonit" is considered female at birth, but develops in an atypical direction. The "saris" is designated male at birth, but later becomes a eunuch.[109]

These terms, as Rabbi Kukla and others[110] have admitted, do not perfectly map onto modern understandings of transgender and nonbinary identities, but merely show that Judaism has historically had a view of gender more complex than what is defined in SB 254 and other laws like it.[111]

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[106] *"Tikkun Olam" Halakhic Principles*, *supra* note 105.

[107] Wren Sanders, *Rabbi Elliot Kukla Wants Us to Remember the Many Genders of Ancient Judaism*, THEM, (Sep. 29, 2023) https://www.them.us/story/trans-rabbi-elliot-kukla-one-of-them [https://perma.cc/9VJC-F3MA]. Rabbi Kukla uses He and They Pronouns.

[108] *See, e.g.,* DR. MAX STRASSFELD, TRANS TALMUD: ANDROGYNES AND EUNUCHS IN RABBINIC LITERATURE (2022). Dr. Strassfeld is an Assistant Professor of Religious Studies at the University of Arizona. In this book he grapples with tensions within rabbinic texts, concluding that there is a long history of engagement with identities outside of the binary, in direct opposition to the reductive view of exclusively binary gender.

[109] 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 [https://perma.cc/4PQ6-T4B3]; Adventures in Jewish Studies Podcast, *Episode 25: The Many Genders of Judaism*, ASS'N FOR JEWISH STUDS., (Nov. 7, 2022), https://www.associationforjewishstudies.org/podcasts/the-many-genders-of-judaism-transcript [https://perma.cc/83DM-J6H8] (highlighting that some accounts cite a seventh and eighth gender category, accounting for some slight variations in the several definitions of the term "eunuch,' showing further the diversity and fluidity of gender and sex classification in ancient Judaism); *see also* Rabbi Sarah Freidson, *More Than Just Male and Female: The Six Genders in Ancient Jewish Thought*, SEFARIA (June 10, 2016), https://www.sefaria.org/sheets/37225[https://perma.cc/EVF6-6VPG].

[110] STRASSFELD, *supra* note 108; see also an interview with Dr. Strassfeld in Adventures in Jewish Studies Podcast, *supra* note 109.

[111] Adventures in Jewish Studies Podcast, *supra* note 109 (quoting Dr S.J. Crasnow: "I agree with arguments I've seen that . . . the Rabbis are talking . . . about both about sex and gender, because it's not just that they will say something about [what] the physical body, . . . means for social [gender] roles."

Further, it can be understood as guaranteeing protections for transgender individuals from Jewish law—as Rabbi Kukla states further: "This [2000 year old] law in the *mishnah* that people beyond the gender binary need to be protected from all forms of harm is so much more comprehensive than anything we have today to shield [transgender people] from attacks."[112] Additional texts and interpretations by Rabbi Kukla and Dr. Max Strassfeld, another Jewish scholar focused on the history of gender variance, also point to how these designations took on not just biological, but social meanings.[113] For example, Rabbi Kukla points to fifth century interpretation of the Jewish creation story which interprets Adam, and by extension, the "divine image" in which he was created, as not male but "androgynos," highlighting protection of transgender individuals as not just permissible, but sacred.[114]

One prominent "radical yeshiva," Svara, has gone as far as to state "that transition, for trans Jews, constitutes a fulfillment of the positive commandment 'Be whole with Hashem your god' (Dvarim 18:13)."[115] Svara have further created and compiled a collection of prayers and blessings directed at different elements associated with medical transition,

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[112] Elliot Kukla, *From the School Yard to the Talmud: Trans People Exist and Are Not Going Away*, SVARA, (Feb. 7, 2025), https://svara.org/trans-people-exist [https://perma.cc/H8B4-9ARJ].

[113] Rabbi 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 [https://perma.cc/4YC3-4NTM].

> In the Mishna, the oldest and most authoritative source of Jewish legal theory, composed in the second century, we learn that anyone who kills or harms an androgynos (either accidentally or on purpose) is subject to the exact same ramifications as someone who hurts a man or woman. That chapter ends with a conversation about whether the androgynos is more like men or women. One of the sages, Rabbi Yossi, suggests that "he is a created being of her own." This phrase plays with the gender in Hebrew grammar to poetically express the complexity of the androgynos's gender. The first time I learned this text, I was with my study partner, a transgender rabbi named Reuben Zellman. "Rabbi Yossi is right," he said, "but not just about us. Everyone is a created being of their own."

Id.

[114] Kukla, *supra* note 113.

> Judaism sees us as so ancient that according to one fifth-century interpretation of the Bible, the very first human being, Adam, was actually an androgynos. This explains why Genesis says, "And God created humankind in the divine image, creating it in the image of God," referring to Adam, the first person, with a singular pronoun. But then, the very same verse says: "creating them male and female."(1:27). "Them," in this ancient interpretation, also refers to Adam: a single person who is both male and female. In other words, in this reading of the creation story, the first human being is described with a singular "they" pronoun to express the multiplicity of their gender.

Id. See also, Kukla, *supra* note 112; *Trans Halakha Project*, *supra* note 8.

[115] ALEXANDRA ROSE KOHANSKI, BE WHOLE: A HALAKHIC APPROACH TO GENDER & TRANSITION (TAMIM TIHIYEH: SHITA HILKHATIT L'MIGDAR U'MA'AVAR) (2023); Trans Halakha Project*, Teshuva-Writing Collective*, SVARA (2023), https://svara.org/twc/ [https://perma.cc/P84U-2YTX] (containing other documents by the Trans Halakha Project).

emphasizing that for members of this particular branch of Judaism, transition is sanctified and deeply integral to their spiritual life.[116]

While the interpretation of Jewish law and spiritual connection can by no means be said to be universal throughout the faith, it is enough of a strongly held belief with sufficient roots in tradition as to constitute a sincere religious belief of a significant population of Jewish individuals, and one with considerable historical precedent and centuries of tradition.

B. What is SB 254

SB 254 states that the State of Florida may intervene if a child under the age of eighteen is "subjected to sex-reassignment prescriptions and procedures."[117] This Act adds several provisions to preexisting statutes concerning child abuse and neglect. Further provisions add several new definitions of "government entity," "sex," and "sexual-reassignment prescriptions and procedures," allowing for further restrictions on gender affirming care. Finally, it outright prohibits gender-affirming care for minors.

The first modification is made to Subsection (1) of the existing child abuse statute, codified in chapter 61 section 517 of the Florida Statute.[118] This modification extends the state temporary emergency jurisdiction over a child when "it is necessary in an emergency to protect the child because the child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures."[119] The second modification pertains to Florida Statute Chapter 61 section 534, which concerns "warrants to take physical custody of a child." SB 254 amends the definition of "serious physical harm" to include children receiving gender affirming care for the purpose of granting a warrant for a petitioner to take physical custody of a child.[120] Third, it creates a new Florida Law, codified in Chapter 286 section 31, which prohibits the use of state funds for "sex-reassignment prescriptions or procedures." Fourth, the Act adds several definitions of terms as subsections (8) and (9) of Florida Law Chapter 456§ 001, which provides definitions for key terms relating to health professions and occupations. Here, SB 254 defines "sex" as exclusively either male or female, and "sex reassignment prescriptions or procedures" as "the administration of puberty blockers for the purpose of attempting to stop or delay normal puberty in order to affirm a person's perception of his or her sex if that perception is

[116] Trans Halakha Project, *Tefillat Trans: Rituals and Blessings for Trans Lives*, SVARA (2023), https://svara.org/tefillat-trans [https://perma.cc/ZXG2-AF6T].

[117] S.B. 254 at 1, 3.

[118] S.B. 254 at 1.

[119] S.B. 254 at 3.

[120] S.B. 254 at 4.

inconsistent with the person's sex as defined in subsection (8)," and "[t]he prescription or administration of hormones or hormone antagonists to affirm a person's perception of his or her sex if that perception is inconsistent with the person's sex as defined in subsection (8)," in addition to any other medical procedure with a gender affirming purpose.[121]

Though there are exceptions, permitting any surgeries or medical interventions for children born with intersex characteristics[122] as well as some additional carveouts made for those already undergoing said therapies,[123] healthcare practitioners can be held liable for criminal offenses under this statute.[124] It further allows for violations of the above sections to be utilized as civil suit causes of action with no limitation on punitive damages.[125]

The negative implications of this bill are clear. A transgender child, even with the support of a loving family and experienced medical professionals, could be, under this statute, effectively kidnapped by the state and denied the safe, medically-approved treatments that would allow them to live a full and authentic life. The list of medical associations that oppose the bans laid out in SB 254 and others is long, including the Endocrine Society, the American Medical Association, and the American Academy of Pediatrics, to name only a few.[126] Further, the imposition of the belief, as will be explored in the sections to come, constitutes a violation of the religious liberty of parents and transgender youth who seek the care recommended by their doctors.

C. Establishment Clause Challenge to SB 254

Though the argument that SB 254 violates the Establishment Clause might be the more intuitive argument, it becomes significantly more difficult when applying the new framework set out by *Kennedy*.

Under the new "History and Tradition" test laid out in *Kennedy*, there would simply need to be a showing of "historical practices and

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[121] S.B. 254 at 13.

[122] While the term is not used explicitly in the statute, the language references "[e]xternal biological sex characteristics that are unresolvably ambiguous," and various other medical conditions that may impact the presentation of an individuals' sex at birth. S.B. 254 at 5. "[I]ntersex" is the more commonly used term to refer to these individuals. *Who Are Intersex People?*, INTERSEX CAMPAIGN FOR EQUALITY (May 6, 2022), https://www.intersexequality.com/intersex [https://perma.cc/W3RD-DXPA].

[123] *Id.* at 5-6.

[124] *Id.* at 9-10.

[125] *Id.*

[126] *AMA Strengthens Its Policy on Protecting Access to Gender-Affirming Care*, ENDOCRINE SOCIETY (June 12, 2023), https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care [https://perma.cc/WE66-8NG7]; Trisha Korioth, *Pediatricians Say State Bills Would Harm Transgender Youths*, AM. ACAD. OF PEDIATRICS (Mar. 9, 2021) https://publications.aap.org/aapnews/news/12780?autologincheck=redirected [https://perma.cc/EC2R-FCA2].

understandings'" to determine whether a practice is an inappropriate establishment of religion.[127] This test is far friendlier to religious liberty than the *Lemon* test. Though the Supreme Court has yet to elaborate in much greater detail what this means, and lower courts have not offered much guidance as to this test. It seems that subsequent case law has so far ignored the test, preferring to focus on the element of Free Exercise as a sort of counterweight. In a recent Supreme Court case, *Mahmoud v. Taylor* concerned religious parental exemptions for LGBTQ+ inclusive curricula, yet the History and Tradition test is mentioned only in Justice Thomas's concurrence.[128] The majority focuses its argument on the rights of parents to raise their children in accordance with their religious values, and do not consider the state interest in educating children on the values of tolerance and inclusion to be sufficient to overcome this right.[129] For this reason, the modern Establishment Clause is of little value in challenging SB 254. The relative strength of the Free Exercise Clause established by this case law, however, offers several interesting avenues towards a challenge.

D. Free Exercise Argument Against SB 254

To comply with the Free Exercise Clause, SB 254 must contain an exception allowing religious practices that run counter to the requirements of the statute. The developments of *Masterpiece* and *Fulton* offer potential grounds to show that either the law in question is not neutral and generally applicable, or else that its application is discriminatory.

Masterpiece established the precedent of showing religiously discriminatory animus of a facially neutral law through evaluating statements made in relation to its enactment: "[f]actors relevant to assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, include . . . contemporaneous statements made by members of the decision-making body.'"[130] To this end, the history and context of the bill becomes particularly relevant. Using this framework, a similar picture can be painted with regards to SB 254. To name just a few connections, the three senators—Clay Yarborough, Warren "Keith" Perry, and Doug Broxson—who

[127] Kennedy v. Bremerton Sch. Dist, 597 U.S. 507, 540 (2022). For a breakdown on how this argument has been historically unsuccessful as it relates to anti-abortion cases, see Corbin, *supra* note 51, at 46-48. *But see* EMW Women's Surgical Center v. Cameron, No. 22-CI003225, 2022 WL 20554487, at *15 (Ky. Cir. Ct. Jul. 22, 2022) (holding that the belief that life begins at conception is distinctly Christian and not reflective of other religious beliefs).

[128] Mahmoud v. Taylor, 145 S. Ct., 2332, 2374 (2025).

[129] *Id.* at 2359-60.

[130] Masterpiece Cakeshop Inc. v. Colo. C. R. Comm'n 584 U.S. 617, 639 (quoting Church of the Lukami Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993)).

sponsored SB 254 in the Florida Senate[131] have significant ties to Christian and evangelical communities. Yarborough describes himself as "faith-guided,"[132] referencing his Christian beliefs, and he is explicitly endorsed[133] by Florida Family Action[134] and Stand for Health Freedom,[135] which are both organizations with stated goals of upholding religious liberty and parental rights. Perry, while not explicitly receiving support from any religious organization, does discuss being an active member of the Christian Motorcyclists Association,[136] an organization with a stated "investment into world-wide evangelism."[137] Lastly, Broxson is a graduate of Evangel University, a private Christian university in Missouri.[138] He cites the "biblical" value of kindness as driving his success.[139] Further, the amicus brief filed in support of the bill during the *Doe v. Ladapo* case[140] includes the organizations America's Future,[141] Laws of Nature and Nature's God (LONANG) Institute,[142] and One Nation Under God Foundation among others.[143] If it can be said that the Colorado Civil Rights Commission in

[131] *Senate Bill 254 (2023)*, FL. SENATE, https://www.flsenate.gov/Session/Bill/2023/254 [https://perma.cc/4QX7-F2M8].

[132] *Meet Clay Yarborough*, CLAY YARBOROUGH FOR SENATE, https://clayyarborough.com/about [https://perma.cc/AM9Q-RNKP].

[133] *Endorsements*, CLAY YARBOROUGH FOR SENATE, https://clayyarborough.com/endorse (last visited Jan. 3, 2025).

[134] *Legislative Agenda*, *supra* note 10 ("[T]he legislative arm of the Florida Family Policy Council, is committed to protecting and defending life, marriage, family and religious liberty.").

[135] *About Us*, STAND FOR HEALTH FREEDOM, https://standforhealthfreedom.com/about-us [https://perma.cc/MA3N-PVD4] ("Together we have taken over 6.2 million actions through our specialized portal to preserve and promote informed consent, parental rights, religious freedom, freedom of speech, and privacy.").

[136] *Get to Know Keith*, KEITH PERRY FOR SENATE, https://votekeithperry.com/about [https://perma.cc/Z2SV-6NJZ].

[137] *Run for the Son*, CHRISTIAN MOTORCYCLISTS ASS'N, https://cmausa.org/Donate/Donate?Id=RFS#Runfortheson [https://perma.cc/VHU9-N5FP].

[138] Romi White, *Senator Broxson Honored for Bridging Past and Future*, SOUTH SANTA ROSA NEWS (Apr. 23, 2024), https://ssrnews.com/senator-broxson-honored [https://perma.cc/DX24-QMKQ].

[139] White, *supra* note 138

[140] Doe v. Ladapo, 737 F. Supp. 3d 1240, (N.D. Fla. 2024). The case where the parents of children impacted by SB 254 sued for an injunction to protect their children from the bill.

[141] *Mission & Guiding Principles*, AM.'S FUTURE, https://www.americasfuture.net/our-mission [https://perma.cc/B6QZ-5AW4] ("America's Future strengthens American patriotism, reinforces American greatness, and re-establishes our founding fathers' framework that America is 'one nation, under God, of the people, for the people and by the people.'").

[142] *See* LONANG INST., https://lonang.com [https://perma.cc/2E7H-RVSX] ("LONANG stands for the Laws Of Nature And Nature's God, a phrase first used in the U.S. Declaration of Independence, 1776. But the concepts embodied in the phrase didn't originate with Thomas Jefferson, the author of the Declaration. The 'law of nature' was a common term used by historic legal writers. The 'laws of nature's God' refers to the divine law, or the laws of God revealed in the Bible. So what are these laws, and what can be known about them? This is what we want to explore . . . .").

[143] Brief for Surgeon General et al. as Amicus Curiae Supporting Appellants, Doe v. Ladapo, No. 24-11996, 2024 WL 4142987 (11th Cir. 2024).

Masterpiece Cake Shop showed religious animus due to the nature of the evaluation, it logically follows from even a cursory glance that the same may be said of SB 254 through the evaluation of the supporters of the bill.

Fulton found that laws not explicitly preventing religious practices may still be subject to review under the Free Exercise clause, despite the holding of *Smith*, if it withstood the test laid out in *Church of Lukumi Babalu Aye v. City of Hialeah*.[144] In *Church of Lukumi Babalu Aye*, practitioners of Santeria, a religion originating in Cuba with roots in African spiritual tradition and Roman Catholicism, challenged a local ordinance prohibiting the "unnecessary" killing of animals without religious exception.[145] Animal sacrifice is an important part of Santeria religious practice, and the ordinance was passed very specifically to inhibit their ability to practice this element of their religion.[146] This local ordinance was not considered facially neutral, despite the fact that the pure text of the bill could appear secular, with significant reliance on comments by public officials on the "sinful" nature of the Santeria practices.[147] "Official action that *targets religious conduct for distinctive treatment* cannot be shielded by mere compliance with the requirement of facial neutrality."[148] The lack of neutrality meant the Court must apply strict scrutiny review, ensuring that the means are "narrowly tailored" to the "compelling" ends.[149] Bringing in the analysis of the supporters of SB 254,[150] a picture emerges that shows clear animus towards supporters of access to transgender health care and, by extension, the systems of religious belief that demand access to such services.

The next significant hurdle is showing that SB 254's application is not generally applicable.[151] This is done by showing a "comparable secular activity" that the law permits while simultaneously barring the one with religious roots.[152] SB 254 provides a mechanism for individualized exceptions, as it allows the same medical interventions which constitute gender affirming care for minors to be administered when not for the purpose of "sex reassignment."[153] With the allowance of certain secular exemptions, but not religious ones, all that is needed to trigger strict scrutiny review of SB 254 is to show that access to gender-affirming care for minors constitutes

144 Fulton v. City of Philadelphia, 585 U.S. 1056 (2018) (citing Church of the Lukami Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523(1993)).

145 *Church of the Lukami Babalu Aye*, 508 U.S. at 523-26.

146 *Id.*

147 *Id.*

148 *Id.* at 534 (emphasis added).

149 *Id.*

150 *See supra* notes 140-145

151 *Church of the Lukami Babalu Aye*, 508 U.S. at 544.

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

153 S.B. 254 at 5.

a substantial burden of a sincere religious belief. There is little doubt that a "substantial burden" would be imposed upon individuals seeking gender-affirming care.

This must be a sincerely-held belief rooted in religion, not "[p]urely secular philosophical concerns."[154] Further, these religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others."[155] Even if the Judaic arguments established earlier in this Note may not appear logical, consistent, or readily comprehensible, they nonetheless constitute held beliefs for the scholars at Svara and countless other Jewish individuals.[156] The notion that medical transition is a means of saving lives is supported by a vast consensus of medical and mental health-care professionals, as outlined numerous times throughout this Note.[157] A defender of SB 254 is likely to argue that the "sanctity of life" is far too nebulous and universal to constitute a concrete religious belief and would more aptly be considered a "secular philosophical concern." Given the centrality of the belief within Judaism, its importance within the faith cannot be understated. When brought in tandem, *Pikuach Nefesh* and the ancient protections for transgender and nonbinary individuals in the *mishnah* are likely to satisfy the requirements as a sincere religious belief for a transgender Jewish youth. For these people, the prohibition of access to medical transition is a direct violation of their religious practices and obligations.

Moreover, if it is said to be a requirement therein, particularly due to the interpretation of the commandment to "be whole,"[158] barring access to affirming care for individuals of any age would be considered a substantial burden on a sincere religious belief. The proponents of the bill will likely argue that the interests in protecting children from what is defined, with minimal scientific backing, as "abuse" is a sufficient government interest to establish a justification here. However, the sensitivity of the right at stake is such that "no showing [of] merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount [compelling] interests, give occasion for permissible limitation.'"[159]

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[154] Royce v. Bonta, 725 F. Supp. 3d 1126, 1132 (S.D. Cal. 2024).

[155] *Id.*

[156] *Id.*

[157] See *supra* note 115

[158] ALEXANDRA ROSE KOHANSKI, BE WHOLE: A HALAKHIC APPROACH TO GENDER & TRANSITION (TAMIM TIHIYEH: SHITA HILKHATIT L'MIGDAR U'MA'AVAR) (2023).

[159] *Warner*, 64 F. Supp. 2d 1272 at 1027 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

E. Florida Law Argument Against SB 254

Applying the more stringent Free Exercise argument from Florida would disallow not only laws prohibiting the Free Exercise of religion but also those which would "penalize" its practice.[160] This adds an additional means of challenging the law within the state specifically. In *Warner v. City of Boca Raton,* the Florida Southern District Court found that a local rule of the Boca Raton Municipal Cemetery did not violate the FRFRA, nor constitutional protections.[161] The rule limited the rights to decorate grave markers, which had insufficient religious roots.[162] While the holding of this particular case is not useful to this argument, the application of the FRFRA shows the great deal of deference granted by the statute. Warner established, "[u]nder the Act, any law, *even a neutral law of general applicability*, is subject to the strict scrutiny standard where the law substantially burdens the Free Exercise of religion."[163] Thus, applying the FRFRA standard, the mere fact of showing a substantial burden, even absent a finding that the law is not neutral or generally applicable, makes the strict scrutiny standard of review applicable. In this case, the Florida Court defines a "substantial burden" as "one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer)."[164] Unlike the grave markers in *Warner*, Jewish law's commandments to "be whole" and to "uphold life" establish sufficient grounds to show a substantial burden on sincere religious belief. Through the holding of Warner, the FRFRA's far broader religious freedom protections shield, at the very least, Jewish transgender minors and their families from SB 254's encroachment into their personal lives and religious practices.

CONCLUSION

In sum, the recent expansion of the Free Exercise doctrine means that an argument for LGBTQ+ rights from the perspective of religious freedom is tenable at the federal level and almost guaranteed at the state. This latter approach is significant due to the considerable overlap between states with highly permissive Free Exercise provisions[165] and those with highly

[160] FLA. CONST. art. I, § 3; Religious Freedom Restoration Act of 1998, 1998 FLA. LAWS 98-412; Fla. Stat. Ann. § 761.03 et seq. (West 2025).

[161] *Warner*, 64 F. Supp. 2d 1272 at 1033.

[162] *Id.* at 1023-25.

[163] *Id.* 1035-36 (emphasis added).

[164] *Warner*, 887 So.2d 1023 at 1033.

[165] *See* MARK DAVID HALL & PAUL D. MUELLER, RELIGIOUS LIBERTY IN THE STATES 2024 (2024).

restrictive laws concerning transgender rights.[166] Truly, the greatest hurdle to this challenge is judicial discretion. All of the pieces are present, and the case has been laid out, but whether a judge would be convinced, despite the evidence, to actually confront the hypocrisy and unequal treatment of religious beliefs, remains to be seen.. Given the well-documented negative impact of restricting access to gender-affirming healthcare for minors,[167] this line of argumentation may offer a lifesaving[168] means for some protection for, at least, a not-insignificant subset of transgender youth. While the limited scope of such challenges means its value as a form of impact litigation may be limited, the value of this argument for individual youth in the states affected by such policies and protected by religious practice cannot be overlooked.

While some legal scholars postulate these arguments are not particularly useful. They point to the significant bias held by members of the Supreme Court, an argument and application for Free Exercise by progressive religious individuals will inevitably be dismissed.[169] There are several counterpoints: firstly, this argument heavily relies on the perspectives set out by members of the Supreme Court and does not examine its efficacy regarding lower and state level courts as applied to state-level constitutions and legislation regarding the Free Exercise of religious beliefs. Further, even if this argument has little legitimacy when applied to any courts already biased in favor of their own beliefs, it still serves to show that the purported protection of Free Exercise of religion that has been championed by the Supreme Court do not, in actuality, protect the religious freedom of those diverting from those of the Christian-aligned groups that have spearheaded these efforts. Despite claiming to stand for religious freedom and parental and individual rights, these groups ironically erode these very values. Continuing to highlight the hypocrisy of such groups serves to chip away at the lies that make up their foundations, and expose them as violators, rather than protectors, of the rights guaranteed by the Constitution.

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166 *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://perma.cc/KJ42-2RE3].

167 McCarthy, *supra* note 18; *see also* Matouk & Wald, *supra* note 18*;* Budge et al, *supra* note 20.

168 Matouk & Wald, *supra* note 18.

169 Sherry F. Colb, W*hy Free Exercise on Steroids Won't Benefit Progressive Religious People*, DORF ON LAW (Jan. 3, 2022), https://www.dorfonlaw.org/2022/01/why-free-exercise-on-steroids-wont.html [https://perma.cc/EQ7D-4KMY].