The Halachic Mandate for Gender Affirming Care: Examining the Potential Efficacy of Religious Liberty Claims made by Jewish Health Care Providers

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In the wake of Dobbs v. Jackson Women's Health Organization, many states enacted anti-abortion statutes which could be challenged by Jewish individuals and institutions who believe that such laws threaten their religious liberties.[229] Although a valiant effort, it is necessary to take a precautionary approach to challenging such laws on grounds of religious freedom, for successfully doing so could have reeling effects on LGBTQ+, BIPOC, and other marginalized communities. This article takes a bottom-up approach to such claims and investigates whether a religious liberty argument can and should be made against anti-trans laws.[230]

I. Road Map

This article will begin with an exploration of religious liberty in the United States, highlighting key cases and critiquing the Supreme Court's departure from secularism in the era of Establishment cases to evangelical sectarianism in the era of Free Exercise cases. Then, a case study will show that Jewish legal tradition and US law increasingly sit in

[228] Brandeis University, Class of 2025; The author dedicates this piece to the queer rabbis, scholars, community members, and co-conspirators who came before and fought for a future that celebrates everyone *b'tzelem elohim.*

[229] Anderson, "Synagogue Challenges Florida Abortion Law over Religion," 2022; Hernandez, "Some Jewish Groups Blast the End of Roe as a Violation of Their Beliefs," 2022.

[230] This approach comes from black feminist thinkers who teach that freedom comes from the liberation of those on the bottom of the social ladder.

conflict, raising First Amendment concerns for Jewish health care providers across the United States. This section will argue that Arkansas' Health Care Ban is not generally applicable, lacks a compelling state interest, and must provide exemptions for Jewish doctors. Finally, this paper will analyze issues with the aforementioned case and discuss other viable modes of ending health care bans enforced on the basis of sex.

II. History of Religious Liberty

Throughout the first one hundred seventy-eight years of the Supreme Court's existence, the Court refused to rule in favor of claimants petitioning against religiously inhibitory statutes.[231] The Court reasoned that making a citizen's "...religious beliefs superior to the law of the land…" would free individuals to establish their own law, erasing the need for government.[232] Over time, however, the Court whittled away at its historic, and often discriminatory, approach to religious liberty in order to provide accommodations for certain religious minorities and establish the framework for the contemporary debate over religious exemption in the Constitution.[233]

The Court first granted a constitutional right to religious exemptions from otherwise generally applicable laws in *Sherbert v. Verner* (1963). The case involved the State Employment Security Commission denying a Seventh-Day Adventist, Adele Sherbert, unemployment benefits after she "...failed… to accept available suitable work when offered…" and without "good cause."[234] The Supreme Court ruled that forcing Sherbert to work on the Sabbath would run in opposition, not only to the clear definition of "good cause" in

[231] Oleske, "Free Exercise (Dis)Honesty," 2019.
[232] *Reynolds v. United States*.
[233] Oleske, "Free Exercise (Dis)Honesty," 2019, 699.
[234] South Carolina Unemployment Compensation Law, S.C Code § 41-35-130 (1952).

the statute, but also to the intent of the Free Exercise Clause. The Court borrowed lines of reasoning from a similar case from the Supreme Court of Michigan to show that statutes with seemingly neutral purposes can have grave implications for religious minorities and potentially exclude them from engaging in public and religious life, contradicting the clear charge of the government under the Bill of Rights.[235] The Court understood that, by ruling in favor of Sherbert, it opened a Pandora's box of Free Exercise claims in which folks would begin to argue religious freedom from laws which they believed themselves to be exempted from by their religion. In order to prevent itself from becoming the arbiter of religious legitimacy, the Court established the *Sherbert* test, which allows the government to burden religious individuals so long as it has a "compelling state interest" to do so. In the case of Adele Sherbert, the Court relied on a strict scrutiny test to determine that South Carolina's practice of denying benefits to all rather than investigating sincere unemployment claims did not constitute a compelling state interest.[236] Although the threshold of "compelling state interest" had already been established for other First Amendment cases, the Court failed to construct a consistent framework for questions of Free Exercise.[237] This failure prevented the Court from establishing reliable jurisprudence on religious liberty and caused vague, weak, and inconsistent understandings of Free Exercise to dominate the Judicial Branch for nearly three decades.

In the 1980s, the Employment Division of the Oregon Department of Human Resources denied unemployment compensation to a member of the Native American Church under a law disqualifying employees discharged for work-related "misconduct." The man, Alfred Leo Smith, was

[235] *Swenson v. Employment Security Comm*.
[236] *Sherbert v. Verner*.
[237] Nelson, "A Textual Approach to Harmonizing Sherbert and Smith on Free Exercise Accommodations," 2008.

fired from his job at a private drug rehabilitation center for consuming peyote in a ceremonial context. Smith subsequently filed suit against the department for violating his religious liberties guaranteed under the Free Exercise Clause.[238] The case came before the Supreme Court twice to decide whether an individual's religious beliefs provide them an exemption from the disqualification. At the first appearance, the justices vacated the lower court's ruling and instructed it to determine whether peyote fell under the State's controlled substance law.[239] On remand, the lower courts held that, although peyote did fall within the controlled substance law, the lack of a religious exemption for the drug violated the Free Exercise Clause.[240] Overruling the lower court, the Supreme Court issued a 6-3 decision that the First Amendment permits Oregon to ban the religious use of peyote and deny benefits. The Court reasoned that the Framers did not write the First Amendment to allow personal beliefs to take priority over otherwise valid laws which the State is free to establish. The notorious *Smith* ruling highlights the Court's shifting understanding of the concept of compelling state interest initially determined in *Sherbert* to one that would prevent the *courting of anarchy* by religious claims.[241] *Smith* significantly limited the scope of the Free Exercise Clause, effectively throwing out the strict scrutiny test applied to Free Exercise cases under *Sherbert* unless a law purposefully burdened religious practices.[242]

The new threshold, later solidified in *Church of Lukumi Babalu Aye Inc. v. City of Hialeah,* carved two paths for cases

[238] *Smith v. Employment Division,* 301 Or. 209, 721 P.2d 445.
[239] *Employment Division, Department of Human Resources v. Smith*, et al, 1988.
[240] *Smith v. Employment Division,* 1988.
[241] *Employment Division, Department of Human Resources of Oregon v. Smith et al,* 1990.
[242] Marin, "Employment Division v. Smith," 1990.

of religious liberty.[243] Both paths begin with *Smith,* asking whether the regulation in question is generally applicable.[244] If the Court determines that the regulation is not generally applicable under *Smith,* then it applies the *Sherbert* test of compelling interest to determine whether the issue targeting religious activity is necessary to achieve the goals of the governing body. As in *Lukumi*, federal courts frequently hold that regulations targeting specific religious practices do not pass the strict scrutiny test.[245] Despite this, the ruling in *Smith* created an alternative path for the majority of policies in which facially neutral laws can burden religious practitioners. Following this path of reasoning, courts evaluate the circumstance by applying rationally based scrutiny to statutes "written and applied neutrally" but which incidentally burden religious folks. This leads courts to conclude that, so long as the infringement was incidental or facially neutral, it likely does not violate the Free Exercise Clause under *Smith*.[246]

In the wake of *Smith,* and to a lesser extent *Lukumi*, Congress, the Executive, and myriad religious organizations, made attempts at strengthening Free Exercise by adopting the Religious Freedom Restoration Act (RFRA) and the 1994 amendments to the American Indian Religious Freedom Act (AIRFA).[247] Despite this, the Supreme Court prevented the Federal Government from broadly reinstating the "compelling interest" test as set forth in *Sherbert* on state and local levels, leaving such regulations subject to *Smith.*[248] This ruling forced federal courts to uphold facially neutral state and local laws

[243] See *Church of Lukumi Babalu Aye Inc. v. City of Hialeah* 508 U.S. 520 (1993).
[244] Regulation in this context is broadly defined as any government implementation with impacts for the public.
[245] Winkler, "Fatal in Theory and Strict in Fact," 2019.
[246] Gautsche, "Neutral Discrimination," 2014.
[247] 42 U.S.C § 2000 bb; 42 U.S.C § 1996.
[248] See *City of Boerne v. Flores,* 521 U.S. 507 (1997).

which injured religious practitioners unless petitioners could prove that the regulation contained secular exemptions, codified or not.[249] Although this may seem like a reasonable compromise for a judicial system weighing issues of minority religions against that of majority rule, it paved the way for the Supreme Court's 2022 adoption of the "Most Favorite Nation" approach to Free Exercise in *Tandon v. Newsom*.[250] This framework bestows disproportionate power to evangelical Christian plaintiffs who use religious liberty as a means of weakening detested policies.[251]

The Court's recent and callous eagerness to provide amnesty for evangelicals running afoul of anti-discrimination ordinances and the Establishment Clause, discussed further below, leads many progressive religious minorities to see the Court's current stance on religious exemptions as an affront to the original goals of the Free Exercise Clause.[252]

In 2014, the Supreme Court shifted further away from the traditional view of the Free Exercise Clause as a protection for religious minorities from discriminatory laws and toward a weapon for fundamentalists to wield against the LGBTQ community and people in need of reproductive care.[253] In *Burwell v. Hobby Lobby,* the Court ruled that a for-profit entity

[249] See *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (1999); and *Tenafly Eruv Association Inc. v. The Borough of Tenafly* 309 F.3d 144 (2002).
[250] *Ritesh Tandon, et al. v. Gavin Newsom* 593 U.S. __ (2021), Justice Kagan writing for the dissent.
[251] Epstein and Posner, "The Roberts Court and the Transformation of Constitutional Protections for Religion," 2021; Melissa Murray, discussion with Micah Schwartzman and Nelson Tebbe, 2022.
[252] See Anti-Defamation League, Orthodox Church in America, The Sikh Coalition, et al. Brief of Amici Curiae in Support of Respondent in *Fulton v. City of Philadelphia,* 593 US_ (2021); John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York, NY: Oxford University Press, 2017).
[253] Gillman and Chemerinsky, "The Weaponization of the Free-Exercise Clause," 2020.

run according to religious principles could deny its employees coverage for contraceptive care.[254] The Affordable Care Act (ACA) mandated that for-profit companies provide health care plans covering certain types of FDA-approved contraceptives, but Hobby Lobby Stores Inc. successfully argued that the mandate imposed a substantial burden on its honest Christian convictions.[255] Writing on behalf of the majority, Justice Samuel Alito reasoned that a multi-billion dollar corporation could hold religious beliefs protected under the Free Exercise Clause and Federal RFRA. Justice Alito's line of reasoning partially relied on a conjured fiction connecting the Jewish merchants whose religious freedoms were denied in *Braunfeld v. Brown* (1961) and the Hobby Lobby Stores.[256] This false analogy posited that if the five merchants in *Braunfeld* incorporated their businesses and lived in a time in which RFRA existed, the federal government would unconstitutionally force them to open on Saturdays and close on Sundays solely because they operated as a corporation.[257] In replacing key issues of the 1961 case, the Justice rewrote Jewish American legal history and co-opted discrimination against Jews across the country in the name of the conservative majority's metastasizing evangelical agenda. By comparing the oppression of Jewish Americans to the financial inconvenience of Hobby Lobby, the Court justified endowing for-profit organizations with the ability to exercise religious beliefs on behalf of their owners. This ruling empowered evangelical shareholders to mobilize their corporations, hiding their prejudices and frugality behind a facade of religious zeal. The ruling also muddled the line between owner and entity by equating the beliefs of the former to that of the latter as

[254] *Burwell v. Hobby Lobby Stores Inc.* 573 US 682 (2014).
[255] 42 U. S. C. §300gg–13(a)(4), (2010); *Burwell v. Hobby Lobby Stores Inc.* 573 US 682 (2014).
[256] *Braunfeld v. Brown,* 366 US 599 (1961).
[257] *Burwell v. Hobby Lobby Stores Inc.* 573 US 682 (2014).

corporations litigate not to maximize profits, but to advance other mundane objectives.[258]

Three years after *Hobby Lobby*, the Court overlooked major issues of entanglement when a church charged Missouri with infringing on its rights to Free Exercise. When the Missouri Department of Natural Resources denied the Trinity Church of Columbia (Trinity) from receiving public funds for purchasing recycled tires to resurface its playgrounds, Trinity sued, suggesting that the state's constitutional obligation to deny it the grant violated the Church's rights to Free Exercise.[259] Ignoring Missouri's argument that its strict anti-entanglement state Constitution and the Federal Establishment Clause commanded the Department of Natural resources to deny Trinity the grant, the majority of the Court sided with Trinity.[260] The Court figured that the rejection of otherwise-qualified applicants based solely on the presence of religion triggered a strict scrutiny test under *Smith* which the state could not pass.[261] This framing positioned the Court greatly in favor of state-sponsored religion, whereby it would become unconstitutional for states to deny institutions secular aid when Missouri has "no viable Establishment Clause claims."[262] The case, alongside other recent Establishment-Free

[258] Garrett, "The Constitutional Standing of Corporations," 2014.
[259] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017); Brief for Petitioner in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017).
[260] American Civil Liberties Union Foundation et al. Brief of Amici Curiae in Support of Respondent in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017); MO. Const. Art. I, § 7 (1875).
[261] Drawing from *Smith,* Chief Justice Roberts wrote in the opinion that "the Free Exercise Clause protects against laws that "impose special disabilities on the basis of… religious status."
[262] T*rinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017). It is important to note that despite the question of the case seemingly voiding the state of an Establishment claim, Respondents continued to make Establishment claims in their brief.

Exercise battles, signals a growing willingness by conservative justices to narrow the Establishment Clause in a post-*Lemon* era and expand the Free Exercise Clause in a post-*Smith* era.[263] The question remains, however, to whom such rights will be extended and to what extent the Establishment Clause will be sacrificed. Will everyone be granted the same levels of religious liberties as evangelicals were in *Hobby Lobby*, *Bremerton*, and *Trinity*, or will the hopes of conservative legal theorists win out and allow them to deny religious minorities the right to Free Exercise?[264]

III. Gender Affirming Care

A. Introduction to the Case

To explore the incongruencies between anti-trans laws and *halachic* tradition, this section will apply Jewish legal reasoning and American religious liberty jurisprudence to Act 626 of the Arkansas 93rd General Assembly, hereafter referred to as the Health Care Ban, which was the first state law explicitly criminalizing gender affirming care.[265] Beginning with a thought experiment on the *halachic* obligations of

[263] England, "Justices Answer Coach Kennedy's Prayer with Play in the Joints Audible," 2020; *Lemon v. Kurtzman* was a major Establishment Clause case and provided a three-pronged test to determine whether statutes are secular, advance or inhibit religion, or excessively entangle the government in religious matters.

[264] *Burwell v. Hobby Lobby Stores Inc.* 573 US 682 (2014); *Kennedy v. Bremerton School District,* 597 US__ (2022) effectively overturned *Lemon* by reasoning that the government cannot suppress religious expression, even when Establishment concerns exist; T*rinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017); Blackman, et al, "Tentative Thoughts on the Jewish Claim to a "Religious Abortion,'" 2022.

[265] Conron, O'Neill, Vasquez, and Mallory, "Prohibiting Gender-Affirming Medical Care For Youth," 2020; Defendants in *Brandt v. Rutledge* the 8th Circuit Court upheld the lower court's injunction of the Health Care Ban. For the sake of argument, this article acts as if *Brandt* never happened.

Jewish medical providers and then applying it to the current predicament of Jewish physicians in Arkansas, this section will prove that mounting anti-trans laws in conservative states, predominantly supported by Evangelical Christians, violate the Free Exercise rights of Jewish providers.[266] This section calls on Jewish healthcare providers to unite with LGBTQ+ communities and lawyers to fight the rising denial of science and medicine in states like Arkansas, whose governments are controlled by theocratic extremists, by bringing *halacha* and the Free Exercise Clause into court.

B. Foundations of the Case and Halacha

Let us begin this thought experiment by positing that a transgender eleven-year-old in Little Rock asks his pediatrician, with the full support of his parents and long-term therapist, to prescribe puberty blockers. The pediatrician, anxious about the legal repercussions she could face for providing treatment or recommendations, tells the family that she will call back with a definite answer by the end of the week.[267]

During that week, the doctor reaches out to her rabbi to ask what she should do given the circumstances. Her rabbi tells her to come to his office to discuss the doctor's worries about providing gender affirming care to a child wishing to transition. Upon arrival, the doctor explains that although she thinks the Health Care Ban is abhorrent, she feels as though it leaves her with nothing to do but to let her patient suffer.

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[266] For more on evangelicalism and anti-trans laws/culture see Sex and Uncertainty in the *Body of Christ*: Intersex Conditions and Christian Theology, 2010, by Susannah Cornwall and OtherWise Christian: A Guidebook for Transgender Liberation, 2019, by Chris Paige.

[267] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch. 9 § 1502 (2021).

Responding to the internal conflict in his congregant, the rabbi recounts the story of the wicked Turnus Rufus and Rabbi Akiva to explain that the disparities in the world exist for the children of God to change, not to enjoy as predetermined.[268] He further explains that God makes no mistakes in putting trans folk in the wrong body, just as God makes no mistakes in allowing people to develop inflamed appendices or heart defects.[269] God creates these situations to allow doctors and their patients to work in collaboration, building a compassionate society through learning and care.[270] To ignore the cries of trans children who beg their doctors to help them materialize their identity would be a crime akin to murder, no different from denying care to a patient with the flu or Crohn's Disease.[271]

The doctor responds by saying that she knows that she should offer the boy care, but even to make a medical recommendation would put her medical license in jeopardy, preventing her from providing care for sick children in the future.[272] The rabbi first responds by reminding the doctor that one who destroys a soul is considered to have destroyed the entire world, and to deny her current patient the care he needs would be to deny him of his existence, sentencing him to years of trauma that could end in suicide.[273] Addressing her concern for future patients, the rabbi reminds the doctor that the boy's

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[268] Bava Batra 10a:4.
[269] Moskowitz and Safer, "Advancing the Rabbinic Prescription for Transgender Health Care," 2019.
[270] Sefer HaChinuch 66:2.
[271] Beit Yosef, Yoreh Deah 336:2.
[272] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch. 9 § 1504 (2021).
[273] Mishnah Sanhedrin 4:5; Yerushalmi Talmud 4:9; Hayward, "Don't Exist," 2017, 191-194; Van der Miesen, et al., "Psychological Functioning in Transgender Adolescents before and after Gender-Affirmative Care Compared with Cisgender General Population Peers," 2020), 699-704.

life is not a hypothetical, unlike the lives of future patients.[274] The doctor's inclination to shed the blood of one child in exchange for her career and the lives of future patients is an act of violence that violates her sacred duties as a qualified Jewish medical professional.[275] According to *halacha,* the doctor must show compassion, knowing that neither she nor the State of Arkansas could ever completely comprehend the boy's experience, and she must provide gender affirming care.[276]

With this information, the doctor realizes that, according to Jewish law, she must provide the boy with gender affirming care. Following the conversation with her rabbi, the doctor calls the patient's family to inform them that she will prescribe the off-label usage of gonadotropin-releasing hormone (GnRH) injections to suppress the boy's natural releasing sex hormones. After three rounds of safe injections, consistent monitoring, and thousands of dollars in out-of-pocket payments from the family, the Arkansas State Medical Board learns of the doctor's actions and calls a disciplinary hearing in accordance with the Health Care Ban.[277] The Medical Board revokes the doctor's license under charges of "unprofessional conduct," forcing her to appeal.[278]

C. The Case

We continue the imagined case of the Jewish doctor to evaluate the efficacy of predominantly conservative legal methods of reasoning as a means of protecting gender affirming care. We will first apply the Most Favorite Nation

[274] Rabbi Mike Moskowitz, interviewed by Daniel Block, virtual, May 24, 2022.
[275] Shulchan Arukh, Yoreh De'ah 336:1.
[276] Yoma 83a:2.
[277] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch. 9 § 1504 (a) (2021).
[278] Medical Practices Act, A.R. Code Title 17, Ch. 95 § 409 (2) (2020).

Doctrine to show that the Health Care Ban violates the Federal Constitution's guarantee to Free Exercise. Then, we will show a plain and historical reading of the Free Exercise Clause and how it allows the Jewish physician to continue prescribing hormone replacement therapy (HRT). We will end with a critique of the case below, examining pitfalls and shortcomings that a Jewish petitioner and their legal team may expect when making such religious liberty claims.

D. Most Favored Nation Doctrine

The invention of the Most Favorite Nation Doctrine highlights the asymmetric treatment of religious exemptions demanded by zealots appearing before courts. As solidified in *Fulton v. Philadelphia,* the Supreme Court understands that the existence of any individual and secular exemption written into statute renders the policy not generally applicable, thereby triggering the strict scrutiny test under *Sherbert.*[279] When evaluating the permissibility of a law not generally applicable, courts must question whether the denial of religious exemption relies on the compelling interest of the governing body.[280] As previously stated, the denial of religious exemption seldom passes the strict scrutiny test in courts. Before arriving at this test, we must ask two questions: (1) does the statute provide any individualized exemptions? (2) If so, does the government take into consideration the particular reason behind the conduct in question? The following evaluation will show that the answer to both questions is yes, triggering a strict scrutiny test of compelling state interest that the Ban will surely fail.

Upon answering the first question, one would see that the Health Care Ban excludes the treatment of those with a "medically verifiable disorder or sex development" or an

[279] *Fulton et al. v. City of Philadelphia*, 593 U.S. __ (2021).
[280] *Church of Lukumi Babalu Aye Inc. v. City of Hialeah* 508 U.S. 520 (1993).

"infection, disease, or physical disorder, injury, or illness" from its definition of "gender transitioning procedures".[281]Although one might argue that the categorical exclusion of certain classes of health conditions is not the same as an individualized exemption from the law, it is clear that, by applying the definition of "gender transitioning procedures" to all pediatric prescriptions of HRT and Gonadotropin-Releasing Hormones (GnRH) except those with the aforementioned "medically verifiable conditions" the Ban does in fact create an exemption. For example, a pediatrician treating children with hypogonadism would not have to worry about being sanctioned for prescribing HRT because a categorical exclusion exists in the Health Care Ban for doctors treating children with such ailments.[282] However, the same doctor would be barred by the Health Care Ban from prescribing HRT to patients who seek the treatment as gender affirming care.[283] The ban's exclusion of gender affirming care from its definition provides doctors treating gender conforming patients with a secular exemption under the law. The existence of a secular exemption for individual doctors providing care to children with "medically verifiable conditions" parallels the exemptions ruled unconstitutional in Supreme Court religious liberty cases.

To evaluate whether the Ban invites a governing body to consider the reason for the conduct, we turn to *Fulton v. City of Philadelphia.* In *Fulton*, the Court held that the Commissioner of the Department of Human Services' refusal to contract Catholic Social Services (CSS) unless it certifies

[281] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch9 § 1501-6B(i) (2021); Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch9 § 1501-6B(iii) (2021).
[282] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch9 § 1501-6B(ii) (2021); Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch9 § 1501-6B (iv) (2021).
[283] Save Adolescent From Experimentation Act, A.R. Code Title 20, Ch9 § 1502 (a) (2021).

same-sex couples as foster parents violated the Free Exercise Clause.[284] The Court relied on its rulings in *Smith* and *Bowen v. Roy* (1986) to determine that laws which create a system of individual exemption cannot prevail unless they extend such a system to issues of religious hardship.[285] The Arkansas General Assembly created a system similar to that in *Fulton* when it empowered the Arkansas State Medical Board (ASMB) to investigate claims of unprofessional conduct and categorical exemptions.[286] During its investigation and hearing proceedings, the ASMB must "accord the person against whom charges are preferred a full and fair opportunity to be heard in his or her defense."[287] However, by opening the door to a "full and fair" hearing of the defending health care provider, the ASMB is forced to consider the particular reason for the provider's decision to violate the law. It must do so, not only to give a "full and fair" hearing to the accused, but to determine why the treatment was prescribed. For instance, if a doctor were accused of illegally prescribing HRT for the purpose of gender affirmation, they may seek dismissal because they prescribed HRT to treat a "medically verifiable condition". Upon hearing this reason for prescription, the ASMB would surely deem the provider not guilty and dismiss the case. However, if the ASMB were to ask the Jewish doctor in the case above why she prescribed GnRH, the doctor would undoubtedly explain that she administered the treatment because she deeply believes her religion commands her to do so. Despite holding serious religious convictions that informed her decision, the ASMB would still deny the doctor an exemption, even though it would do so for a doctor prescribing HRT for non-gender affirming reasons.

[284] *Fulton et al. v. City of Philadelphia*, 593 U.S. __ (2021).
[285] *Bowen v. Roy,* 476 U.S. 693 (1986).
[286] Medical Practices Act, A.R. Code Title 17, Ch. 95 § 410.
[287] Medical Practices Act, A.R. Code Title 17, Ch. 95 § 410(d).

The consideration of the doctor's reason for violating the law, a consideration the ASMB is mandated to undertake during its proceedings, renders the law not generally applicable and triggers strict scrutiny.[288] The ASMB not only hears the defendant's case to understand the reasoning behind the action, but to determine whether the conduct truly was in violation of the Health Care Ban. If the ASMB determines that the accused medical provider was acting in accordance with the law and providing HRT for someone with a "medically verifiable condition", it will recognize the categorical exemption and dismiss the charges.[289] Because the exemption is predicated on the reason for treatment, and doctors accused of violating the law must demonstrate that the care they prescribed falls within the Ban's listed exemptions, the ASMB must provide individualized exemptions to doctors. The provision of individualized exemptions enumerated in the Ban and executed by the ASMB's interrogation of a doctor's particular motive for prescribing care infringes upon the Jewish doctor's right to free exercise and "can be justified only by a compelling state interest."[290]

E. Compelling State Interest

Finally arriving at the question of compelling state interest, we ask if the State of Arkansas maintains a compelling interest in preventing the Jewish doctor from fulfilling her *halachic* obligation to provide medical care to trans children.

The Court held in *Trinity v. Comer* and solidified in *Espinoza v. Montana Department of Revenue* that state laws generally providing funding for social programs while prohibiting funding for religious organizations "impose special disabilities on the basis of religious status" and violate the Free

[288] *Bowen v. Roy*, 476 U.S. 693 (1986).
[289] Medical Practices Act, A.R. Code Title 17, Ch. 95 § 410(e)(2).
[290] *Fulton et al. v. City of Philadelphia*, 593 U.S. __ (2021).

Exercise Clause's prohibition of unequal treatment of religious folk.[291] Although the disputed elements in the case do not involve the distribution of public funds, it is clear that the Ban similarly burdens Jewish healthcare providers by allowing doctors prescribing HRT and GnRH for non-gender affirming reasons to continue their practice. It thus "effectively penalizes the Free Exercise" of the Jewish doctor's constitutional liberties to practice her faith, which deeply informs her medical practice.[292] Some may argue that the Ban does not qualify as a "special disability," because it prevents all doctors from prescribing gender affirming treatment, not just Jewish doctors. However, the fact that no provider can prescribe gender affirming care is not what qualifies the above case as a "special disability". The crux of the constitutional violation rests on the fact that the doctor is obligated by *halacha* to validate the trans child through medicine, and the State of Arkansas punishes her for doing so. This indirect coercion forces the physician to "surrender" her "religiously impelled" actions or suffer the penalty dealt by the ASMB.[293]

By framing the case in terms of coercion, we see that the state's desire to restrict access to gender affirming care does not provide a compelling enough interest for preventing Jewish health care providers from fulfilling their religious obligations.[294] This assertion is buttressed by the fact that Arkansas lacks any sort of "historic and substantial" interest in forbidding Jewish doctors from fulfilling their religious need to care for their patients.[295] In fact, the State's historical and substantial interest in preserving the rights of religious individuals who violate local statute far outweighs the State's

[291] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 US __ (2017); *Espinoza v. Montana Department of Revenue,* 591 U.S. __ (2020).
[292] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[293] *McDaniel v. Paty*, 435 U. S. 618 (1978).
[294] *Lyng v. Northwest Indian Cemetery,* 485 U.S. 439 (1988).
[295] *Locke v. Davey,* 540 U.S. 712 (2004).

recent interest in policing gender affirming care.[296] By weighing these two interests against one another, it becomes clear that Arkansas and its people throughout history have maintained higher regard for the protection of religious exercise than it has for the restriction of gender affirming care. Clearly, the Ban fails the strict scrutiny test on these grounds.

F. Issues with the Case and Further Considerations

Although this article proved that the State of Arkansas fails the strict scrutiny test and that the ASMB must provide religious exemptions for Jewish doctors prescribing gender affirming care to minors, the strategy taken in the above case should only be utilized as a desperate last resort. If a lawyer were to argue that a Jewish doctor who lost their license due to providing gender affirming care should receive an exemption on the basis of religion, they would probably succeed on the merits. However, three critical issues arise from succeeding in the above case: (1) It would further legitimize the "Most Favorite Nation" Doctrine and strengthen arguments raised by conservatives wishing to be exempt from non-discrimination ordinances; (2) It would only empower Jewish medical providers to prescribe gender affirming care to minors, a small population in Arkansas; (3) It ignores the more convincing Civil Rights argument which Justice Neil Gorsuch made available to liberal attorneys in *Bostock v. Clayton County.* This

[296] Millar, "What makes Arkansas' 'Religious Freedom' Bill Different from Other States?," 2015; The passage of Ark Code Title 12, Subtitle 5, Ch. 75 § 134 (2021) highlights Arkansas' interest in protecting "soul-sustaining" religious activities, despite the advice of select medical professionals; For an example of Arkansas' historic interest in defending religious practitioners from government interference see Ernest Valachovic, "Faubus Opens Home to Children of Cude; Assails Ruling as Too Drastic On Simple Law." *Arkansas Gazette*, April 8,1964. p.1A-2A. Although the request for religious exemption was denied in *Cude*, Governor Faubus and many Arkansans voiced support for Mr. Cude during the early 1960s.

final section will explain why each of these flaws must be seriously considered before any attorney makes a religious liberty claim to practice medicine.

As previously discussed, the "Most Favorite Nation" Doctrine has only appeared in one Supreme Court ruling and one shadow docket decision, both of which occurred in the past two years.[297] The newness of this Doctrine not only shows the maximalist tendencies of the recently anointed ultraconservative Supreme Court, but also its willingness to disregard the Establishment Clause's prohibition against the government showing preference toward religion. If a liberal attorney were to utilize the Doctrine to secure the right for a Jewish medical provider to prescribe gender affirming care to a minor, they open the door for plaintiffs of other beliefs to attack similar statutes. For example, if the Court validated the above argument and granted the Jewish doctor an exemption from the Ban, evangelical psychiatrists living in other states could challenge statewide bans against conversion "therapy" on similar grounds. To remedy this, attorneys could make the potentially problematic argument that the Jewish physician is commanded by a rich history of oral and written laws, whereas no parallel tradition encourages the abuse of queer youth in Evangelicalism.[298] In suggesting that the Jewish doctor is explicitly commanded by her religion to provide health care for those in need, as opposed to the psychiatrist who sees queerness as an abomination, a lawyer could demarcate the boundaries of what it means to exercise religion. This argument would rely on a differentiation between religious commandments and what a religious person views as "endorsing" or "promoting" unholy behavior. Such a claim would rest on the fact that Talmudic tradition commands the Jewish physician to provide medical care, but the Bible does

[297] *Fulton et al. v. City of Philadelphia*, 593 U.S. __ (2021); *Tandon v. Newsom,* 593 U.S. __ (2021).
[298] Neumann, "'A Definitive but Unsatisfying Answer,'" 2022, 108-147.

not command its followers to let children suffer. Furthermore, evangelical leaders have explicitly condemned the practice of conversion therapy, a fact which could potentially weaken a religious liberty claim to administer the conversion "treatment."[299] Still, attorneys should explore the possibilities and risks of arguing that only those explicitly commanded to act a certain way can receive religious exemptions under the "Most Favorite Nation" Doctrine. Before making a religious liberty claim to prescribe gender affirming care, lawyers must ascertain a clear understanding of "exercise" in the First Amendment so that they do not incidentally burden religious minorities living in states such as Arkansas'.

The fact that the above argument would only empower Jewish doctors with the ability to prescribe gender affirming care needs little discussion. Because the above case argues for individualized religious exemptions for Jewish doctors, it leaves no room to include physicians of other faiths who are similarly commanded to provide treatment for trans youth. Although physicians could form a coalition of complainants in the above case, doing so might dilute the sincerity of the claim for individual exemptions, leading them to potentially be accused of using religion as a means of advancing a political agenda. Additionally, providing religious exemption to Jewish practitioners in Arkansas does nothing in actuality to alleviate the pain inflicted by the Ban. Only one practicing Jewish general pediatrician currently lives in central Arkansas, and there is no Jewish endocrinologist in the state to actually monitor healthy hormone levels in children.[300] Clearly, the above case exists in a world where there are enough Jewish health care providers to treat all of the trans children in

[299] Bailey, "Evangelical Leader Russell Moore Denounces Ex-Gay Therapy," 2014.
[300] Rabbi Barry Block, interviewed by Daniel Block, virtual, August 26, 2022.

Arkansas, but no such world actually exists, which is why the case is a thought experiment.[301]

The last issue for lawyers to consider before implementing the strategy in the above case is Justice Gorsuch's understanding that the LGBTQ+ community sits as a protected class in the Civil Rights Act of 1964.[302] An attorney could point out that the Health Care Ban makes testosterone illegal for trans boys because they were born in a female body, but it still allows cisgender boys to receive testosterone because they were born in a male body. This argument would push the idea that Arkansas violated the Civil Rights Act when it identified the sex of the child as the only qualifying factor in considering whether they can receive HRT, GnRH, or other gender affirming treatments. This qualifying factor forces the entire Arkansan medical field to deny trans people a certain level of care, which it otherwise offers to cisgender patients, entirely on the basis of sex.[303] The sex-based discrimination, mandated by the Ban, violates the Civil Rights Act and cannot be upheld in court.[304] This claim is likely the most persuasive. If successful, the Civil Rights claim would also have the greatest impact for trans people and their doctors in Arkansas. It would allow doctors to administer gender affirming care, regardless of religion, and would recognize that the rights come from that of the trans individual and do not depend on a relationship with a Jewish physician.

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[301] Of course, this ignores the fact that a Jewish doctor living in a bordering state could be licensed in Arkansas and travel for the sole purpose of providing gender affirming care.

[302] *Bostock v. Clayton County,* 590 U.S. __ (2020).

[303] Note the difference between sex and gender. Sex is determined by the last two chromosomes in a human's genome. It by no means makes someone a man or woman. Gender can only be articulated by the individual.

[304] *Bostock v. Clayton County,* 590 U.S. __ (2020).

IV. Conclusion

This paper examined religious liberty jurisprudence and the efficacy of making a Free Exercise claim to prescribe gender affirming care to minors in Arkansas. Although the claim would be a noble effort made by a Jewish doctor, and it highlights religious coercion forcing Jewish Arkansans to choose between their religion and other cherished rights, it would not extend sufficient access to care for trans kids and would only legitimize the religious claims made by fundamentalists looking to defy non-discrimination statutes. Lawyers could add a Free Exercise claim to a case primarily concerning the Civil Rights issues of the ban, but the health care provider's religion should not be the center of the case. Despite the issues with the Free Exercise claim, it is still crucial for Jewish health care providers in Arkansas and across the country to enthusiastically fight for the right of trans children and their families to receive gender affirming care. Only by joining hands with the trans community can Jewish health care providers ensure a more just and joyous world for their patients, regardless of identity.

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