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3 Myths About Religious Freedom and Abortion

The official demise of *Roe v. Wade* and the proliferation of abortion bans around the United States have been met with a range of lawsuits fighting to restore reproductive freedom. Several suits raise religious liberty arguments in support of abortion rights. These suits have piqued interest across the political spectrum, though much of the commentary around the litigation is mired in misconceptions. This explainer tackles the three main myths surrounding the legal questions in suits arguing for a religious right to abortion. For a more thorough analysis of this field, please see the Law, Rights & Religion Project's publication, **A Religious Right to Abortion: History and Analysis.**

1

MYTH Arguments that religious freedom supports abortion access are "new."

FACT Many religious denominations and people of faith have asserted a religious right to abortion for decades.

Shortly after the Supreme Court reversed *Roe v. Wade* in 2022 (in *Dobbs v. Jackson Women's Health Organization*), several lawsuits were filed arguing that new state restrictions on abortion violated the religious liberty of people whose faith supported abortion. These claims were seen as "new" or "fabricated" attempts by supporters of abortion rights to jump on the religious liberty bandwagon. But quite the opposite is true. A right to abortion articulated by religious denominations, clergy, patients, and healthcare professionals has been grounded in faith-based principles for decades. While these challenges may have new meaning in a post-*Roe* world, they are not novel. People of faith have long insisted that the Constitution's guarantees of religious freedom include a right to reproductive autonomy.

In the pre-*Roe* era, a significant number of religious organizations supported the decriminalization of abortion. Prompted, at least in part, by the increased visibility of unsafe abortion, **many** of them published official policy statements supporting law reform, not motivated by secular rights-based politics but as a matter of their religious beliefs. Elsewhere, religious organizations and **clergy members** acted on their faith by assisting women across the country to access safe abortion. And for thousands of women, the decision to seek an abortion was deeply connected to their religious beliefs about life, liberty, and parenthood.

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This religious thought and practice also impacted legal and political efforts. Advocates impugned abortion restrictions as violations of the Establishment Clause (separation of religion and the state) and the Free Exercise Clause of the First Amendment (right to freely exercise one's religion) in **courts**, in **legislatures**, and through public advocacy. Religious freedom claims took different forms. In a **challenge** to New York's abortion ban in the 1960s, lawyers representing 300 women made both Establishment Clause and Free Exercise claims, **arguing** that the state's regulation was based on the belief that abortion is a sin, and prohibited women from acting freely on alternative religious beliefs. In a separate case in the same period, ***Women v. Connecticut***, the plaintiffs focused on the religious underpinnings of the statute, arguing that it imposed a specific religious conviction that life begins at conception. Ultimately, neither of the courts directly addressed the religious freedom claims brought in these pre-*Roe* decisions. The New York case was dismissed as moot because the state legislature legalized abortion and the Connecticut federal district court invalidated the state's abortion ban as a violation of the right to privacy under the 14th Amendment.

The First Amendment also did not form the basis of the Supreme Court's 1973 decision in *Roe*. Nevertheless, **some** argue that separation of "church and state" concerns are visible in Justice Blackmun's majority opinion. Others claim that by declining to endorse a theory of when life begins, the U.S. Supreme Court affirmed an individual's ability to seek an abortion as a matter of their own religious and spiritual conscience. Notably, when initially filed, ***Doe v. Bolton*** (*Roe*'s companion case) included a challenge brought by clergy to Georgia's anti-abortion statute. The ministers argued that Georgia unconstitutionally restricted their right to practice their profession and counsel in favor of abortion with their pregnant congregants, but the District Court **ruled** that only the pregnant woman had standing to challenge these statutes.

Appeals to religious liberty to shore up the abortion right continued after *Roe*. For example, First Amendment claims were central to the **strategy** to tackle the Hyde Amendment – the federal law barring the use of federal funds to pay for most abortions. In ***Harris v. McRae***, plaintiffs, including officers of the United Methodist Church, asserted that the Hyde Amendment violated the separation of church and state, and the Free Exercise rights of pregnant women. Though the Free Exercise claim was successful in the **lower courts,** ultimately the Supreme Court chose not to rule on the question. Later cases have invoked the protections of state or federal **Religious Freedom Restoration Acts** (RFRA) to challenge abortion restrictions, albeit **unsuccessfully**.

Since the 1980s, in response to conservative litigation efforts to chip away at abortion rights, pro-choice religious groups have also been active in filing "friend of the court", or *amicus*, briefs. In contrast to the voices that critiqued *Roe* as an offense to religion, groups such as the American Jewish Congress, Catholics for Free Choice, the

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Religious Coalition for Reproductive Choice, and the Unitarian Universalist Association emphasized that *Roe* safeguarded religious freedom by enabling people to follow their faith when deciding if and/or when to terminate a pregnancy.

Despite this long history of faith-based principles supporting the full range of reproductive healthcare, religious opposition to abortion has gained more media and court attention. Indeed, many faith-based organizations have maintained the position that protecting the right to abortion (and contraception) is more consistent with religious liberty principles than restricting it. The long legal history of religious freedom arguments for reproductive rights appears to have been largely forgotten by the legal community and media alike. While often accompanied by privacy and equal protection claims, advocates have brought legal challenges to everything from total abortion bans to public funding limits on the provision of abortion in public hospitals, to informed-consent statutes as violations of the religion clauses.

2

MYTH To claim a religious right to abortion, my religion must officially "require" abortion.

FACT Religious liberty rights need not be grounded in sacred texts, but rather in each person's sincere religious beliefs, even if they depart from official doctrine.

Religious liberty rights are quite broad, and protect both orthodox and unconventional believers. A person need not establish that their religion mandates abortion in order to claim a religious right to terminate a pregnancy. Nothing in current U.S. religion law doctrine demands that a religious act or belief be obligatory in order for it to be eligible for protection as religious practice. Nor does one's religious belief or practice have to be rooted in formal religious doctrine or even be shared by others.

What, then, is required? To obtain a religious exemption under the First Amendment or religious freedom statutes (e.g. RFRA and state analogs) a claimant must demonstrate that the challenged government action: (i) imposes a substantial burden on their religious exercise or belief, and (ii) that the burden cannot be justified as "the least restrictive means" of achieving a "compelling governmental interest." The "religious exercise" part of this test does not oblige a claimant to prove that the religion they follow *requires* certain conduct – it **can include** "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Longstanding First Amendment doctrine similarly **holds** that it would be inappropriate for courts to decide whether a particular religion imposes certain obligations on its adherents or the validity of particular claimants' interpretation of their religion. To do so

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would entangle the courts in religion **in violation** of the Establishment Clause. That is, if courts were tasked with deciding whether some act or belief is part of a particular religion, the State would be far too involved with religion.

In the abortion rights context, the claimant must demonstrate that their own sincere religious beliefs motivate their reproductive decision-making or efforts to help others access abortion care.

3

MYTH

Plaintiffs are only claiming a religious right to abortion as a "gotcha" because conservatives have successfully used religious freedom arguments.

FACT

Religious liberty does not protect only conservative believers, but people of all faith traditions. As explained, people of faith have argued for a religious right to abortion for decades, and such claims should be treated as seriously as those brought by religious opponents of abortion.

One of the most foundational rules of religious liberty—mandated by both the Free Exercise Clause and the Establishment Clause of the First Amendment—is that laws and policies must apply neutrally to people of all faiths. Courts must review RFRA and free-exercise claims neutrally and treat claims equally. Similarly, those who think, speak, and write about religious liberty must take care to present a pluralistic view of religion and religious freedom. It is useful in this context to consider the **legal cases** involving people of faith who have exercised their religious freedom for humanitarian or social justice ends. For example, aid workers who were prosecuted for providing food, water, and medical aid to migrants in southern Arizona, allegedly in violation of U.S. immigration and other laws, successfully **defended** their actions as an exercise of their religious liberty. Faith-based institutions have also successfully used religious liberty claims in support of their efforts to shelter unhoused people or feed people who are hungry.

Many aspects of reproductive freedom — safeguarding abortion access, decision-making about family size and birth, assisting persons in need – are religious practices of deep importance for many people. And as explained, people of faith have argued for a religious right to abortion for decades, and such claims should be treated as seriously as those brought by religious opponents of abortion. Narratives that treat religious commitments to reproductive rights as superficial or politically motivated are both doctrinally unsound and offensive.

Commentators must be careful not to imply that plaintiffs in abortion cases are insincerely exploiting religious liberty law. The misunderstanding that religious liberty exclusively applies to a narrow set of conservative Christian beliefs about sex, sexuality, and marriage must be rejected by the media, advocates, and courts alike.