2022 Religious Freedom Plenary Workshop
CLS National Conference, October 2022

Introduction: The 2021-22 Supreme Court term will go down in history as the term the Court decided *Dobbs*, but *Dobbs* was not the only landmark opinion this term. The Court also decided four significant religious freedom cases - *Shurtleff, Ramirez, Carson,* and *Coach Kennedy*. Attendees will hear about all of these victories from the lawyers who litigated them. Panelists will discuss how these cases came about, what it was like to argue before the Court, and how these decisions have reshaped religious freedom law.

I. Religious Freedom and Free Speech Cases

A. Establishment Clause

Carson v. Makin

1. **Background.** The State of Maine has a tuition assistance program under which the state pays students' tuition to attend a different high school - public or private - if students live in a school district that lacks a high school, as is sometimes the case in rural Maine. Maine will not, however, pay tuition if students choose a "sectarian" school. Parents who wanted their children to attend accredited religious high schools sued the state, claiming violation of their Free Exercise rights.
2. **Majority Opinion**
   - **a.** The Court ruled that Maine's tuition assistance program violated the Free Exercise Clause because it excluded religious schools from the program, overturning the previous U.S. Court of Appeals ruling. In a 6-3 decision by Roberts, and joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause. Speaking on behalf of a six-judge majority, the Chief Justice noted that Maine's tuition assistance program is available to a wide variety of schools, including single-sex and out-of-state schools, but not religious schools. It therefore denied religious schools a generally available benefit.
   - **b. Religious discrimination.** "The state pays tuition for certain students at private schools – so long as the schools are not religious," Roberts wrote. "That is discrimination against religion."
   - **c. Strict scrutiny.** In so ruling, the Court held that Maine's program could not survive strict scrutiny, and that the principles the Court applied in *Trinity Lutheran Church of Columbia v. Comer* (2017) and *Espinoza v. Montana Department of Revenue* (2020) resolved the case at hand. The Court found that Maine's antiestablishment interest did not justify excluding members of the community from an otherwise generally available public benefit simply because of their religious exercise. The Court also found unpersuasive the First Circuit's attempt to distinguish between religious status prohibitions and the religious use prohibition, noting instead that the prohibition on status-based discrimination under the Free Exercise Clause does not justify use-based discrimination.

3. Breyer Dissent

a. The Establishment Clause creates a "wall of separation between church and state" with the key balance being to allow religious exercise without interference or sponsorship.

b. This is the first time the Court has held a state must pay for religious education

i. *Trinity Lutheran* involved resurfacing playgrounds

ii. *Espinoza* turned on schools that were owned or controlled by churches, not necessarily ones that taught religious doctrine

Kennedy v. Bremerton

1. Background. Coach Joe Kennedy was fired after he knelt at midfield after games to field a quiet personal prayer. Initially he prayed on his own, but over time some players began praying with him. This practice continued for seven years before, after receiving a letter from another school praising Coach Kennedy, the superintendent wrote to Coach Kennedy and identified his prayers as "problematic." Kennedy then requested that the school district allow him to continue offering a private prayer alone after games after the players had left the field. The district's response was that Kennedy should refrain from "any overt actions" that could appear to endorse prayer while he was on duty. After a "fleeting" prayer in which none of his players were involved, but during which Coach Kennedy bowed his head, the school district indicated that he could only continue to pray if he went somewhere he could not be seen by the public. After he knelt at the 50-yard line during the final game of the season, where he was joined by adults, but not students, the school district placed him on administrative leave. Both the district court and the Ninth Circuit held that Kennedy's speech was government speech because he had access to the football field by virtue of his job. As to free exercise, the Court of Appeals found the school district had a compelling interest in not violating the Establishment Clause.

2. Majority Opinion

a. Holding. The Supreme Court held that the First Amendment's Free Exercise and Free Speech clauses doubly protected Coach Kennedy's post-game, midfield prayer, specifically rejecting the school district's claim that permitting the Coach's prayer would violate the Establishment Clause.

b. Strict scrutiny. The Court found Coach Kennedy established a prima facie free exercise claim because the school specifically intended to prohibit him from praying but would not prohibit him from other forms of similar nonreligious activity. The district permitted coaches to forego supervising students after games to chat with friends or take phone calls. Because these restrictions were not neutral and generally applicable, the school district must satisfy strict scrutiny.

c. No government speech. The Court found that Coach Kennedy's prayers are not government speech. He was not speaking in the course of his ordinary duties or pursuant to a government message or policy; therefore, his prayers did note "owe their existence" to his status as a public employee. The Ninth Circuit erred by creating a broad brush in which everything a coach or teacher does at the workplace is treated as government speech. The parties agreed that postgame allowed Mr. Kennedy opportunity to engage in private activities such as taking a phone call.

d. The Establishment Clause

i. The Establishment Clause and Free Exercise Clause have complementary purposes. It cannot be that any time a "reasonable observer" believes that the Establishment Clause is violated that the Free Exercise Clause affords no rights. The Court rejects a modified heckler's veto which prohibits religious activity on the basis of perceptions or discomfort. The Establishment Clause does not require a purge of all religion in the public square, or even religious activity that makes people uncomfortable.

ii. The Court has repeatedly advised that in place of *Lemon v. Kurtzman*, courts should interpret the Establishment Clause in reference to historical practices and understanding. The Establishment Clause should not be read to require all government employees to eschew any religious expression. This case is different than other school prayer cases where the prayers were coercive by way of being led as a part of a graduation ceremony or given over the public address system at football games.

3. Concurrences

a. Thomas. The Court does not address how a government employee's Free Exercise rights may differ from that of the general public. Nor does the Court set out a burden for governments to meet in order to justify restricting religious expression.

b. Alito. The Court does not decide what standard applies to government employee speech during times in which private expression is allowed.

4. Sotomayor Dissent. The Court's opinion overrules *Lemon* and calls into question its progeny. Coach Kennedy caused disruptions by actively engaging with the media to discuss his intent to pray at football games. Moreover, these "private prayers" came after a long history of actively leading the team in prayer and, therefore, they should be viewed as a continuation of a coercive policy. The school district was justified in relying upon the Establishment Clause concerns to restrict the coach's speech. Past Establishment Clause jurisprudence has not required that a coercive effect be "direct."

B. Free Speech

Shurtleff v. Boston

1. Background. There are three flagpoles in Boston's City Hall Plaza: the American flag, the Massachusetts flag, and the flag of the City of Boston. Boston regularly allowed groups to hold ceremonies in the Plaza where participants may raise a flag in place of the Boston flag. Between 2005 and 2017, approximately 50 different flags were flown in accordance with this policy. No flag had ever been rejected under this practice. When Harold Shurtleff wanted to hold an event celebrating the civic and social contributions of the Christian community, he requested to fly the Christian flag. The city refused to fly the flag out of concerns that it would violate the Establishment Clause. Shurtleff filed suit claiming violations of the Free Speech Clause. The district court held that the flags were government speech and, therefore, there was no Free Speech Violation. The First Circuit affirmed.

2. Issue and Holding. Whether the fact that the city government has application process to use the Plaza and fly a flag turn the approved flag into government speech? In a 9-0 decision, the Court held that the flag display is not government speech and, therefore,

Boston violated Shurtleff's free speech rights by not allowing him to fly the Christian Flag in the Plaza.

3. Majority Opinion

a. Written by Breyer

b. The Court noted that where the government invites the public to participate in a program, as here, a court will "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." Factors include the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.

c. Not government speech. The Court noted that although flag flying is typically government speech, here "Boston allowed its flag to be lowered and other flags to be raised with some regularity." These flags were typically connected to events, and observers could see the private citizens conducting activities without the government's presence. Moreover, some of the flags seemed disconnected from any reasonable government message, such as the Metro Credit Union flag. Similarly, Boston had never rejected or even previously requested to review a flag in connection with the approval process and had no written policies or internal guidance as to what flags groups could fly. Given these lack of government controls and the obvious involvement of private citizens, the flag display could not be deemed government speech.

d. No violation of the Establishment Clause. Because the flag raisings were not government speech, they could not lead to an Establishment Clause violation. Here, Boston rejected the Christian flag because of its religious viewpoint, which must satisfy strict scrutiny. Boston did not offer any justifications for denying the application apart from its mistaken view that the flag would be considered government speech and therefore in violation of the Establishment Clause.

4. Kavanaugh concurrence. Justice Kavanaugh wrote to reiterate that allowing religious persons and speech in public programs on an equal basis with does not violate the Establishment Clause.

C. Religious Land Use and Institutionalized Persons Act (RLUIPA)

Ramirez v. Collier

1. Issue. Whether clergy may pray aloud and lay hands on the condemned prisoner in the execution chamber

2. Resources

a. CLS/Berg amicus brief: https://bit.ly/3Fj0FFI
b. Becket/McConnell amicus brief: https://bit.ly/3Dj7HZj

3. Decision authored by Chief Justice Roberts

a. In an 8-1 decision, the Court ruled that a prisoner on death row in Texas can have his pastor touch him and pray out loud while he is being executed, finding that "Ramirez is likely to succeed on his RLUIPA claims because Texas's restrictions on religious touch and audible prayer in the execution chamber burden religious

exercise and are not the least restrictive means of furthering the State's compelling interests."

b. Chief Justice Roberts observed that "there is a rich history of clerical prayer at the time of a prisoner's execution" and that while prison officials may have a strong interest "in monitoring an execution and responding effectively during any potential emergency," they have not shown the need to ban all audible prayer in the execution chamber to advance that interest. Indeed, Roberts noted, there are other ways to do so – for example, by limiting the volume of prayers or requiring spiritual advisers to remain silent at key moments. Roberts also noted that the same is true for the state's ban on allowing the pastor to lay hands on inmates.

c. State interests. Although the state's interests, such as security and preventing interference with the intravenous line in the inmate's arm, are "commendable," Roberts acknowledged, there are other ways to address these concerns, such as requiring the spiritual adviser to limit his touch to the inmate's leg.

II. Substantive Due Process

Dobbs v. Jackson Whole Women's Health

1. **Background.** Mississippi passed the Gestational Age Act, which prohibits abortions when the gestational age is greater than 15 weeks but provides exceptions for medical emergency and severe fetal abnormality. This is lower than the general age of viability outside of the womb, which for most purposes is considered to be about 23 weeks. Under Supreme Court precedent, a state may not impede a woman's access to an abortion pre-viability. The Fifth Circuit affirmed given this precedent.

2. Majority Opinion

a. No right to abortion

i. The right to an abortion is found neither in the Constitution nor rooted in the nation's history and tradition. When *Roe v. Wade* was decided, a majority of states had prohibitions on abortion. Even contemporary abortion supporters criticized *Roe* for not articulating a constitutional basis for its decision. Moreover, the issue has never reached consensus, and there remains widespread disagreement over the practice of abortion.

ii. There is no right to an abortion in the text of the Constitution or its enumerated rights. Arguments for the right to an abortion have been housed in numerous different provisions of the Constitution, including the First, Fourth, Fifth, and Ninth, and Fourteenth Amendments.

iii. There is no substantive due process right to abortion access. An unenumerated right is protected by substantive due process if it (1) is deeply rooted in the nation's history and tradition, and (2) is essential to our nation's scheme of ordered liberty. Abortion is not rooted in the nation's history and tradition. No state constitution protected abortion access and no articles discussed a constitutional right to an abortion until only a few years before *Roe*. Abortion was a crime in every state at some stage and, in the majority of states, was illegal at every stage.

iv. Nor is abortion a part of a broader, entrenched right. A "broader right to autonomy and to define one's 'concept of existence'" as discussed in *Casey v.*

Planned Parenthood has no reasonable demarcation point and cannot be absolute. Moreover, abortion differs from other substantive due process cases because it necessarily involves the destruction of potential life. Those who advocate for the existence of a right must show it should not be left to the political process, and those arguing for an abortion right have not done so. More than half of the states have asked the Court to overturn *Roe*.

b. *Stare decisis*

i. *Stare decisis* is not absolute. Indeed, some of the Court's most celebrated decisions have overturned prior decisions: *Brown v. Board of Education* overturned *Plessy v. Ferguson*; *West Coast Hotel Co. v. Parrish* overturned *Lochner v. New York* and its progeny; *West Virginia Board of Education v. Barnette* overturned *Minersville School Dist*., holding that a school could not compel participation in the Pledge of Allegiance.

ii. Factors weighing strongly against the use of *stare decisis* to preserve *Roe* and *Casey*

1) The *Roe* decision was far outside of any reasonable constitutional interpretation and removed a political issue from the political process

2) The *Roe* decision was not grounded in text, history, or precedent

a) Even the *Casey* opinion refused to endorse *Roe*'s reasoning

b) *Roe* ignored that abortion was banned in the majority of states

c) *Casey* similarly made little effort to justify a basis for the right to abortion and its undue burden test was ambiguous and hard to apply

3) *Casey's* undue burden test is inconsistent and unpredictable.

a) Numerous judges have expressed different views about what constitutes an undue burden

b) The large-fraction test is unworkable and court of appeals cases have been widely divergent on its application

4) *Roe* and *Casey* have distorted numerous legal doctrines to protect abortion. Court precedents regarding facial challenges, res judicata, standing, severability, and saving clauses have all been repurposed for abortion.

5) There is no substantial reliance interest

a) People can change their behavior almost immediately to take account of the change in the law

b) The societal reliance interest found in *Casey* is best left to legislatures and political branches

iii. The Court cannot refuse to faithfully apply the law and refuse to overturn precedent on the fear that doing so would be perceived as political. The best course of action is to turn the question over to the political branches where law requires. *Casey* did not, as it purported to do, settle the question of abortion once and for all. The dissent's reliance on *Casey* as settled precedent ignores its failings to achieve the settlement it claimed.

iv. Does not compel upholding *Roe*

c. Rational basis. Future restrictions to abortion access will be judged under rational basis review. The Mississippi Gestational Act satisfies rational basis because of the state's interest in potential life.

3. **Thomas concurrence.** While many people have read Justice Thomas's opinion as expressing a view toward overturning other substantive due process opinions, this somewhat misreads Thomas. Rather, he questions "whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment." Thus, while he would eliminate reliance on "the 'legal fiction' of substantive due process," his main point appears to be looking to other provisions of the Constitution for a basis of unenumerated personal rights.
4. **Kavanaugh concurrence.** This is a policy question best left to the states. The Court's opinion does not outlaw abortion nationally, and no justice has ever indicated the Court should do so.
5. **Roberts' concurrence in the judgment**
   - **a.** Many have mistakenly indicated that Roberts voted to overturn *Roe*. He did not join the majority that overturned *Roe* but would have upheld the Mississippi law at issue.
   - **b.** The Chief Justice would have held that the right to an abortion should extend far enough to ensure a reasonable opportunity to choose. Accordingly, the Mississippi law is constitutional because 15 weeks gives a woman plenty of opportunity to terminate her pregnancy, and the Court need not decide more.
   - **c.** The Chief Justice would have partially overturned *Roe* and *Casey* to the extent that those opinions gave near absolute protections to women's access to abortion pre-viability; however, he would decide no further because he does not read the question presented as requiring more.
6. **Dissent**
   - **a.** The dissenters argue that by overturning *Roe* and *Casey*, the Court fails to "[r]espect[] a woman as an autonomous being, and grant[] her full equality" by denying "her substantial choice over this most personal and most consequential of all life decisions." Accordingly, the dissenters state that "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."
   - **b.** The dissenters note that although the statute at issue allows abortion at up to 15 weeks, the opinion leaves open the possibility of greater restrictions. The dissenters also argue that *Casey* was a Solomonic splitting of the baby, taking into account the history of the Fourteenth Amendment, the need to recognize the rights or women, and the interest in protecting fetal life.