2022 Religious Freedom Update Workshop:
Developments in the Practice of Religious Freedom Law in 2021-22
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Introduction: As a nonpartisan organization, CLS has long worked with groups across the political and religious spectrum to protect religious freedom and life. This past year has been no different as CLS has worked with a variety of organizations to defend religious freedom. This workshop, which primarily focuses on the federal and state governments' actions affecting religious freedom and life, will update participants on a variety of actions by the Executive Branch, Supreme Court, and Congress during 2021 and 2022.

COURTS

I. Religious Freedom and Pro-Life Cases in the Supreme Court's 2022 and 2023 Terms

Overview: This may have been the most impactful year on religious liberty at the Supreme Court in decades, with two long-derided precedents, *Roe v. Wade* and *Lemon v. Kurtzman* both having been overruled or abrogated. The Court parted from its more recent trend of granting narrow victories and granted more sweeping victories, eliminating ambiguities from more recent decisions. While the Court passed on some significant religious liberty cases, it was still a very good year for religious liberty at the Court.

A. Establishment Clause/ Free Exercise Cases/Free Speech

Carson v. Makin

Background – In Maine, most rural school districts have opted to offer tuition payments to private high schools rather than maintain their own high schools. Where a district offers tuition assistance, the school must be accredited by an approved body, but may otherwise differ from public schools. However, Maine parents could only use tuition assistance for "nonsectarian" schools. Parents who wanted their children to attend accredited religious high schools sued the state, claiming violation of their Free Exercise rights.

Relevant Precedents:

- ***Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)** – Holding, with respect to a church-run school's application for playground resurfacing, that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"

- ***Espinoza v. Montana Dept. of Rev.*, 140 S. Ct. 2246 (2020) –** Holding that Montana's exclusion of religious schools from a tax credit scholarship program and subsequent

elimination of the scholarship program for private schools because some religious schools may benefit violated the Free Exercise Clause because the "Free Exercise Clause protects against even 'indirect coercion,' and a State 'punishe[s] the free exercise of religion' by disqualifying the religious from government aid."

Issue: Did Maine's exclusion of otherwise qualified religious schools from tuition assistance violate religious parent's free exercise rights?

Held: (6-3) The Maine tuition assistance program improperly excludes schools from a generally applicable benefit and does not survive strict scrutiny. It therefore violates the Free Exercise Clause.

Majority Opinion (Roberts, C.J): 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.

Maine argued (based on the First Circuit's opinion upholding its exclusion of religious schools) that *Espinoza* is distinguishable on two grounds: (1) the scholarship program in *Espinoza* excluded schools based on religious status, not based on the religious use of funds, and (2) unlike the Montana program, the Maine funds were designed to be used in lieu of a public education, and the program should be viewed in the light of that purpose.

The Court rejected these arguments, noting that the statute does not require the equivalent of a public education, and allows the tuition assistance to be used in schools that differ significantly from public schools. For example, funds can be used for NEASC accredited schools, which do not have the same curricular requirements as Maine public schools. Similarly, many private schools approved by Maine also do not need to meet the same curricular requirements as Maine public schools. Further, the direction of funds to religious schools is through parents, not directly through the state. Maine was not forced to fund religious schools, it could expand its public-school system or otherwise provide education, but it cannot constitutionally exclude religious schools from an otherwise generally available tuition program.

Regarding the status-use based distinction, the Court held that although *Trinity Lutheran* and *Espinoza* focused on status-based discrimination, the Court was not signaling that use-based discrimination was therefore permissible. The Court noted that scrutinizing religious schools to determine whether there is an improper religious use would likely create entanglement issues in violation of the Establishment Clause. The Court held that *Locke v. Davey* was not a broad rejection of any religious use of government funds, but rather violated the Establishment Clause because the government money was specifically earmarked for ministerial education. It is limited to vocational degrees. Here, the government funding promoted a general good, which was available to religious and non-religious groups.

Key Arguments from the Breyer dissent:

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

- This decision will lead to religious strife in a diverse country.
- We have never held that a state must pay for religious education.
    - *Trinity Lutheran* involved resurfacing playgrounds.
    - *Espinoza* turned on schools that were owned or controlled by churches, not necessarily ones that taught religious doctrine.
    - Here the State is required to sponsor religious activity.
- *Locke* precludes the use of state funds for religious purposes.

Key Takeaways:

- Following *Trinity Lutheran* and *Espinoza*, many Court watchers wondered whether the Court would extent those precedents to cases involving the religious use of government funds, as opposed to the exclusion of religious institutions. The Court definitively answered that excluding an organization from a generally applicable benefit merely because the funds may support a religious use violates the Free Exercise Clause.

- *Locke v. Davey* is likely confined to cases where the intended and exclusive use of the funds is to promote religious vocations. Where religious use is incidental to a secular good, the Establishment Clause is not violated. "*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."

Boston v. Shurtleff

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. However, 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.

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.

Issue: Does the fact that the city government has application process to use the Plaza and fly a flag turn the approved flag into government speech?

Key Precedents:

- ***Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200 (2015)** – Holding that Texas's denial of an organization's application for a specialty license plate did not violate the First Amendment because the license plates are government speech, and the government may control its own message.

- ***Matal v. Tam*, 137 S.Ct. 1744 (2017)** – Holding that the trademark registration is not government speech and therefore the government cannot deny a trademark registration simply because the registered expression may be offensive.

Held: 9-0, the flag display is not government speech, therefore Boston violated the Shurtleff's free speech rights.

Majority Opinion (Breyer, J.):

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.

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.

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. Therefore, the denial violates the Free Speech Clause.

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.

Key Takeaway: The Court will examine the circumstances holistically to determine whether the speech at issue can reasonably be attributed to the government, including the level of review and whether the message is consistently government-related. Just as with offensive speech in *Matal*,

a religious message does not become impermissible simply because it is expressed through some process requiring governmental involvement.

Kennedy v. Bremerton

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 Coach Kennedy a letter identifying his prayers as "problematic." In response, Kennedy requested that the District allow him to continue offering a private prayer alone after games, after the players had left the field. The District responded with a letter indicating 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 District indicated that he could only continue to pray if he went somewhere that 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 District placed him on administrative leave.

The district court and 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 held the District had a compelling interest in not violating the Establishment Clause.

Additional Background: This case originally went to the Supreme Court after the denial of a preliminary injunction. Four Justices (Thomas, Alito, Gorsuch, and Kavanaugh) concurred in the denial of certiorari to further develop the record. At that time, they expressed an openness to revisit *Smith v. Employment Division* and *Trans World Airlines v. Hardison*.

Key Precedents:

***Lemon v. Kurtzman*, 403 U.S. 602 (1971) - Holding** that the Establishment Clause is violated where a government action has (1) a religious purpose, (2) a religious effect, or (3) inextricably entangles the government and religion, also known as the Lemon test. The *Lemon* test became a paradigmatic example of unworkable guidance from the Court and was widely maligned by justices of varying judicial philosophies and dispositions. Lemon v.

***Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968) –** Holding that the government has a greater interest in regulating speech where it is also the employer. The *Pickering* test examines (1) whether the employee spoke on a matter of public concern, and (2) whether the employee's right to free speech is counterbalanced by the government's interest in an efficient, disruption-free workplace.

***Garcetti v. Ceballos*, 547 U.S. 410 (2006)** – Holding that a government employee generally has no free speech rights with respect to statements made pursuant to their official duties.

Majority Opinion (Gorsuch, J.):

The Court held that 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.

The Court found that Coach Kennedy's prayers are not government speech under *Garcetti*. He was not speaking in the course of his ordinary duties or pursuant to a government message or policy. Accordingly, 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 sch as taking a phone call.

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.

The Court has repeatedly advised that in place of *Lemon*, 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.

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

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

Sotomayor Dissent: The Court's opinion overrules *Lemon v. Kurtzman* 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. Thus, they should be viewed as a continuation of a coercive policy. The District was justified in relying upon the Establishment Clause concerns to restrict his speech. Past Establishment Clause jurisprudence has not required that a coercive effect be "direct."

Key Takeaways:

Government employees cannot be prohibited from engaging in religious expression, even while on the job, if the speech is not reasonably viewed as being on behalf of the government. If an employee is free to do non-work-related tasks at the time, then personal religious expression is

probably okay. *Lemon* has been effectively abrogated and replaced with the historical test used in *Galloway v. Town of Greece* and *American Legion v. American Humanist Association*.

Of note: Following the *Kennedy* decision, the Eleventh Circuit vacated and remanded a district court's Establishment Clause decision that relied on *Lemon*. *Rojas v. City of Ocala, Fla.*

B. RLUIPA CASES

***Ramirez v. Collier* –** In this case, the Supreme Court held (8-1) that a prohibition against a prisoner's pastor laying on of hands and audible prayer in the execution chamber is likely to violate a prisoner's rights under RLUIPA, which requires any substantial burden on a person's religious exercise to be narrowly tailored to protect the government's compelling interest.

C. PRO-LIFE CASES

Whole Women's Health v. Jackson.

Background: Texas passed a bill banning abortion once a fetal heartbeat was detected (approximately 6 weeks gestational age). The law did not allow for state officials to bring criminal or civil enforcement actions. Rather, the law allows citizens to bring a civil suit with statutory damages against persons who perform or assist in prohibit abortions. A group of abortion providers filed a pre-enforcement challenge suing a state court judge, a state-court clerk, the Texas Attorney General, executive director of the Texas Medical Board, the heads of other state medical boards, and a private party.

Held: (5-4 in part (; 8-1 in part, Gorsuch, J) – The Court held that the plaintiffs do not have standing to sue the Attorney General or the court system defendants. Many of the State Defendants have sovereign immunity, and because they do not enforce the law in question, are not subject to the *Ex Parte Young* exception. Furthermore, parties in the state court system cannot be fairly said to have an interest adverse to Plaintiffs. Moreover, there is no equitable basis to enjoin every potential future plaintiff in a suit to enforce the law. In the same vein, there is no evidence that the private citizen that has been sued intends to enforce the law. However, the State medical board defendants are proper parties under *Ex Parte Young* to maintain a challenge to the Heartbeat Bill. They have authority to revoke licenses or provide other professional discipline under the law against plaintiffs.

Justice Thomas would hold that there was no standing against any defendant.

Chief Justice Roberts, writing on behalf of four justices, would hold there is standing against the Attorney General and court clerk in addition to the medical board defendants.

Dobbs v. Jackson Whole Women's Health

Background: Mississippi passed the Gestational Age Act that prohibits abortions when the gestational age is greater than 15 weeks, with 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. Judge Ho concurred, noting the binding precedent, but wrote separately to address claims of racism and sexism lodged by the district court against those who oppose abortion.

Additional background: In a first for the Supreme Court, a draft opinion of this case was leaked to the press.

Key Precedents:

***Roe v. Wade*, 410 U.S. 113 (1973) –** Holding that substantive due process protects a woman's access to abortion in the first (absolute access) and second (limited access) trimester.

***Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992) –** The Supreme Court upholds *Roe* on the basis of *stare decisis*. The Court further substituted an "undue burden" test for *Roe*'s trimester framework.

***Washington v. Glucksburg*, 521 U.S. 702 (1997)** – Holding that to determine whether an unenumerated substantive due process right exists should be determined by reviewing (1) whether the right is deeply rooted in the nation's history and tradition, and (2) whether the right is essential to our Nation's scheme of ordered liberty.

Majority Opinion (Alito, J.)

The right to an abortion is found neither in the Constitution nor rooted in the nation's history and tradition. At the time *Roe* 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.

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

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. 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, states was illegal at every stage.

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* 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 advocating for the existence of a right have the burden to show that 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 ask the Court to overturn *Roe* today.

Stare decisis does not compel upholding *Roe*. *Stare decisis* is not absolute, and 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. Five factors weigh strongly against the use of *stare decisis* to preserve *Roe* and *Casey*.

- The *Roe* decision was far outside of any reasonable constitutional interpretation and removed a political issue from the political process.
- The *Roe* decision was not grounded in text, history, or precedent.
  - Even the *Casey* opinion refused to endorse *Roe*'s reasoning.
  - *Roe* ignored that abortion was banned in the majority of states.
  - *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.
- *Casey's* undue burden test is inconsistent and unpredictable.
  - Numerous judges have expressed different views about what constitutes an undue burden.
  - The large-fraction test is unworkable and court of appeals cases have been widely divergent on its application.
- *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.
- There is no substantial reliance interest.
  - People can change their behavior almost immediately to take account of the change in the law.
  - The societal reliance interest found in *Casey* is best left to legislatures and political branches.

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.

Accordingly, 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.

Thomas concurrence: Many people have read Justice Thomas's opinion as expressing a view toward overturning other substantive due process opinions. However, 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.

Kavanaugh concurrence: This is a policy question best left to the states. Today's opinion does not outlaw abortion nationally and no justice has ever indicated the Court should do so.

Roberts concurrence in the judgment: (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 as discussed herein). The Chief Justice would hold that the right to an abortion should "extend far enough to ensure a reasonable opportunity to choose. Accordingly, the Mississippi law is constitutional because fifteen weeks gives a woman plenty of opportunity to terminate her pregnancy, and the Court need not decide more.

Chief Justice Roberts would partially overturn *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.

Breyer, Sotomayor, and Kagan, dissenting – 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."

The dissenters note that although the statute at issue allows abortion at up to fifteen 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.

Key takeaway: *Roe* and *Casey* are overturned. The Court will judge future abortion regulations under rational basis review.

CONSCIENCE RIGHTS

Roman Catholic Diocese of Albany v. Emami

In 2017, the New York State Department of Financial Services mandated that employers cover abortions in their employee health insurance plans. Following the order, a diverse coalition of religious groups that includes contemplative goat-herding Anglican nuns asked the New York state courts to protect them from this regulation that would force them to violate their deepest religious convictions about the sanctity of life. But the New York state courts refused. The Supreme Court granted cert., vacated the opinion below, and remanded for reconsideration in light of *Fulton v. City of Philadelphia*.

303 Creative v. Elesnis

The Supreme Court has granted cert in this case and will hear it in the upcoming term.

Background: A website designer in Colorado wanted to expand her business into creating custom wedding websites. Because of her faith, she sought to place a message on her website that she can only create websites that do not violate her religious convictions. However, the Colorado AntiDiscrimination Act ("CADA") prohibits persons from making any statement that indicates a person's patronage is unwelcome because of orientation or to "directly or indirectly" refuse services or accommodations to a person because of sexual orientation. The designer brought a pre-enforcement challenge to CADA alleging that the law violated her free speech and free exercise rights.

Proceedings Below: The Tenth Circuit noted that the designer is "generally willing" to work with LGBT customers but did not want to convey a specific message endorsing same-sex marriage. The Tenth Circuit panel held that the CADA "compels speech in this case" and "works as a content-based restriction."

However, applying strict scrutiny, the Court found 2-1 that CADA was nonetheless constitutional because of Colorado's compelling interest in "protecting both the dignity interest of marginalized groups and their material interests in accessing the commercial marketplace." The Court held that the law is narrowly tailored to protect equal access to goods and services. This is because as a web designer, the offered services are "custom and unique" and therefore not fungible, holding that "LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer, referred to as the artists-are-monopolist theory.

Moreover, the Court denied the designer's Free Exercise Clause claim, even though the state had adopted a message-based exemption based on a message that an artist would refuse to provide to anyone. The Tenth Circuit claimed that this is not an exemption, but a defense, but failed to offer any meaningful distinction between a "defense" and an "exemption."

In dissent, Judge Tymkovich would have held that CADA violates both the Free Speech and Free Exercise Clauses. He noted that even where protecting access to the marketplace is a compelling state interest, "ensuring access to a *particular* person's unique, artistic product is not." Regarding the designer's free exercise claims, Judge Tymkovich noted that the entire CADA system is designed to rely on individualized enforcement decisions, thus invoking the "individualized determinations" that the Supreme Court has held require strict scrutiny in *Lukumi* and *Fulton v. City of Philadelphia*.

II. Issues Being Litigated in Lower Courts

A. State Law Protections for Abortion – Following the Supreme Court's *Dobbs* ruling, many litigants have filed suit asking the state courts to hold that their state constitution protects a woman's right to an abortion.

B. Adoption Rights – Many states (including Tennessee, Michigan, South Carolina) are currently facing lawsuits arguing that the statue constitution restricts funding of religious foster or adoption agencies to the extent that those agencies turn away potential foster or adoptive parents based on the parents' sexuality or religious faith.

a. *Rutan-Ram v. Tenn. Dept. of Children's Services*
b. *Dumont v. Lyon* (Michigan)
c. *Rogers v. HHS* (South Carolina)

C. Title VII & Title XI – The Eastern District of Tennessee recently granted Plaintiff states, led by Tennessee, an injunction against guidance letters from the Biden administration, informing employers and schools they must open all facilities and benefits to persons on the basis of their claimed gender identity.

LEGISLATION

Respect for Marriage Act – Congress is currently considering legislation that would require states to give full faith and credit to marriages performed in other states, even if such recognition would violate the public policy of the state. The bill is currently before the Senate, having passed in the House of Representatives on a vote of 267-157.

Women's Health Protection Act of 2021 – This bill would enshrine a statutory protection for abortion access in federal law. This bill passed the House of Representatives on a near party line vote. This bill is unlikely to pass in the Senate, where a vote for cloture failed 46-48.