2024 Religious Freedom Update Workshop

Developments in the Practice of Religious Freedom Law in 2023-24
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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 (life issues are more directly addressed in other workshops), will update participants on a variety of actions by the Federal Courts, Congress, and the Executive branch during 2023 and 2024.

My goal for this time is not to do a deep dive into any one topic, since there are many angles and nuances involved in Religious Freedom cases and topics, but to touch on these important issues and to equip and encourage some of you non-experts so that you can grow in awareness of how you might better serve, whether it is on the board of a religious school or adoption agency, or as an engaged member of your community.

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I. Supreme Court Cases that may implicate Religious Freedom in the Supreme Court's 2023 and 2024 Terms

Overview: This year, the Supreme Court does not have cases that directly address the Free Exercise Clause or the Establishment clause, unlike the past several years. Nevertheless, a number of the Court's decisions may have implications for religious freedom around the country. I will therefore highlight some of these cases, before then diving into a more focused analysis of some of the key appellate court decisions that are directly significant for religious freedom and may very well affect upcoming Supreme Court decisions.

[NOTE: for each Supreme Court case, I will mention one or two potential impacts on religious freedom that may impact the development of and state of the law applied to religious freedom cases.]

Standing Restrictions*:* *Impact on religious Freedom*: These cases may affect each determination of standing in Constitutional Law cases. The *FDA* case could impact situations where states or organizations want to represent the free exercise or free speech rights of individuals who are affected by government action such as laws or regulations believed to be unconstitutional. The *Murthy* case could mean that plaintiffs must more clearly draw lines of causation and traceability, both for backward looking and forward looking relief, and may not rely on implied pressure or connections.

- ***Food and Drug Administration v. Alliance for Hippocratic Medicine***, 602 U.S. 367 (2024) (9-0 decision on June 13, 2024 by Justice Kavanaugh, with concurrence by Justice Thomas)
    - Issue: This case addresses Standing doctrine. The Supreme Court did not reach the merits of the FDA's changes in its approval of the abortion drug mifepristone, but rather focused on the limitations on Article III Standing.
    - Relevant Reasoning: The plaintiffs in this case did not have standing because there was not actually a "predictable chain of events" leading from the government action to the asserted injury." The claims by the doctors were very speculative, and their interests were actually largely met by other laws, like federal conscience laws. The court stated that the plaintiff must have a personal stake in the dispute, and that it must be able to be resolved by judicial remedies. In restating the requirements for standing as (1) injury

in fact (2) likely caused by the defendant, and (3) that would be redressed by the requested judicial relief, the court emphasized that standing is based on separation of powers and should allow for issues, in contrast to cases, "to percolate and potentially be resolved by the political branches in the democratic process." The Court emphasized that an "injury in fact" must be "real and not abstract," "must be particularized" and not a "generalized grievance," and "must be actual or imminent, not speculative." The courts are not intended to be a vehicle for vindicating "value interests of concerned bystanders." In describing causation, the court emphasized that the line of causation "must not be too speculative or attenuated," and may not be based on "ripple effects."
    - Concurrence: Thomas, concurring, said he joined the opinion in full, but wrote separately to assert his concerns about third party standing and associational standing, stating that plaintiffs must assert only their own injuries. He raised his concern about universal injunctions as well.
- ***Murthy v. Missouri***, 144 S.Ct. 1972 (2024) (6-3 decision on June 26, 2024 by Justice Barrett, with Dissent by Justice Alito)
    - Issue: The Court decided this case on standing rather than answering the original question about whether the government's request to social media companies that they take steps to prevent misinformation from being disseminated turn those companies' decisions into state actors, thereby violating users' First Amendment rights.
    - Facts: the platforms have their own content-moderation policies that they applied. Federal officials also spoke with them extensively during the COVID-19 response period about misinformation. States and social media users sued, asking for an injunction to prevent government pressure on platforms to censure protected speech. The District Court found likely government coercion. The Fifth Circuit also found standing and found private party conduct may be state action "if the government coerced or significantly encouraged it."
    - Relevant Reasoning: The Court said the Fifth Circuit was wrong to issue a sweeping injunction because the plaintiffs lack standing to pursue an injunction against the government. "The one-step-removed, anticipatory nature of their alleged injuries presents the plaintiffs with two particular challenges." First, the independent third-party action in between (traceability), and second, the lack of a "real and immediate threat of repeated injury" (redressability). The Court notes that here the plaintiffs are not seeking compensatory relief (for which standing would focus on traceability of injuries), but forward-looking relief (meaning past injuries are only relevant for their predictive value). The link between the restrictions and the government communication with the platforms is weak, because the platforms had their own independent incentives to moderate content. And there is no proof of an ongoing pressure campaign that takes future risk out of pure speculation, creating "a redressability problem." The platform can still enforce or not enforce its own policies. Finally, the court rejects the "right to listen" theory of standing as "startlingly broad" because it claims an interest in the speech of not having others' speech censored. This would at least require "a concrete, specific connection to the speaker."

Administrative Law

- ***Loper Bright Enterprises v. Raimondo***, 144 S.Ct. 2244 (2024) (6-3 decision by Chief Justice Roberts)

- Issue: How much should the courts defer to agency interpretations of the statutes giving them authority to act? Based on *Chevron v. Natural Resources Defense Council* (1984), the courts have for forty years given significant deference to agencies' interpretations.
- Relevant Reasoning: The majority held that the Administrative Procedure Act requires courts to use their independent judgment in interpreting Congress' delegation of authority to agencies. If a statute is ambiguous, it need no longer defer to the agency's interpretation of the statute, overruling *Chevron*. This is important because of the Article III power given to the courts over cases and controversies, not to the Executive branch. The administrative process expanded significantly during the New Deal era, and then Congress enacted the APA as a check on the administrative state. The courts may seek help, but need not defer. "[A]gencies have no special competence in resolving statutory ambiguities." The APA does not allow it. The court also asserted that Chevron is unworkable, and that courts are better suited to develop the law in a principled way.
    - Justice Thomas, Concurring, emphasized that the Chevron doctrine was also inconsistent with the separation of powers designed in the Constitution.
    - Justice Gorsuch, Concurring, focused on the fact that this decision "returns judges to interpretative rules that have guided federal courts since the Nation's founding," instead of treating agencies differently.
    - Justice Kagan, Dissenting, expressed concern about courts trying to interpret laws with ambiguities that are best answered by the expertise that agencies have long provided. She emphasized that agencies are still best suited to deal with the ambiguities in Congress' delegations, because Congress cannot always provide it. She also worried about the many court decisions that have relied on Chevron being destabilized, and the significant effect that may have on the law.
- *Impact on Religious Freedom*: This case will have significant impacts for the Administrative state generally speaking. Religious liberty will be affected by it when it is impacted by agency regulations, because the courts will feel the responsibility and freedom to apply First Amendment protections directly, without having to defer to an agency's analysis or narrowing interpretations of such protections based on the way it interprets the authority it has been given by Congress. We do not know how this will play out, but it will affect how the rulemaking process plays out as well as the authority claimed by the Executive Branch Agencies.

Free Speech

- ***Lindke v. Freed***, 601 U.S. 187, (2024) (9-0 decision on March 15, 2024, by Justice Barrett)
    - Issue: This case defines when a public official is engaging in state action related to their social-media presence versus when they are speaking personally.
    - Relevant Reasoning: The Court held that they are only engaging in state action under § 1983 if the official 1) had actual authority to speak on the State's behalf AND 2) the official is claiming to exercise that authority when speaking in the relevant social media posts. The Court said that someone cannot misuse power unless they first have it and are using it.
    - *Impact on Religious Freedom:* This might impact the religious speech rights of government employees if there is a dispute over religiously framed posts and the impact such posts might have.
- ***National Rifle Association v. Vullo***, 602 U.S. 175 (2024) (9-0 decision, released May 30, 2024, by Justice Sotomayor)

- Issue: The use of means of coercion through various forms of government action against a third party "to achieve the suppression" of disfavored speech and whether it violates the First Amendment.
- Relevant Reasoning: Holding that the NRA plausibly alleged a violation of its First Amendment rights by the former superintendent of the NY Dep't of Financial Services, Maria Vullo, when she coerced entities regulated by her office to end their business relationships with the NRA (through letters, press releases, public statements, and implied threats) in order to suppress its ability to advocate for its viewpoint.
  - Reversing the Second Circuit's finding that Vullo's actions were government speech and legitimate law enforcement, the Court found unconstitutional coercion was involved. While she was free to criticize the NRA, she "could not wield her power…to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy."
  - The court notes "that viewpoint discrimination is uniquely harmful to a free and democratic society." Relying on *Bantam Books*, the court stated "that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."
  - In order to show a First Amendment violation through coercion of a third party, "a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech." It is relevant how much authority the official has and how much those hearing will feel pressure to conform. It is also not a defense to claim the official targeted nonexpressive activity, because the important thing is whether it was "aimed at punishing or suppressing speech."
- Justice Gorsuch's concurrence emphasizes that, in analyzing coercion, as lower courts use a "multifactor test" to analyze it, they need to remember that it is meant to be guideposts, not completely controlling – that the key is whether together it points to a threat of government action in order to punish or suppress the plantiff's speech.
- Justice Jackson's concurrence clarifies that analyzing coercion and determining if there is a First Amendment violation are two different aspects of analysis. The government has to be able to enforce its rules, but whether there is a First Amendment violation "will depend on the facts of the case." She believes that a retaliation theory, more than the censorship theory, is a better fit in this case for the analysis of speech suppression.
- *Impact on Religious Freedom:* This importantly defines First Amendment limits to government action that seeks to not just speak against something with government speech, but goes farther to use its power to undermine and silence specific voices and viewpoints.

- ***Moody v. NetChoice, LLC***, 144 S.Ct. 2383 (2024) (consolidated with ***NetChoice, LLC v. Paxton***)
  - Issue: First Amendment challenges to social media content moderation. This case addresses content-moderation restriction laws in Texas and Florida (S.B. 7072), determining whether their explanation requirements (requiring the platform to give reasons to a user if it altered a post) comply with the First Amendment. The 11th Circuit had blocked the Florida law, saying the First Amendment protected editorial discretion, and the 5th Circuit upheld the Texas law, saying the content-moderation activities of the platforms were not speech at all, not implicating the First Amendment.

- Relevant Reasoning: The Supreme Court vacates both judgments and remands for a proper analysis of the First Amendment challenges in relation to the facial challenge. (2394). The justices seemed skeptical of government actors seeking to infringe on the ability of certain private companies to make decisions about the content on their platforms. Editorial decisions by private companies are important, and the First Amendment cannot lose its strength just because advanced technology is involved. (2393). Though the issue is dependent on more factual analysis. So the court gives principles to apply.
    - Facial challenges are hard, because the plaintiff usually has to show the law cannot be valid or that it "lacks a plainly legitimate sweep." (2397 (quotation removed)). That is different, however, in First Amendment cases, where courts instead ask "whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (cleaned up).
    - Courts need to "assess the state law's scope." (2398) and then consider "which of the laws' applications violate the First Amendment," measured against the rest. This is very fact contingent, considering what different levels of editorial choice might be involved. (2399). The Fifth Circuit was wrong to conclude the content choices were not speech. (2399). The Texas law "requires the platforms to carry and promote user speech that they would rather discard or downplay." (2399). This therefore implicates the First Amendment "if [] the regulated party is engaged in its own expressive activity." (1400).
    - Principles: 1) "An entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity," even when the content "comes from third parties." (2402 (cleaned up)); 2) that analysis does not change if most items are included and only some excluded. *Id.*; 3) "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas." *Id.*
    - "But a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction."" (2407).
- *Impact on Religious Freedom:* the implications of these cases are more indirect, based on the conclusion to the question of how much can the government affect a private organization's editorial choices about whether and how to publish and disseminate speech? It is unclear which result will actually protect the speech of religious groups and individuals, as it involves many cultural realities about power, money, and access. Generally, however, affirming free speech protections for private actors is a very good thing long term.

Discrimination Law

- ***Muldrow v. City of St. Louis, Missouri***, 601 U.S. 346 (2024) (9-0 decision on April 17, 2024, by Justice Kagan).
    - Issue: In a Title VII sex discrimination claim, how significant does the harm have to be in order to proceed with the discrimination claim. The Court defines that there must be a

disadvantageous change in employment, but that it does not have to meet a "significant" or heightened bar to be cognizable.
    - Relevant Reasoning: The employee was transferred from one job to another because she is a woman. The change did not impact her rank or pay, but was less desirable in terms of schedule and perks. The petitioner does not have to show that the harm was "significant" or meets some heightened bar, because the text of Title VII requires a showing that the discrimination "brought about some 'disadvantageous' change in an employment term or condition." The court rejects "an elevated threshold of harm," noting that different things "can make a real difference" for certain employees.
        - The court focused on textual analysis, including the "ajeusdem generis canon" and whether a list implies everyone must have a similar level of harm.
    - Justice Thomas's concurrence indicates that he does not read the 8th Circuit decision to have imposed a heightened-harm requirement in the form of a 'significance test.'
    - Justice Alito's concurrence says he agrees that she was transferred "because of her sex," but says that the majority's framing is unhelpful at providing applicable standards.
    - Justice Kavanaugh's concurrence notes that the DC Circuit got it right, but other circuits have added the "significant" requirement. He actually indicates he would go farther, and not require any specific level of harm, stating that "the discrimination is harm." But he notes it will likely play out the same way as the majority's framing.
    - *Impact on Religious Freedom:* Individual employees pursuing religious discrimination claims may be affected because it could allow for individuals who are mistreated because of their religious beliefs or practices to have more access to court.

II. Issues being litigated in Lower Courts

A lot of First Amendment law is developing in the Circuit Courts right now. This is part of how Supreme Court cases from recent terms are playing out in the lower courts, with judges determining the parameters of the principles and logic laid down by the Supreme Court. This list is not intended to be comprehensive, and does not touch on the many cases percolating through the district courts that will likely have circuit court opinions by next year.

A. Campus Access cases

Fellowship of Christian Athletes v. San Jose Unified School District, 82 F.4th 664 (9th Cir. 2023) (en banc)

- Issue: The majority in this en banc decision focused on Free Exercise in determining that the San Jose School District had violated the First Amendment rights of FCA.
- Key legal principles:
    - Free Exercise: the court stated that *Employment Division v. Smith* has been limited by the Supreme court, because it does not apply and strict scrutiny then must be met, if the challenged policy is not neutral or generally applicable. The court applied Fulton v. City of Philadelphia (2021) because the school district had a system of individualized exemptions/exceptions that it applied to certain student clubs. It applied Tandon v. Newsom (2021) because it noted that secular activities had been favored over religious ones, and it applied *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) because it found that some district personnel had acted in a way that showed hostility to religious beliefs, going so far as to say that the claim that there was no evidence of animus "does not pass the straight-face test." The court cited *Kennedy v. Bremerton*

School District (2023) to emphasize that religious views have to be respected like non-religious views.
    - Importantly, the court also addressed free exercise as relevant in relation to interpreting other campus access context cases that, while they involved free exercise claims, did not address them directly. It clarified the narrowness of *CLS v. Martinez* (2006), stating that an all-comers policy may not have exceptions. It also overruled the unhelpful *Alpha Delta Chi v. Reed*, 648 F.3d 790 (9th Cir. 2011), rejecting that a policy has to be "targeted" at religion for there to be a free exercise concern (686), and rejecting that a free speech violation requires explicit targeting of a viewpoint either (686, fn8)
- Outcome: After the en banc court directed that FCA should receive a preliminary injunction, the case then settled, with a huge attorneys' fees reward.
- *Impact on Religious Freedom*: This case is hugely significant for campus access, because it is an en banc decision overruling a problematic precedent in the Ninth Circuit that had prevented religious student organizations from having faith-based leadership standards, and because it further cabins *Martinez*, which we still believe needs to be overruled by the Supreme Court.

B. Free Speech/Free Exercise

Parents Defending Education v. Olentangy, 109 F.4th 453 (6th Cir. 2024)

- Issue: Pre-enforcement challenge to school district policies that prohibit harassment based on characteristics, including gender identity. Seeking to enjoin the policies' enforcement (459)
- *Facts*: The school has harassment and bullying policies that define harassment based on a "reasonable fear of harm" or "has the effect of substantially interfering with a student's educational performance, opportunities, or benefits, or an employee's work performance," or that "has the effect of substantially disrupting" the operation of the school. Bullying rises to "unlawful harassment" if it is "unwanted and repeated written, verbal, or physical behavior" that is "severe or pervasive enough" to 1) "create an intimidating, hostile, or offensive educational or work environment", 2) "cause discomfort or humiliation", 3) "or unreasonably interfere with the individual's school or work performance or participation." The school also has a policy prohibiting the use of PCDs (Personal Communication Devices), both on and off campus, "in any way that might reasonably create in the mind of another person an impression of being threatened, humiliated, harassed, embarrassed or intimidated." Parents emailed to clarify the policy, and the school confirmed that if a student purposefully misgenders, then it would be discrimination. They offered to discuss accommodations.
- *Reasoning* (Majority by Judge Stranch): The Court upholds the district court denial of the Preliminary Injunction and the finding that the plaintiffs did not clearly show that the relevant policies violate the *Tinker* student-speech standard, compel speech, represent viewpoint-based discrimination, or are impermissibly overbroad.
    - On **free speech**, the court found the school setting significant, placing weight on the fact that schools are supposed to be places where students learn tolerance of diverse views, but are protected from inappropriate things. (462). The court noted different categories of speech schools may reasonably regulate, and stated that the *Tinker* disruption standard can be speculative, and doesn't require certainty. (463). The court did not find **compelled speech**, distinguishing *Meriwether* because it was the university context.

Even though the students here intend to communicate a message the court said they have other options in order to not violate their conscience and still ensure the environment the school wants, like using first names or gender neutral pronouns. (467). Ultimately, the court relies on the "special characteristics of the school environment" to justify restricting offensive speech at school, even if it wouldn't be allowed to be censored outside the school. (467). The court did not find **viewpoint discrimination**, saying that "schools may permissibly enact and enforce blanket bans on particularly disruptive symbols or speech, but may not regulate speech as a means of silencing a particular viewpoint." (468). In applying this principle, the court said schools "may constitutionally distinguish between divisive and non-divisive speech, and choose only to regulate the former…" To do so was not viewpoint-based. "The District is entitled to recognize that speech about students' identities is particularly harmful and likely to disrupt the educational experience, and to regulate that speech accordingly." (469).

- Rejecting the **overbreadth** challenge, the court noted that the standard is that if "a substantial amount of constitutionally protected speech" is swept into the proscribed category. In the special school setting, where schools need flexibility and have expertise, the court was "more hesitant" to apply the strict standards. (470-71). So "On this preliminary injunction record, and given the proper deference accorded to school officials, we cannot definitively conclude that speech the regulation may improperly prohibit (that which causes only discomfort) is substantially disproportionate to the regulation's lawful sweep" (471(quotation omitted)). Even the PCD policy, which sweeps in conduct and speech off campus, the court said was okay because it was "susceptible to a limiting construction." (472).

- Dissent by Judge Batchelder: stating that this is clear viewpoint-based speech regulation. She indicates that schools can regulate some student speech, but that there is a difference between teaching through curriculum and compelling speech. She says this is a misapplication of *Tinker*, which has to require more than discomfort. She notes that there is a lot of conclusory statements and justifications going on in determining what is "harmful." (480). She says it is clearly irreparable harm to lose one's constitutional rights. (481). She notes that the majority here confines *Meriwether* to its facts, particularly because there should be more freedom for students than for employees, who represent their employer in some way. (483) She notes that the claim that the school is still allowing students to engage in civil discussions about the topic, and that they just can't use wrong pronouns, "contradicts the District's promises to vigorously enforce the policies…" (484). And she notes that this is still "forcing students to affirm a belief they do not hold." (484). She also says she would find viewpoint discrimination. She says the lead 6th Cir case on viewpoint based regulations, *Castorina v. Madison County Sch. Bd.*, 246 F.3d at 536 (6th Cir. 2001) (about confederate flag t-shirts), says that *Tinker*'s substantial disruption standard does not justify viewpoint discrimination or enforcement that happens in a viewpoint-specific manner. (486). She then concludes that "a school district cannot defend viewpoint-discriminatory policies merely by saying that the policies' restrictions 'appl[y] equally to individuals on either side of a given debate.'" (487). It is not a neutral application when one side

"loses nothing." (487). The *Tinker* standard for disruption has to mean more than just "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." There needs to be some kind of justified expectation of disruption. (489-90).

- NOTE: Rehearing en banc has been requested.
- *Impact on Religious Freedom:* This majority opinion waters down the concept of viewpoint discrimination by saying that schools can't silence a viewpoint because it is offensive, but can regulate how it is allowed to be expressed in order to avoid disruption. This feels like a manipulative way of determining what is objective. The majority's opinion feels disingenuous towards constitutional standards – hemming and hawing and coming back again and again to "the school setting is special…" (a common refrain in K-12 cases, but extreme here). In addition, by rejecting the overbreadth challenge, the court ignores just how much speech could be swept up into the scope of the language, that it includes even off-campus, subjectively interpreted and experienced speech without objective standards, and invites targeted application that will chill protected speech. [Notably, the ACLU agrees that this is wrongly decided, and submitted an amicus].

Young Israel of Tampa, Inc. v. Hillsborough Area Regional Transit Authority 89 F.4th 1337 (11th Cir. 2024)

- Issue: The Transit authority policy prohibited advertisements that "primarily promote a religious faith or religious organization," and it denied advertising for the "Chanukah on Ice" event by the Orthodox Jewish synagogue. Instead of finding a free speech violation within a nonpublic forum, the Eleventh Circuit finds the policy unreasonable because it lacked workable norms.
- Relevant Reasoning:
    - The court does not reach the question of whether, in a nonpublic forum, a content regulation is permissible and is not improper viewpoint discrimination, because it finds that, even if viewpoint neutral, the policy is unreasonable "due to a lack of objective and workable standards." The District Court had found it violated free speech based on *Lamb's Chapel, Rosenberger, and Good News Club*.
    - The decision about whether a certain advertisement meets the standard is determined on a case-by-case basis without any additional guidance for the decisionmaker (1341). They gave suggested edits to the "Chanukah on Ice" advertisement that involved removing any mention of the menorah. "The concern about inconsistent application of the policy is not conjectural." (1349)
    - The court therefore finds that this version of the policy is unlawful (narrowing the permanent injunction to just that), but that a different version could be lawful.
    - Judge Newsom's concurrence states that the policy is also clearly viewpoint discriminatory. He then describes the complexity of the question "what is religion?" and raises the relevance of free exercise analysis as well.
    - Judge Grimberg, District Judge, sitting by designation, separately concurred, also stating that he would have reached the clear viewpoint discrimination here.
- Impact on Religious Freedom: It is helpful that the Court found this language poorly defined and that it is concerned about inconsistent application based on the knowledge and whims of a

government agent. It is disappointing, however, that there is not a clear rejection of the desire to exclude "religion" as a category from an advertising space.

McKesson v. Doe, 71 F.4th 278 (5th Cir, June 2023)

- Issue: This is a long-running case before the 5th Circuit a few times, about the leader of several Black Lives Matter protests, and whether he can be held liable for tortious negligence under Alabama state law. The most recent panel opinion, after considering the Louisiana Supreme Court's statement that its tort law did allow for a negligence theory, found that the officer, Doe, had plausibly alleged the claim against Mckesson. In rejecting the First Amendment concerns, the court said *Claiborne Hardware,* 458 U.S. 886 (1982), supported that violence was not protected, but that there must be "a sufficiently close relationship between the leader's actions and the protestor's unlawful conduct." (290). Judge Willett concurred in part and dissented in part, concerned about the First Amendment implications of this kind of liability, emphasizing that there really should be intentional encouragement of violence. The court, however, indicates that they are only allowing the case to proceed, not determining that it will be successful.
- *Cert denied* by the Supreme Court in April 2024. Justice Sotomayor said they were not implying approval, but did expect that future cases would consider their decision in *Counterman v. Colorado*, decided a few days after the 5th Circuit opinion came out in June 2023. [*Counterman,* written by Justice Kagan, was about Facebook messages, and whether they were protected speech. The court held that a defendant had to have subjective understanding of the threatening nature of his statements, though the other limits on speech still do apply (true threats are not protected). We don't want to cause a speaker to swallow words that are not true threats, thereby unnecessarily chilling protected speech. The appropriate mens rea standard is "recklessness" (fitting with defamation standards).]
- *Impact on Religious Freedom*: While not specifically about religious speech at all, this case does not give much confidence to a leader of a protest that their protected speech will not lead to liability. The link to the conduct of a participant is at least arguably not sufficiently defined to protect a speaker or leader of a protest in their expressive activity. We should always pay attention to free speech implications like this because any disfavored speech can be targeted in politically charged environments.

***Honeyfund.com Inc. v. Governor*,** 94 F.4th 1272 (11th Cir. 2024).

- Issue: In the challenge to Florida's Individual Freedom Act's section that bans mandatory workplace trainings if they teach certain ideas and perspectives, the Eleventh Circuit affirmed the preliminary injunction against the act's enforcement because it was a content-based regulation of private protected speech.
- Reasoning: The court said it did not protect the act to claim that it banned mandatory meetings instead of speech, because it defined those meetings based on content and disapproved messages. (1278). The court also rejected Florida's claim that it was just regulating "offensive conduct," because the right of free expression encompasses communication of ideas, not just speech, and the law clearly favors a particular viewpoint. (1279). "Florida's attempts to repackage its Act as a regulation of conduct rather than speech do not work." "[T]he Act is a

content- and viewpoint-based speech regulation," so strict scrutiny applies. (1280). And it does not pass strict scrutiny. "That many people find these views deeply troubling does not mean that by banning them Florida is targeting discrimination." (1281).

- *Impact on Religious Freedom*: The court's reasoning here is very helpful, because we are often seeing efforts to claim that religious beliefs don't need to be expressed or taught in ways that encompass more than just speech, and claims that the government should be able to regulate "conduct," (even if religious people say that "conduct" is just belief lived out--teaching, expressing and living out their worldview and teachings). Regardless of your view on the topic of CRT, etc., it is important to be wary of advocating politically for things that undermine religious freedom—things that can quite reasonably be called hypocritical.

Carpenter v. James, 107 F.4th 92 (2d Cir. July 12, 2024)

- Issue: A wedding photographer's §1983 claim alleged that NY accommodations law violated her 1st A rights to free speech, free association, and free exercise. She also claimed an Establishment clause violation and unconstitutional overbreadth. The court affirmed dismissal of all claims but the free speech claim.
- Reasoning: The court remanded the free speech claim based on *303 Creative* but declined to issue a preliminary injunction in the meantime. Part of the uncertainty involved the fact that she requires all her clients to sign a service agreement giving her artistic license and editorial discretion. She also blogs about the clients she photographs. She provides other services to same sex couples, but not her wedding photography service.
    - This is a very nuanced case, with the court saying the facts must be further explored to determine the compelled speech claim. It says the question that must be answered is "whether Carpenter's photography services are expressive conduct" and therefore similar to the "pure speech" in 303 Creative. The court says that it is specifically a "fact-intensive" inquiry that "varies depending on the context and nature of the goods and services at issue."
    - The court rejects the association claim, narrowing it to only "expressive association" and dismissing its relevance here. It also rejects the Establishment Clause claim and Vagueness claims.
    - In addition, the court rejects the Free Exercise claim, saying there is no "comparable secular activity" that is treated more favorably because the interest is in prohibiting discrimination based on sexual orientation, and no one else is allowed to refuse service based on sexual orientation for secular reasons. It says the focus is on the "asserted interest" and whether something undermines it to the same extent.
- *Impact on Religious Freedom:* While the Second Circuit acknowledges that 303 Creative may apply, it keeps the focus on whether the creative work is expressive conduct. The negative here is that the court keeps free exercise analysis very narrow. It determines that the law is neutral and generally applicable by making sure to narrow the inquiry about general applicability based on keeping a narrow governmental interest and determining that there are therefore no secular

comparators that affect the same interest and would trigger *Tandon*'s finding that the law is not generally applicable.

Jarrard v. Sheriff of Polk County, 115 F.4th 1306 (11th Cir. Sept 16, 2024)

- Issue: Did jail officials violate the free speech rights of a volunteer county jail minister? Can they reject a volunteer ministry program using unbridled discretion and rejecting it because they don't like the church member's views on baptism?
- Reasoning: the jail officials "engaged in viewpoint discrimination based on their disagreement with Jarrard's beliefs about baptism." First, the court found that the church member was not a "de facto government employee," and that the government had created a limited public forum. The court therefore uses forum analysis and finds that the volunteer ministry program was a limited public forum where viewpoint discrimination was not allowed. (1318-19) The Eleventh Circuit reverses summary judgment for the officials, finding a dispute of material fact (some evidence showed their decision was affected by their views) as to whether there was viewpoint discrimination. Their decision could not then survive strict scrutiny. The court noted that unbridled discretion given to a government official is particularly problematic and that censorship is a serious concern and can constitute a prior restraint. (1321). The court even denied qualified immunity, finding the law clearly established (though the dissent disagrees).
- *Impact on Religious Freedom*: It is helpful to see the 11th Circuit protecting the rights of ministers in the jail setting, and finding a limited public forum. Therefore, prison officials can't just make decisions based on disagreements with their theological positions. It is also helpful to see them say that this law is clearly established, even in the prison setting.

Chiles v. Salazar, 116 F.4th 1178, (10th Cir. Sept 12, 2024).

- Issue: pre-enforcement §1983 challenge by a licensed professional counselor, claiming Colorado's Minor Conversion Therapy Law (MCTL) violates her free speech and free exercise rights (notably, the law does exempt those engaged in religious ministry. The law does carry significant consequences, including revocation of a license and significant fines).
- Facts: Ms. Chiles says she seeks only to help clients with their stated desires. She says the law prevents her from freely exploring things with clients, even when they want to do so.
- *Reasoning on standing*: Yes, standing. (*4) Applying the 10th Circuit *Walker* test. (*5) Noting the law is "aimed directly at plaintiffs" (*6) and that there is a credible threat of enforcement (*7).
- *Reasoning on Free Speech*: Determining, as a matter of first impression, that a standard different from strict scrutiny applies in this context. It reached this by noting that there is less protection for "incidental burdens on speech," purporting to draw its reasoning from *Nat'l Inst. Of Fam. & Life Advocs.* V. *Becerra*, 585 U.S. 755, (2018) and saying that while the Supreme Court rejected that professional speech was a different category of speech, it did state that less protection was afforded when a law regulates professional conduct "even though that conduct incidentally involves speech." It then found that principle applies here, because the CO law is about regulating the healthcare profession. (1201-04). The law here regulates healthcare by protecting against "improper application" of professional counseling. (1205). It then says that talk therapy

is a "medical treatment" that is therefore conduct, not speech. (1206). "The MCTL does not regulate expression. It is the practice of conversion therapy—not the discussion of the subject…--that is a 'prohibited activity' under the MCTL" (1208 (cleaned up)). Saying the speech involved is "implicated only as part of the practice of medicine" that is subject to licensing and regulation. (1209) The court says the government can't lose its ability to regulate every time "the practice of a profession entails speech." (1210). This is still medical treatment that the government has a right to regulate and establish "standards of the profession." (1211). The Court says this involves "practicing a treatment," not "communicating a message" (1212). It then concludes by saying that she can still discuss her views and refer people, she just can't "engag[e] in the practice herself." (1214).

  - The court does also find it meaningful that it is just about minors. (1214)
  - Notably, there is a Circuit Split: The Tenth Circuit here agrees with the 9th Circuit, which found the Washington law was a regulation on conduct incidentally involving speech. *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022). It acknowledges a conflict with the 11th Circuit. *Otto* v. *City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020) (saying what the government calls a medical procedure consists entirely of words, so finding it a content-based regulation of speech).
  - The Court then applies rational basis review to the free speech claim (1215). It finds no likelihood of success because the restriction is tied to Colorado's interest in protecting minor patients from harmful therapy. (1220).

- *Reasoning on Free Exercise*: The court also rejects the Free Exercise challenge because of a failure to show a lack of neutrality or any individualized exemptions, so applying reasonableness. (1221-22). It finds the law is not restricting conduct and practices "because of their religious nature" (but rather in order to protect against their "harmful effect on minors"). (1223). Therefore, the law is not clearly targeting religion (1224). It also says there is no evidence the law lacks general applicability because there is no system of individualized exemptions. It applies equally to "all licensed mental health professionals, regardless of their religious beliefs or affiliations." (1225) And there is no mechanism to consider any reasons to "determine that providing conversion therapy to children in a professional setting might be permissible." *Id.* No secular activity is permitted that undermines the state's interest equivalently. *Id*.
- *Dissent by Judge Hartz*: He characterizes the majority as saying speech is not speech under the First Amendment when it is "speech by licensed professionals in the course of their professional practices." He says "such wordplay poses a serious threat to free speech." (1226). He also points with concern to the court's decision to treat certain pronouncements as "science." He states that "Ideology, however, cannot substitute for data and experience." (1227). He says this is not about the views expressed by the court, but that "the path taken is quite troubling" and that it "contradicts directly relevant Supreme Court authority." (1227). He is particularly concerned that professionals do have an interest in their speech, and that reasonable regulations may require them "to disclose factual, noncontroversial information in their commercial speech," but that is different from what is happening here. (1230). And the court cannot change that by just

calling the speech "conduct." (1231-32). It is dangerous to say otherwise, because then the government just has to categorize things in order to take them out of the "speech" category. (1231). But he notes that contradicts the Supreme Court in *Cohen v. California* (1971), about an expressive t-shirt, and *Holder v. Humanitarian L. Project* (2010), about a law "as applied" to restricting training being offered to terrorist organizations about resolving disputes. (1233). He says that "a regulation that bars speech because of what it communicates is a direct regulation of speech, not a regulation of conduct that incidentally affects speech." (1233-34). And *NIFLA* specifically said that speech by professionals is not unprotected. (1235).

- *Impact on Religious Freedom*: This case is concerning, because it takes a concept of regulating a profession, and then ignores that the government is dictating, not just noncontroversial facts, but a specific worldview and professional conclusions. This erases the unique realities of the counseling profession, undermines academic freedom for those researching and training in these areas, and erases portions of free speech. It is also troubling from a free exercise perspective, because it implies professionals may not have religious convictions in relation to their professional lives if the government has reasonably chosen to regulate in that area.
    - In the free exercise analysis, it is also interesting that the way the court narrowly defines what the state's interest is allows the court to then say that everyone is held to the same standard with regard to that interest (saying there are no exceptions for secular counselors that undermine that specific state interest in the same way). Therefore it says the secular exceptions are not comparable. This narrow framing erases the possibility of finding the policy not generally applicable.

Moms for Liberty – Brevard County, FL v. Brevard Public Schools (11th Cir. Oct. 8, 2024).

- Issue: This is a speech Case, not free exercise. It asks: was the speech of the Mom's for Liberty group chilled and silenced during school board meetings? Was the policy barring statements that were "too lengthy, personally directed, abusive, obscene, or irrelevant" unconstitutional on its face and as applied to them?
- Status: the District court found no standing, but then went on to decide the constitutional question as well. The Circuit court does find standing and addresses the constitutional questions.
- Reasoning: the court says there is standing because members allege they were unconstitutionally censored at meetings. The Eleventh Circuit here specifically says that standing in First Amendment cases should be granted more freely because of how free speech may be chilled, and that the framing the district court gave in order to reject standing was "borderline frivolous." On free speech, the court said the "school board meetings here qualify as limited public forums," and therefore may not involve viewpoint discrimination. While limited public forums may be limited in purpose, "even restrictions that pursue legitimate objectives can be unlawful if their enforcement cannot be 'guided by objective, workable standards.'" (*12) Those regulating may not have "unrestrained discretion." (*13) The court then analyzes the facial challenge to certain policy terms – "abusive," "personally directed," and "obscene." (*14).

    - Term "abusive": finding that in practice this term meant whatever the government actor thought was offensive. The court says "A prohibition on all offensive— or "unacceptable," as Belford put it—speech may appear neutral. After all, it prohibits a speaker from saying anything offensive about any person or any topic. But "[g]iving offense is a viewpoint." (*16 (citing *Matal v. Tam*, 582 U.S. 218, 243 (2017)). Finding it facially unconstitutional.
    - Term "personally directed": The court does not find viewpoint discrimination, but still finds the policy unreasonable, based on the likelihood of it being "enforced in an arbitrary or haphazard way" and the very inconsistent practice. (*19). Also unreasonable because it does "not advance the goals that the Board claims it serves."
    - Term "obscene": The court notes "some iterations of an obscenity policy would be constitutional." (*24) But here it has been used to bar protected speech and in a way that unreasonably "frustrates the purpose of the forum." (*26).
- In closing, the court says that, even in limited public forums, "Speech restrictions must still be reasonable, viewpoint-neutral, and clear enough to give speakers notice of what speech is permissible." (*26)
- *Impact on Religious Freedom*: This case is helpful in that it emphasizes that policies that are poorly defined and applied in certain ways can be tools to silence. Religious speech is often targeted when it involves unpopular perspectives that some find "offensive." Therefore, this decision is an important one for protecting speech, including religious speech. A helpful line is: "Because the government may not burden the speech of others in order to tilt public debate in a preferred direction, the Board's policy on 'abusive' speech is facially unconstitutional." (*18 (citation removed)).

COVID-19 Related Cases:

Impact on Religious Freedom for all these cases: These cases impact religious freedom because they clarify that religious beliefs should not be evaluated for their sincerity, and that they should not be treated differently than secular reasons that are given. In addition, in relation to accommodations, undue burdens may not be weighed differently when religious beliefs are involved than when other secular concerns are being applied, though the undue burden may be met when the business' success is on the line. Animus, even in non-extreme forms, should be avoided.

1. **Does v. Board of Regents of the University of Colorado**, 100 F.4th 1251 (10th Cir. May 7, 2024)

- Issue: This is a Covid-19 vaccination case involving a free exercise claim. The University of Colorado changed its policy for religious exemptions for the Covid-19 vaccine in 2021 a couple times. The court held that a government employer may not punish some employees and not punish others for the same conduct, with the only difference being their religious beliefs.
- Reasoning: First, the court found standing because there is still a constant threat that the policy will be enforced in the future. Second, the court also found a likely Free Exercise violation. "Accordingly, when the government "impose[s] regulations that are hostile to the religious beliefs of affected citizens" or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," it is appropriate to "set aside" the regulation." (1269 (citing Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n, 584 U.S. 617 (2018)). Also

finding that "The record is replete with evidence of stereotypes about and prejudice toward certain religions and religious beliefs for being insufficiently "organized," insufficiently "official," or insufficiently "comprehensive" in the eyes of the Administration" (1270). This violates that the government may not decide or suggest if religious grounds are legitimate." Third, the court also found a likely Establishment Clause violation because of how the Administration sought to evaluate boundaries between religious faith and other beliefs, sorting people based on whether it found their beliefs credible. It wasn't just asking whether they had religious beliefs, but "why" the religious beliefs resulted in an exemption request. (1271) The state is not allowed to take such positions or it is "entangling itself in an intrafaith dispute." (1271-72). Finally, the court concludes that it is "clearly established that non-neutral state action imposing a substantial burden on the exercise of religion violates the First Amendment." (1281)

2. **Lowe v. Mills**, 68 F.4th 706 (1st Cir. 2023)

- Reasoning: On appeal of a dismissal for failure to state a claim, the First Circuit found that the plaintiffs adequately alleged a Free Exercise violation in its challenge of the Maine statute mandating vaccinations that eliminated the religious exemption, but not the medical exemption. The court, however, found that the Title VII religious accommodation claims against the employers failed because the threat of onerous penalties for the business was enough to meet the undue hardship standard.

3. ***Spivack v. City of Philadelphia***, 109 F.4th 158 (3d Cir. July 29, 2024)

- Issue: Covid vaccine exemption case. Key question was whether the preferential treatment for secular medical exemptions was similar to religious exemptions.
- Facts: Spivack submitted a religious exemption request with supporting documentation. An additional form was sent for her to fill out, and she continued to express religious objections based on her orthodox Jewish beliefs. The govt employer changed its policy to not examine case-by-case, but to deny all. Her request was denied.
- Reasoning: For the free exercise claim, the Third Circuit said many govt policies "incidentally burden religious practice," but did note that they could not single out religious conduct, or it would be subject to strict scrutiny. (166). It said:
    - "we search for anti-religious animus on the face of the policy itself and in the circumstances of its enactment. But we also look for subtler signs that policymakers targeted religion. For instance, arbitrary distinctions between religious and secular conduct suggest anti-religious bias. Likewise, open-ended, discretionary exemptions permit government officials to mask discrimination against religion." (167).
    - The court said neutrality must be further considered, saying there were material issues of fact as to whether there was evidence of anti-religious bias and which policy was actually applied. (167). One version of the policies involved significant discretion. (172). It was generally applicable, however, in that there were not comparable secular exemptions: the carveouts for medical exemptions and unionized employees did not equally undermine the asserted government interest. (174).
- *Impact on Religious Freedom*: This case reinforces that detailed facts are important in analyzing neutrality and general applicability in free exercise claims. It also confirms that *how the*

government interest is framed is key to whether or not the court will see "comparability" in treatment of religious and secular interests, undermining general applicability based on *Tandon*.

4. **Ringhofer v. Mayo Clinic, Ambulance**, 102 F.4th 894 (8th Cir., May 24, 2024)

- Issue: In a failure to accommodate claim under Title VII and the Minnesota Human Rights Act, when Mayo clinic employees were terminated for refusing Covid-19 vaccinations or testing on religious grounds, the Eighth Circuit reversed the district court's dismissal of the claims.
- Reasoning: The Eighth Circuit clarifies that religious beliefs don't have to be logical or comprehensible to others. A Title VII failure to accommodate claim for religious discrimination must show that they have a religious belief that conflicts with an employment requirement, that they informed the employer of the belief, and that they were disciplined for failing to comply with it. These plaintiffs have plausibly pled the religious conflict, and the court should not have determined that their beliefs were personal and not religious.

5. ***Passarella v. Aspirus, Inc***., 108 F.4th 1005 (7th Cir. July 29, 2024)

- Issue: About Title VII religious accommodation question, after employees were denied exemption from COVID-19 Vaccination requirement because their healthcare employer said their requests were "more rooted in safety concerns than religious conviction," and denied.
- Reasoning: Saying that request for religious accommodation can be a mixed secular and religious claim, but that at least some aspects have to be based on religious belief or practice. The employee does have to show that the belief is religious in nature and that the belief was the basis for the discriminatory treatment. The employer can then show that an accommodation would result in "undue hardship" (citing *Groff*). (1009). The court says that applying this language is "an exercise of judgment" and that it is not "formulaic." (1009). It notes that an employee's objection may include "both religious and non-religious grounds." This is part of the reality of "covering all aspects of an employee's religious observance, practice, and belief." (1009 (quotation omitted)). The court then notes that it would be dangerous to have the courts drawing lines to determine which percent or amount of the objection is "based on religion…," violating the prohibition on courts "dissect[ing] religious beliefs" from *Thomas v. Review Board,* 450 U.S. 707 (1981). (1010). The court does say that the record needs developing.
- Judge Rovner, Dissented, saying the way the plaintiffs articulated their beliefs was truly secular rather than religious, so they didn't meet the first layer of proof in showing that their accommodation request was actually religious at all. (1013).
- *Impact on Religious Freedom*: This is incredibly helpful to see an articulation by the court that religious practice can be intertwined with seemingly secular reasoning, and that courts are not supposed to try to disentangle and label exactly which parts are religious or not, as long as they are grounded in a religious belief.

6. **DeVore v. University of Kentucky Board of Trustees** (6th Cir. Oct 11, 2024)

- Issue: A department manager at the Univ of Kentucky did not receive a religious accommodation from Covid testing requirements. She asserted that her "religious beliefs require that I refuse" because it would require her to act against her will and with risk to her person. The university denied the request all three times she requested, and also denied her accommodation request. She retired early and filed a lawsuit based on Title VII, claiming religious discrimination.

- Reasoning: The court, applying the Title VII standard that "aspects of religious observance and practice" are protected, said that its job was not to consider the reasonableness of the belief, but to ensure that it is "sincerely based on a religious belief." The court didn't find any connection between her conclusions about how she was treated and her "religious principles" she adheres to, instead saying it was a rubric of "secular values."
- *Impact on Religious Freedom*: This case clarifies that religious beliefs must be articulated as the foundation for the objection, not just mentioned on the side.

C. Church Autonomy

Oklahoma Annual Conf of the United Methodist Church, Inc. v. Timmons, 538 P.3d 163 (Okla. 2023)

- Issue: In a disaffiliation challenge between a church and its denomination's governing body that involved property ownership, the Oklahoma Supreme Court said that the church autonomy doctrine precluded its jurisdiction over the church's action. It clarified that this is an issue of subject matter jurisdiction, not an affirmative defense.
- Reasoning: In finding the jurisdiction bar based on church autonomy, The Oklahoma Supreme Court reviewed the basis for church autonomy principles, noting that government engagement in such circumstances was prohibited by the First Amendment. Because the issue is the interpretation of a governing church document, "its interpretation is an ecclesiastical issue." (168). The court then concluded that the process of disaffiliation set forth in the UMC's policies was "inextricably intertwined with church doctrine, and church autonomy applies." In stating that it is a jurisdictional issue, the court distinguished the broader concept of church autonomy from the ministerial exception, saying church autonomy broadly "bars courts from exercising subject matter jurisdiction over disputes involving faith, church discipline, and church government."
- In the concurrence, two justices did say they believe some church property disputes could be different.
- *Impact on Religious Freedom*: This continues to add to the discussion of whether church autonomy is jurisdictional and therefore able to be raised at any time to bar a suit, or if it is an affirmative defense.

Hunter v. U.S. Dept of Education, 115 F.4th 955 (9th Cir. Aug 30, 2024)

- Issue: does the Religious educational institution Title IX exemption violate the Establishment clause or equal protection? No, it does not.
- Facts: LGBTQ+ students attending religious educational institutions alleged that they experienced discrimination based on sexuality or gender identity, and sued the Dept of Education claiming that the Title IX exemption violates the Equal Protection guarantee of the 5th Amendment and violates the First Amendment Establishment clause. The Department's practice is to not require schools to claim the exemption ahead of time.
- Reasoning: The Ninth Circuit found that Congress did not exceed its constitutional boundaries in enacting the religious exemption. "The exemption does not violate the Establishment Clause under the historical practices and understanding test." (964) The practice was accepted by the

framers and has withstood the critical scrutiny of time. In fact, there is a long history of religious exceptions – "a continuous, century-long practice of governmental accommodations for religion that the Supreme Court and our court have repeatedly accepted as consistent with the Establishment Clause." (966). In addition, there is no evidence that this Title IX exemption was intended to include only particular religious denominations (favoring only some). (967) And the government is not supposed to intervene in disputes about religious beliefs or applications of doctrine. *Id.* "The exemption substantially relates to the achievement of limiting government interference with the free exercise of religion." (968).

- *Impact on Religious Freedom*: This is very helpful to reinforce that longstanding practices of religious exemptions are not Establishment Clause violations, and also to reinforce that the government may not evaluate doctrinal questions.

D. Employer-Employee Dispute cases (Ministerial Exception, Free Exercise, RFRA)

a. Discrimination claims

Billard v. Charlotte Catholic High School, 101 F.4th 316 (4th Cir., May 8, 2024)

- Issue: Ministerial Exception
- Facts: An English and Drama teacher at a Catholic high school sued for sex discrimination under Title VII after he was fired when the school discovered his plan to marry a same sex partner.
- Reasoning: applying the case-by-case analysis required in these employment cases. Although the party had waived the ministerial exception and was focused on the Title VII religious exemption, church autonomy, and freedom of association, the Fourth Circuit raised the ministerial exception defense *sua sponte*, finding that it applied because he "played a vital role as a messenger of CCHS's faith." The court said it had to raise statutory defenses before constitutional ones, and saying even though the ministerial exception had been waived by the parties, "structural concerns regarding separation of powers" allowed it to nevertheless be raised. "The ministerial exception does not protect the church alone; it also confines the state and its civil courts to their proper roles.".
    - The court noted the complexity of Title VII arguments, and noted that there is disagreement about the Title VII exemption's application in the different Circuits in terms of whether it applies to anything besides clearly religious discrimination.
    - Notably, the court did say that RFRA did not apply to a suit between private parties.
    - In applying the ministerial exception, the court looked for duties connected to the school's religious mission, stating that even "seemingly secular tasks…may be so imbued with religious significance that they implicate the ministerial exception." It stated that teachers are particularly important in "modeling religious values." It noted that, although applying the ministerial exception is "highly fact-intensive," if it applies it requires the court to "stay out."
- *Impact on Religious Freedom*: This case is important because it indicates that the ministerial exception is structural and not waivable and must be addressed.

Hittle v. City of Stockton, CA, 101 F.4th 1000 (9th Cir. 2024) (Amended May 17, 2024 after denial of en banc review with dissents)

- Issue: The Ninth Circuit affirmed the grant of summary judgment to the city in his discrimination claim about his removal from his position, saying there was no clear animus based on his religion.
- Facts: Mr. Hittle was fired because of a report that said he lacked effectiveness in his leadership and had used City resources to attend a religious event that he said provided leadership development, a topic they had encouraged him to pursue.
- Reasoning: The panel brushed aside evidence of how the employer disfavored and targeted the religious beliefs and practices of Hittle, saying the various comments by the employer "do not constitute discriminatory animus," and that just repeatedly referencing the "religious event" they did not approve of should not carry much weight, saying instead that they were more like "stray remarks…insufficient to establish discrimination" or "circumstantial evidence." The court said that remarks must be "clearly sexist, racist, or similarly discriminatory" to infer discriminatory motive. (1014)
- There are numerous *dissents from the denial of rehearing en banc*. They are strong opinions about the danger of ignoring and explaining away this evidence of religious discrimination that did not have its day in court. Judge Callahan expressed concern that it would foreclose discrimination claims if facts are not viewed favorably for the nonmoving party, as seemed to be true here. Judge Ikuta indicated that other cases have required much less evidence to overcome a motion for summary judgment, and this one had much more than a single discriminatory comment. Judge Vandyke used a story to point out the blatant double standard here and warned against a "modified heckler's veto" where religious activity can be proscribed based on perceptions or discomfort with religious ideas. He worried about the potential impact of this case on discrimination jurisprudence.
- *Impact on Religious Freedom*: As the dissents from denial of rehearing en banc make clear, this case reflects a minimization of religious experiences and concerns in a discrimination claim case. It could be problematic if it becomes influential in other cases, allowing significant facts to be brushed aside.

Ames v/ Ohio Dep't of Youth Services, 87 F.4th 822 (6th Cir. 2023)

- Issue: Title VII discrimination claim based on sexual orientation and sex by heterosexual woman denied a promotion.
- Facts: A female employee was demoted and then replaced by a young gay man.
- Reasoning: The court held that the claimant failed to make a prima facie case of sexual orientation discrimination.
    - The court reasoned that "she must make a showing in addition to the usual ones for establishing a prima-facie case. Specifically, Ames must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."" (at 825)
    - The concurrence by Judge Kethledge expressed disagreement that people should be treated differently "based on their membership in different demographic groups." He pointed out the significant disagreement among the circuit courts in this area.
- *Impact on Religious Freedom*: This case is interesting in that it implies that there can be a different standard to be applied (heightened burden to reach a prima facie case) when the claimant is a member of a majority group. This could potentially be applied to a religious view that has been seen to be a majority religion for a long time as well.

b. Religious Accommodation

Kluge v. Brownsburg Community School Corp. __ F.Supp.3d __, 2024 WL 1885848 (S.D. IN, April 30, 2024) (on remand from 7th Circuit to review in light of *Groff v. DeJoy*).

- Issue: Whether the particular religious accommodation request in the K-12 education context involving pronoun use constituted an undue hardship for the school district.
- Facts: A music teacher who had a religious conviction against using pronouns that don't match biological sex sought an accommodation to use last names of students instead. Some members of the community complained and asked not to have him as their teacher. Kluge sued the school claiming religious discrimination and failure to accommodate. The district court granted summary judgment for the school, finding that even though there was an objective conflict between Kluge's beliefs and the school's policies, his refusal to follow the policies created an undue hardship on the school's mission to educate all students. On appeal, the Seventh Circuit looked at the degree of accommodation required, using the pre-Groff "de minimis" standard. 64 F.4th 861 (7th Cir. 2023). The Seventh Circuit then vacated its opinion and remanded for reconsideration in light of *Groff.*
- Reasoning: Analyzing undue hardship after *Groff v. DeJoy*, 600 U.S. 447 (2023), the court stated that the analysis had to be done with awareness of the particular business and its needs—in this case education. It then determined that the requested accommodation "burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." It said showing he helped many students was not dispositive because their obligation was "to meet the needs of *all* of its students." The court said the decision was not just about religious animosity, but more focused on "significant disruption to the learning environment," and concern over potential liability for discrimination against students. The court noted that Kluge was not willing to accept an alternative, and that he persisted in treating trans students differently. The school claimed that its undue hardship was that the harm caused by Kluge's behavior exposed the school to liability, and the court agreed that was adequate. The court said the school has to be able to set its own mission and to prevent student harm.
- This case is now on appeal to go back to the 7th Circuit again.
- *Impact on Religious Freedom*: The reasoning in this case is concerning because of how quickly the court is willing to dismiss the importance of sincerely held religious beliefs and give overwhelming weight to the cultural values that a school wishes to promote and has determined is necessary to provide safety for its students. It is unclear how much impact it will have on other K-12 cases involving teachers when their beliefs conflict with a school's messages.

Vlaming v. W. Point Sch. Bd. 302 Va. 504 (Va. Dec 14, 2023)

- Issue: Under Virginia state law, a teacher claimed a violation of his state free exercise rights under the Virginia Constitution and the Virginia Religious Freedom Restoration Act, and the Supreme Court of Virginia said he had adequately stated a claim and that his claims should not have been dismissed.
- Facts: Virginia SCt – A teacher was terminated for refusing to use preferred pronouns on religious grounds.

- Reasoning: the Virginia Supreme Court found that the plaintiff stated a claim under the Virginia Free Exercise Clause, the Virginia RFRA, and the Virginia Due Process Clause.
    - Finding that in Virginia, the neutral, generally applicable standard didn't apply to block the free exercise claim, but that Virginia's law was more narrow about the situations where free exercise would not apply (538-39).
    - The court analyzes this as a compelled speech case (not controlled by the school's speech, and not required by Title IX)
- *Impact on Religious Freedom*: This case is focused on State law, but its reasoning is parallel to Federal law analysis. It will likely impact how these cases about teachers' free exercise rights play out.

E. Parental Rights

***Mahmoud v. McKnight*,** 102 F.4th 191 (4th Cir, May 15, 2024)

- Issue: parental right to direct the upbringing of their children
- Facts: Parents are from minority religious faiths, and object to certain books that have been approved for teachers to choose to read and teach to their students that promote certain views of sexuality, etc., that they disagree with, and wish not to expose their children to as part of their desire to direct the upbringing of their children. The district also issued guidance for how teachers could respond to children's questions or comments about the books if they object to them, communicating the school district's views and deflecting concerns. The district had originally allowed an opt out, but it became too difficult to manage because of the number of requests, so they eliminated it.
- Reasoning: Finding that the parents "failed to demonstrate a cognizable burden to the free exercise of their religion," and that they have no right to be notified about when certain books will be used in school.
    - This is a narrow reading of the parental free exercise right, framing the free exercise as protecting individuals from government action, but not giving them rights about what they "can extract from the government." The court says that the parents, to show a cognizable burden, "must show that the absence of an opt-out opportunity coerces them or their children to *believe or act* contrary to their religious views." It then finds that not giving them an opt-out certainly doesn't force them to change their belief and doesn't affect what they choose to teach their own children, so concludes that there is no cognizable burden. The court cites *Lyng* in making this analysis, saying there is no affirmative compelling going on. It emphasizes that their right to prevent exposure is the right to choose a different school.
    - Judge Quattlebaum, dissenting, strongly states that it does burden the parent's rights "by putting them to the choice of either compromising their religious beliefs or foregoing a public education for their children." He points out the economic aspects of this framing as well, stating that "Surely, the reach of the First Amendment extends beyond the bank accounts of those wealthy enough to pay for education alternatives to pubic schools with policies infringing on the exercise of religion."
- *Impact on Religious Freedom*: This is a significant hit to parental free exercise rights. There is a petition for cert.

Parents Protecting our Children, UA v. Eau Claire Area School District, Wisconsin, 95 F.4th 501 (7th Cir. 2024).

- Issue: Parent association group brought a pre-enforcement facial challenge seeking to enjoin the school district's "Administrative Guidance for Gender Identity Support," claiming it offends their right under due process and free exercise to "make decisions with and on behalf of their children." (502-03). But the court finds that there is not standing (no case or controversy), and dismisses for lack of subject matter jurisdiction.
- Reasoning: The lawsuit was not filed in response to any experience by a parent member involving the implementation of the Guidance. It is an effort to invalidate the entire policy. There are many uncertainties about how the policy will actually play out, and it is not designed to exclude parents completely. Nor is there any allegation that one of the member parents has a child that will seek guidance or support under the policy. The district court said the harm is therefore too speculative and based on a "chain of possibilities." The Seventh Circuit agrees, saying that "The law recognizes that an anticipated future injury may be sufficiently imminent to establish standing. … But the alleged future injury must also be concrete: conjecture about speculative or possible harm is inadequate." (505). When sensitive issues like this come up, the right step is to pursue dialogue and to seek resolution outside of court. (506).
- *Impact on Religious Freedom*: This case is consistent with the Supreme Court's jurisprudence on standing. The challenge it presents is that, often parental concerns arise in ways that do make it hard to establish standing. It will continue to be a challenge, but parents need to carefully consider how to engage and protect their rights related to parenting, knowing that the courts are not always available, especially in pre-enforcement actions.

F. RFRA

Apache Stronghold v. United States, 101 F.4th 1036 (9th Cir. 2024) (en banc)

- Issue: How narrowly should RFRA be read, and is it limited to cases where individuals are coerced into acting contrary to their religious beliefs or are denied equal rights enjoyed by others?
- Facts: Oak Flat is a sacred site for the native tribes litigating here, seeking to stop mining that will destroy their sacred land. Their religious identity is inextricably tied to the land, and their most important religious practices must take place there. The US has a history of destroying their land for mining interests, and has given mining companies control over the land. The coalition of native peoples argued that RFRA was violated in the handling of the land transfer.
- Reasoning: The majority says it is applying *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988) (which said the road and timber harvesting did not violate their free exercise rights because the government action did not coerce them into violating their religious beliefs and did not deny them an equal share of the rights and privileges enjoyed by other citizens. The government program merely had incidental effects on the religious practices, and that did not require a compelling justification.) That case was pre-RFRA, but a majority of the *en banc* court says that RFRA subsumes, rather than overrides *Lyng*, saying that disposition of government real property does not impose a substantial burden on religious exercise if it is not coercing individuals into acting contrary to their beliefs and does not deny them equal rights, benefits and privileges enjoyed by others. It therefore says their Free Exercise and RFRA claims fail. (1061, 1063). The majority draws a line between government action that "frustrates or inhibits religious practice" (okay) and government action that "prohibits" free exercise (not okay). It says that RFRA did not define what it meant to "substantially burden" a person's exercise of their religion, and that it was not undoing all the prior caselaw.
- There are numerous concurrences and dissents trying to grapple with all the implications of this case.

- *Impact on Religious Freedom*: This seemingly pragmatically driven decision to narrowly interpret the application of RFRA in a way that excludes protections for certain minority religious practices and expressions (specifically Native American religions that are tied to the land in a way that our culture has long dismissed) should trouble us.

G. RLUIPA

Landor v. Louisiana Dept of Corrections and Public Safety, 82 F.4th 337 (5th Cir. 2024)

- Issue: can a former prisoner seek money damages from prison officials in their individual capacities pursuant to RLUIPA?
- Facts: Prisoner, a devout Rastafarian, brought a §1983 claim under RLUIPA (and several other claims) based on an incident when, after a transfer to a new facility, he was handcuffed to a chair and his hair was shaved off, counter to his prior accommodations at the other facility and his ongoing requests.
- Reasoning: The court says that its caselaw directs that money damages are not recoverable under RLUIPA, and that *Tanzin v. Tanvir*, 141 S.Ct. 486 (2020) does not change that because it didn't directly overrule their precedent, and was about the similar language in RFRA, not the RLUIPA language. (342-43)
- Denial of rehearing en banc, but with some Dissentals, at 93 F.4th 259 (Feb 5, 2024)
    - Dissental from Judge Oldham (with Smith, Elrod, Willett, Ho, and Duncan): saying this is about remedies against state prison officials who ignore free exercise protections.
        - Rejecting the 3 bases the panel gave for not applying the same standards as RFRA. 1)RLUIPA and RFRA are different statues with diff constitutional justifications; 2) constitutional avoidance; 3) precedents from sister circuits. Saying none of these are persuasive.
    - Dissental from Judge Ho and Judge Elrod from the denial of rehearing en banc
        - States enjoy sovereign immunity, but individuals do not. So should be like in Tanzin v. Tanvir, 592 U.S. 43 (2020), where Court said could have action for money damages under RFRA against govt officials in their individual capacities.
- *Impact on Religious Freedom*: This is a significant case because it is such an egregious abuse of authority and denial of the practice of religion in the prison setting in violation of RLUIPA. The court claims it is following its precedent as it is required to do, so the Supreme Court should act to clarify that the language in RLUIPA should allow monetary damages as in RFRA.

Lozano v. Collier, (5th Cir. Apr 11, 2024)

- Issue: Free exercise rights for prisoners
- Facts: A Sunni Muslim inmate's § 1983 claim based on RLUIPA, involved the burden to religious exercise by denying appropriate shower opportunities for Jumah, space to pray, and a lackof access to religious programming and instruction.
- Reasoning: 5th Circuit here saying for the shower claim, there is "a genuine dispute of material fact" about whether his ability to practice Islam was burdened. Also saying the defendants did not satisfy their burden to show least restrictive means by just asserting the need for an efficient shower schedule, especially because they allow certain others to shower as separate groups. The court also found "a genuine fact issue" regarding "adequate space to pray," stating that RLUIPA protects those unable to attend to their religious needs without government permission and accommodation. The inmate's situation must be individually analyzed and tailored. The court remanded for several considerations below.

- The concurrence helpfully summarizes some of the history of RLUIPA application, focused on how it changed based on *Holt v. Hobbs*, 574 U.S. 352 (2015) and *Ramirez v. Collier*, 595 U.S. 411 (2022), stating that the standards are stronger now.

- *Impact on Religious Freedom*: This case helpfully applies the Supreme Court standards and moves in the right direction of respecting diverse religious beliefs and the needs of inmates to practice their religion. It is helpful because it moves us farther towards acknowledging that religion comes with religious practices, not just a set of beliefs.

LEGISLATION

I. Federal Bills

- Right to Contraception Act, S.4381 (49 co-sponsors, including 3 Independents)
  - Cloture filed June 2024
  - Says it supersedes other state and federal laws. Sec.5(a)(1), and includes a RFRA carveout, saying RFRA will not apply to exempt anyone from its requirements. Sec.5(a)(3)
- The Accreditation for College Excellence Act of 2024 and the Respecting the First Amendment on Campus Act were combined in H.R. 3724. This bill received a floor vote in the House and passed on September 19, 2024. It is unlikely to advance in the Senate.
  - This bill included the language of the Equal Campus Access Act that protects religious student organizations.
  - The First Amendment on Campus Act, originally H.R. 7683, was promoted by the House Committee on Education and the Workforce, and introduced in March 2024.
  - It is significant to see language seeking to protect speech and association interests on college campuses to pass the House.

II. State RFRAs

With three more state RFRA bills passed in 2024, the total of states with statutory RFRA protection has increased to 28. In addition, there are still cases applying the compelling state interest test in nine states that do not have RFRA statutes.

See Appendix 1 for Map image of State RFRAs created by 1st Amendment Partnership

a. West Virginia (found at WV Code §35-1A-1 (March 2023)
b. UT Senate Bill 150 Amends Utah Code 63G-31-101, *et seq.* (Feb. 2024)
    i. The Utah house voted unanimously to approve the bill, after it was amended to include non-codified language making it clear that it was not meant to conflict with discrimination protections for LGBTQ+ people (stating that "this part complements, rather than disrupts, the balance" established by Utah's prior enacted laws "that balance religious freedom with other important civil rights," [Advocates were worried particularly about anti-discrimination policies in housing and the state's ban on conversion therapy].
c. Nebraska LB 43 (awaiting codification) (March 2024)

d. IA SF 2095 Iowa Code Chapter 675, *et seq* (April 2024)
    i. It passed on a vote of 31-16 in the state Senate
    ii. Opposition claimed it was aimed at allowing discrimination against LGBTQ+ individuals.

III. State Campus Access Bills

a. West Virginia SB 503. Signed by the governor on March 22, 2024.
    i. The bill applies to religious, political and ideological student orgs
    ii. The bill made a needed adjustment to a prior bill that basically codified the concept of the all-comers policy, saying "which is open to all students"
    iii. So this fixed it and clarified any benefit generally available should be made available to groups and not excluded based on requirements about leadership, affirmation of beliefs, pursuit of mission, or a code of conduct.

b. New Hampshire – HB 1305. Signed by the governor on July 26, 2024.
    i. Bill with language protecting both free speech and association at public higher education institutions in NH.
    ii. Its free speech protections include allowing the use of outdoor areas, deemed public forums, and preventing free speech zones. Reasonable time, place and manner restrictions are allowed as long as they are content and viewpoint neutral criteria.
    iii. Its association protections ensure that "religious, political, or ideological" student organizations may express themselves and may have leadership or membership requirements based on affirming sincerely held beliefs, complying with standards of conduct, or furthering the organization's mission or purpose.

FEDERAL REGULATIONS

Overview: this was a huge year for Administrative Agency action by the Biden Administration. Many of the regulatory promises they made at the beginning of his term resulted in finalized rules this Spring. Here is a list of some of the finalized rules and a snapshot of their implications for religious liberty. It is not exhaustive, but reflective of the reach of the regulatory state, and that agency actions can have a significant impact on religious organizations and individuals.

Here is a list of the rules highlighted below:

- *The 9-agency, "Partnerships with Faith-based and Neighborhood Organizations"*
- *Health and Human Services*
    - *HHS Grant Regulation*
    - *Section 1557 of the ACA: Nondiscrimination in Health Programs and Activities*
    - *Safeguarding the Rights of Conscience*
    - *Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children*
    - *Unaccompanied Children Program Foundational Rule*
- *Department of Education*
    - *Title IX: Nondiscrimination on the Basis of Sex in Education Programs or Activities*
    - *Not final, but relevant to Campus Access: Direct Grant Programs*
- *EEOC*

    - *Implementation of the Pregnant Worker's Fairness Act*
    - *Harassment Guidance*
- *OMB: Guidance for Federal Financial Assistance*
- *State Department: NPRM--Nondiscrimination in Foreign Assistance*

As noted above, the Supreme Court's decisions in ***Loper Bright Enterprises v. Raimondo***, 144 S.Ct. 2244 (2024), could have a significant impact on how the courts evaluate challenges to these rules.

I. 9-agency rule:

This rule, Partnerships with Faith-Based and Neighborhood Organizations, includes protections for beneficiaries of federally funded social services, and details the rights and obligations of organizations providing those services. It modifies regulations for faith-based organizations that partner with all nine agencies to provide services to beneficiaries of agency programs. It claims to also reinforce awareness of religious liberty. As EPPC scholars have said, the rule appears to be "a solution in search of a problem." (see article by Rachel Morrison and Natalie Dodson of EPPC). It went into effect April 3, 2024.

- **Some key aspects of the rule**: It claims to guide the participation of faith-based and community organizations in how to follow federal laws and program terms in delivering social services. It includes a notice requirement of nondiscrimination. It clarifies that any direct federal financial assistance used to provide social services must not be paired with explicitly religious activities, unless they are separated in time or location from the federally funded services. It notes that any accommodation requests by faith based organizations will be considered on a case-by-case basis based on federal law. The rule claims it will have very little impact on faith-based providers decisions to participate in federally funded social service programs.
- **Religious Freedom implications**: Unfortunately, this final rule cuts and endangers religious protections. It specifies that the Department's reading of the Title VII religious employer exemption is limited only to religious discrimination, not any other category.

II. Health and Human Services (HHS)

Final Rule, 45 CFR Parts 75, "Health and Human Services Grants Regulation"

- **Some key aspects of the rule:** This is more interpretive, revealing internal department processes. It clarifies that they see *Bostock's* definition of "sex" applying broadly, across thirteen statutes and in the context of many grants: protections against sex discrimination include protections on the basis of sexual orientation and gender identity. This rule creates a process for considering religious liberty objections and for granting exemptions, after the fact, as they come up, in a case-by-case manner.
- This allows religious organizations two options to their questions on how far their religious freedom rights go in the context of specific government grants.
    - 1. They can proactively write to HHS, noting the provision they object to and describing the religious conflict. They receive a temporary injunction, and the government will confirm and specify the scope of the exemption, or reject and then the temporary injunction will expire.

- 2. They can make a good faith reliance about their religious freedom and conscience protections based on attorney recommendation (good to have a letter on file before renewing a grant) and then if challenged or investigated, they can show the good faith reliance. The letter should specifically state how the religious beliefs conflict with the interpretation of certain provisions, and support for why religious protections apply. The government has said if it begins an investigation, the organization may then apply for an exemption and go through the process at that time, with the government not assessing backwards penalties, but focusing on forward-looking relief.

- **Religious Freedom implications**: HHS, along with other agencies, continue to focus on saying they will honor First Amendment rights, but that they believe analysis must be case-by-case. This allows them to minimize conflicts right now, while at the same time not implying that any particular belief would overcome the government interests involved. Religious organizations, in order to not be chilled or fearful about entering into grant agreements, need to have strong legal advice.

The Final Grants Regulation Rule applies to the following statutes:

- 8 U.S.C. § 1522. Authorization for programs for domestic resettlement of and assistance to refugees
- 42 U.S.C. § 290cc-33. Projects for Assistance in Transition from Homelessness
- 42 U.S.C. § 290ff-1. Children with Serious Emotional Disturbances
- 42 U.S.C. § 295m. Title VII Health Workforce Programs
- 42 U.S.C. § 296g. Nursing Workforce Development
- 42 U.S.C. § 300w-7. Preventive Health Services Block Grant
- 42 U.S.C. § 300x-57. Substance Use Prevention, Treatment, and Recovery Services Block Grant; Community Mental Health Services Block Grant
- 42 U.S.C. § 708. Maternal and Child Health Block Grant
- 42 U.S.C. § 5151. Disaster relief
- 42 U.S.C. § 8625. Low Income Home Energy Assistance Program
- 42 U.S.C. § 9849. Head Start
- 42 U.S.C. § 9918. Community Services Block Grant Program
- 42 U.S.C. § 10406. Family Violence Prevention and Services

Final Rule, re Section 1557 of the Affordable Care Act, Nondiscrimination in Health Programs and Activities.

- **Key Aspects of the Rule**: This rule expands protections in the implementation of the Affordable Care Act, Section 1557. It applies to health programs and activities that receive federal financial assistance (very broad application), and applies *Bostock* broadly to the meaning of "discrimination on the basis of sex." in §92.101(a)(2). It "includes, but is not limited to, discrimination on the basis of: (i) Sex characteristics, including intersex traits; (ii) Pregnancy or related conditions; (iii) Sexual orientation; (iv) Gender identity; and (v) Sex stereotypes." Like the Title IX rules, it focuses on LGBTQIA+ rights, spending extra time on gender identity, for example by stating that to treat someone inconsistently with their gender identity is more than de

minimis harm. See §92.206(b)(3). Throughout the large reg, HHS continues to emphasize that it will respect Federal religious freedom and conscience protections. Rather than try to define the contours of those rights, it then clarifies its new "administrative process" for determining claimed exemptions based on Federal conscience or religious freedom law. §92.302. They may be affirmatively requested or addressed in the context of an investigation, after having relied in good faith on a presumed exemption. HHS specifically wants to make sure that any exceptions are not "too broad" so as to harm the interests they want to protect, and has put itself as the interpreter and determiner of exactly how religious freedom caselaw applies to each individual situation.

- **Religious Freedom Implications**: This leaves health programs, particularly those that are religiously-based, with a lot of uncertainty. HHS's current leadership is likely to interpret religious liberty provisions and caselaw narrowly, strongly weighing government interests in applying any level of scrutiny. (clear based on the evidence and emphasis given in the published rule about the significant harm to LGBTQIA+ individuals underlying these expanded protections.
- There are several lawsuits challenging this provision, most focused on the interpretation of "sex-based discrimination" as including gender identity.
    - *Tennessee v. Becerra*, -- F.Supp.3d--, 2024 WL 3283887 (S.D.Miss 2024) (on behalf of 15 states). Finding the term "sex" in Title IX different from that in Title VII. The district court issued a Preliminary Injunction because it was likely HHS exceeded its statutory authority and the states established irreparable harm.
    - *Missouri v. Becerra* (E.D. Mo, filed 7/10/2024), saying Congress did not authorize any of this, and that it violated the ACA, APA, federalism, and free speech.

Final rule, Safeguarding the Rights of Conscience as Protected by Federal Statutes, published Jan 11, 2024, purporting to clarify OCR's conscience authorities and how OCR enforces those laws. The final rule went into effect March 11, 2024.

- **Key aspects of the rule**: The 2024 rule partially rescinded the 2019 rule, while leaving the 2011 framework in play. It removed the definitions that were in the 2019 rule (which never took effect due to court challenges). The rule indicates that employers must carefully balance employee conscience objections and patient rights, and that decisions must be on a case-by-case basis. It focuses on the importance of access to care, and emphasizes ongoing inequities and barriers to health care faced by certain groups, including LGBTQIA+ individuals. While recognizing conscience protection statutes, and noticing that no statute requires it to implement rules for conscience protections, the rule clarifies that it has the authority to investigate such complaints and consider them case-by-case (Sec. 88.1, 88.2, 88.3). It removes, however, the compliance requirements of § 88.6 from the 2019 rule, which it said were "overly burdensome on covered entities." It instead says that the Department will handle complaints "on a case-by-case basis to ensure the balance struck by Congress is respected," and declined to give additional guidance. The rule also points to the other rule for Section 1557, saying that it provides an additional process for raising exemption requests based on religious objections.

- **Religious Freedom implications**: This rule does not bring adequate clarity about how health care entities should consistently respond to employee's claims of conscience objections, and how the Department will hold them accountable for implementing conscience protections. The Final rule continues to say that the employer must balance rights delicately in a case-by-case manner, saying the Department's enforcement efforts will do the same. The rule seems aimed at ensuring that any impact of conscience protections on LGBTQIA+ community members is minimal and that they are able to receive reproductive health care without delay and gender affirming care without hindrance. It is therefore difficult to know how much weight will be given to concerns of conscience in the balancing of interests and a decision about what constitutes an undue burden on an employer.

Final Rule – Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children (Issued April 30, 2024 and effective July 1, 2024, with an implementation deadline of October 1, 2026). 45 CFR Part 1355.

- **Key aspects of the rule**: This rule provides requirements for placing and caring for children in foster care who are LGBTQI+. The rule is built on the premise that it is unsafe and objectively harmful for any party involved in an LGBTQI+ child's care to not simply affirm their chosen identity, noting that they are "especially vulnerable," and indicating that any raised concerns must be addressed right away. It offers numerous references to research supporting that conclusion. The rule focuses on the requirement to provide "safe and appropriate placements," determining that providers who meet the requirements can be "designated providers" (DP) specifically for LGBTQI+ children. It emphasizes the providers' conduct, trying to distinguish it from beliefs, which are allowed to be different, as long as the actions don't rise to the level of harassment. In order to be a DP, they must make certain commitments and have additional training that is considered necessary to "meet their unique needs and create a supportive environment." The child's concerns are to be given specific weight. It says that providers should not be penalized for not being DPs, since it is considered voluntary, but agencies must ensure that there are sufficient DPs available.
- **Religious Freedom Implications**: this rule claims to tolerate religious viewpoints of foster parents or agencies that differ (specifically claiming it has developed the rule in order to respect religious freedom, free speech, and conscience laws, and that it is not seeking to directly regulate faith-based organizations), but it does so in a way that looks like its goal is still to protect children from those viewpoints and to minimize their influence. It claims that good faith and respectful efforts to engage children will not be considered harassment, and claims there is no penalty for choosing not to become a DP, yet it does clearly mean that LGBTQI+ children will not be placed with families that have certain views, and are likely to be removed if the child was placed there previously. It implies that a child may even be removed because of conflicts with family over LGBTQI+ identity. Nevertheless, it provides a process for providers requesting any accommodation based on religious freedom, conscience, or free speech, and says they will be considered on a case-by-case basis.

Final Rule, Administration for Children and Families, "Unaccompanied Children Program Foundational Rule" 45 CFR Part 410 (effective July 1, 2024)

- **Key aspects of the rule:** This rule seeks to provide child welfare protections for children who are in immigration custody and referred to the Office of Refugee Resettlement (ORR). The Flores Settlement required that final regulations be promulgated consistent with its terms. ORR is tasked with implementing these regulations. Overall, they focus on making sure that actions taken are in the "best interest" of the child, and cover many aspects of the child's safety and needs. Among the factors that should be considered, the rule includes "the unaccompanied child's development and identity." The rule reflects some of the principles in the "Designated Placements" rule as well, noting that sponsor suitability will be evaluated based on the child's individualized needs, including their LGBTQI+ status of identity, and whether the sponsor will be "understanding of the unaccompanied child's needs" and "capable of providing for the physical and mental well-being" of the child, considering a wide range of factors (§410.1202(h)). One interesting phrase in the rule is the idea of "medical services requiring heightened ORR involvement." This signals that ORR has specific additional responsibilities to ensure the receipt of services, including "(1) Significant surgical or medical procedures; (2) Abortions; and (3) Medical services necessary to address threats to the life of or serious jeopardy to the health of an unaccompanied child."
- **Religious Freedom Implications:** The rule does take into account the religious needs and preferences of the children. The rule raises some conscience concerns, as it requires ORR staff to provide certain services for the children that an employee may object to, like abortions. It is not entirely clear how an employee should handle that. It is also unclear whether certain sponsors would be determined unqualified to care for some children based on their religious beliefs and conduct, with ORR claiming it is necessary to prevent discrimination (§410.1003(a)). As with most of these rules, the Department repeatedly, throughout the rule, says it will operate the UC program consistent with "the requirements of federal religious freedom laws," though it does not give many details of how this will play out.

Interim Final Rule, "Health and Human Services Adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards." Published Oct 2, 2024.

- **Key aspects of this rule**: HHS is adopting two previously finalized rules: 1) OMB Guidance for Grants and Agreements (finalized Apr 22, 2024) and 2) HHS Grants Regulation (finalized May 3, 2024). HHS claims that there is "good cause to dispense with the prior public notice and the opportunity to comment" before finalizing this because OMB did a comment period and HHS did one for its guidance. It says it will receive comments, but not respond to them.

III. Department of Education

Final Rule re Title IX, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." Published April 29, 2024; Effective Aug 1, 2024

- **Some key aspects of the rule**: This is a huge rule, with detailed and complex explanations of changes in definitions, due process requirements, and numerous expectations of schools that receive federal funding. It expands the definition of "on the basis of sex," and the scope of protections to include sexual orientation, gender identity, sex stereotypes, sex characteristics, pregnancy or related conditions (which includes the right to termination of pregnancy) (§106.10). It changes the definition of "sex-based harassment" from the 2020 language that said it must be "so severe, pervasive, and objectively offensive that it effectively denies…" to the 2024 language that says it is "based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies…" The rule has a strong emphasis on LGBTQIA+ rights, wanting to make sure that "appropriate support" is given to prevent *harm*, such as that caused by being separated or treated differently or not being able to participate consistent with someone's gender identity (§106.31). The rule acknowledges statutory exemptions, such as for fraternities and sororities and on campus housing, but keeps the religious exemptions narrow (§106.12), making clear, for example, that it does not apply to religious student organizations. The rule also undoes a number of the due process protections put into the 2020 rule, now allowing a single investigator/decisionmaker. It also allows for broad supportive measures, which are not considered disciplinary, but can even be offered "in response to offensive speech" that affects their community, with the only limit being that they may not be "unreasonably burdensome."
- **Religious Freedom implications**: While the final rule consistently acknowledged the presence of RFRA and First Amendment rights, it does so in a scripted way that emphasizes that ED cannot give detailed guidance because it requires case-by-case analysis. ED consistently disagreed with concerns, even as it continued to emphasize its clear compelling interest to prevent discrimination. In addition, "supportive measures" may be used to chill undesirable speech, but do not really have any appeal process connected to them.
    - In addition, ED very clearly states its view of the 2006 Supreme Court case of *CLS v. Martinez* as broadly applicable, emphasizing that schools may have and enforce "reasonable, viewpoint-neutral nondiscrimination policies" as conditions on benefits and resources, though they acknowledge that they can't stop free speech or association rights…
- **Court challenges:** numerous cases are challenging the Title IX rule, already with distinct outcomes. For example, *State of Louisiana v. U.S. Department of Education* (WD LA, June 13, 2024), found that the application of *Bostock* to Title IX contradicts the purpose of Title IX that Congress had. The court then determined that, due to the vast significance of the topic, there must have been "clear statutory authorization" given to the agency to act in this way, based on the major questions doctrine. The Supreme Court denied an application for a partial stay of the preliminary injunction on Aug 16, 2024, though Justice Sotomayor's dissent from the denial (joined by Kagan, Gorsuch, and Jackson) said they would have stayed the PI except as to the three provisions at issue, in order to allow other portions to go into effect). Similarly, in *State of Tennessee v. Cardona*, the court acknowledged the major questions doctrine and noted

significant First Amendment concerns and interference with states' sovereign interests in granting an injunction limited to the plaintiff states.

NOT YET FINALIZED Campus Access Regulation: Direct Grant Programs, State-Administered Formula Grant Programs

- **Some key aspects of the rule**: This is still an NPRM, not yet finalized. ED is seeking to rescind protections for religious student organizations that were finalized in the 2020 rule. ED says they are not necessary to protect First Amendment rights to free speech and free exercise, and have created confusion. They also imply that they are going to be burdensome to investigate, even though they have had to do almost no investigations at all.
- **Religious Freedom implications**: The result of a recission is that universities and colleges will likely see a recission as a green light to consider religious organizations as discriminatory if they have religious leadership requirements, and exclude them from equal benefits given to other groups.

IV. Equal Employment Opportunity Commission (EEOC)

Final Rule and interpretive guidance, "Implementation of the Pregnant Worker's Fairness Act" The Final Rule was published April 19, 2024, effective June 18, 2024

- **Some key aspects of the rule**: This rule implementing the PWFA (passed by Congress and signed in December 2022 as part of the consolidated appropriations package) is focused on the requirement that covered entities provide employee accommodations for conditions "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," unless it would cause an undue hardship to the operation of the business. The final rule includes elective abortion in the definition of "related medical conditions." The EEOC says any failure to accommodate based on religious reasons would be addressed "on a case-by-case basis." (which it says is consistent with how they have always considered defenses raised under section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a) when related to religious employment.
- **Religious Freedom Implications:** There is a lack of clarity for when a religious employer would be required to offer accommodations, even if they violate the employer's sincerely held religious beliefs.
- **Court Challenges**: A Louisiana district court, in *State of Louisiana v. EEOC* (WD LA, June 17, 2024), has granted a preliminary injunction, postponing the effectiveness of the new EEOC rules in relation to accommodations "for purely elective abortions," finding that the EEOC had "exceeded its statutory authority to implement the PWFA" contrary to Congress' authority and state sovereignty. The court found standing (mentioning the newly decided *FDA v. Alliance for Hippocratic Medicine* (U.S. June 13, 2024)) for both the Catholic Bishops--due to a credible enforcement threat and the loss of First Freedoms, and for the States—because of infringements on their sovereign power and because they are also employers and have costs associated with compliance. The court then said the rule directly affected the state speech, and that it narrows the application of Title VII's religious exemption that the PWFA incorporates in a way that harms the Catholic Bishops. In contrast, the district court in *States of Tennessee et. al.*

v. EEOC (ED TN, June 17, 2024) found that the 17 states bringing suit lacked standing to challenge the EEOC final rule. It stated that the sovereign harms articulated are "not imminent" and that there was not a credible threat of enforcement, but just a fear of having to accommodate abortions in the future, and that it might lead to EEOC enforcement.

Finalized Harassment Guidance issued April 29, 2024

- **Some key aspects of the Guidance**: Notably, the EEOC does not have rulemaking authority for Title VII, so this does not bind the public, though it will bind how EEOC employees will enforce its policies. It clarifies the EEOC's legal analysis of its standards for harassment and employer liability. It is supposed to provide a resource to give clear understanding and expectations. The guidance makes clear that "sex-based harassment" includes Sexual orientation and gender identity. The guidance cites *Bostock*, but uses the term "gender identity," not transgender status. The guidance gives a broad understanding of what harassing conduct includes, including things like misgendering, denying access to sex-specific spaces, and outing.
- **Religious Freedom Implications**: The guidance minimizes religious rights, especially in the area of sex discrimination. For example, it acknowledges religious accommodation requirements, but balances that against the need to protect against harassment, even when it is created "by religious expression." It notes that accommodations only need to be provided if they don't result in undue hardship for the employer (such as by preventing them from providing an environment free of harassment). In mentioning RFRA and religious rights, the guidance, like many of these rules, focuses on addressing it on a "case-by-case basis."

V. OMB

Final Rule, OMB Guidance for Federal Financial Assistance. The final guidance will be effective October 1, 2024.

- Key aspects of the guidance: The guidance broadly updates rules and requirements for when federal financial assistance is awarded, seeking to clarify and streamline requirements, so that there can still be accountability, but that recipients can focus on achieving their goals. For example, it clarifies that a portion of the grants may be used for evaluation purposes in order to improve effectiveness. It also addresses the handling of data, including the gathering and analysis of data. It includes standards for community engagement activities and their allowable costs. It also has standards for grant announcements by the agencies, requiring plain language and availability to diverse applicants.
- Religious Freedom Implications: § 200.300(a) states that the agencies must manage and administer the awards consistent with the Constitution, including "free speech, religious liberty, public welfare, and the environment, and those prohibiting discrimination." Some are concerned that this section will not adequately protect religious freedom. This is because §200.300(b) specifically mentions *Bostock*, and says that agencies must ensure that there is no unlawful discrimination based on sexual orientation or gender identity. It is unclear how these different rights, if considered in conflict, will be balanced. OMB asserts that this section "does not impose any new nondiscrimination requirements," but merely explains that the law should

be followed, so it should "not affect faith-based organizations' participation" and they can still request appropriate accommodations. 89 FR 30075-76.

VI. State Department

NOT YET FINALIZED: "Nondiscrimination in Foreign Assistance," and "Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance" -- NPRMs issued on Jan 19, 2024

- **Key aspects of the NPRMs**: The NPRMs seek to implement the State Department's expectation that beneficiaries of department-funded foreign assistance activities will not be discriminated against. It includes nondiscrimination requirements in supplies and services, but also in employment decisions involving those hired to fulfill the contract that uses the government funds. It also includes notification requirements. The proposed language is very broad, with undefined terms. The proposed language includes a possible
- **Religious Freedom Implications**: As CLS noted in its comment, filed March 19, 2024, this proposed rule only vaguely implies that a waiver may possibly be granted for a religious organization, but does not give any clarity or confidence that it will be given. It is a radical proposal to forbid grant recipients from exercising their constitutional and statutory right to hire fellow believers with grant money. By not allowing for a religious exemption, the State department will fail to comply with its obligations to respect religious exercise.

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APPENDIX I: State RFRAs Map