



REPRODUCTIVE HEALTH AND EQUITY FACT SHEET

March 30, 2023

FIRST AMENDMENT IMPLICATIONS: REPRODUCTIVE RIGHTS

The First Amendment to the U.S. Constitution guarantees freedoms of association, petition, and speech, a free press, free religious exercise, and prohibits government establishment of religion. Following *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), which withdrew the fundamental constitutional right to abortion in place since *Roe v. Wade* (1973), several distinct First Amendment arguments have arisen regarding state laws that restrict or guarantee access to abortions and other reproductive freedoms.


I. Freedom of Association

While freedom of association is not explicitly listed in the First Amendment, [the Supreme Court has recognized it as a fundamental right](#). [Freedom of association](#) appears as either:

1. Expressive association (which protects the ability to engage with others to advance beliefs and ideas that are often political in nature); or
2. Intimate association (which protects the ability to associate privately with family or other persons).

Challenges in the reproductive rights arena tend to focus on expressive association. The First Amendment also protects an individual's right *not* to associate. Both positive and negative aspects of these freedoms have arisen in post-*Dobbs* litigation.

Expressive Association: In *Davis v. Sharp*, No. 22-cv-373 (W.D. Tex. Feb. 15, 2023), an abortion fund and three private donors [argued](#) that Texas [Senate Bill 8](#) violates constitutional and state law protections, including expressive association. S.B. 8 bans abortions after six weeks of pregnancy and deputizes private citizens to bring civil lawsuits against abortion providers as well as those who "aid[] or abet[]" prohibited abortions. The abortion fund and donors alleged that the provision threatens to chill their inter-relationships with employees and volunteers in violation of their freedom of expressive association. However, the district court [dismissed the suit](#), determining plaintiffs had not shown an imminent threat giving them standing to sue. Idaho and Oklahoma have enacted similar laws allowing citizen-initiated civil lawsuits against those who provide, or aid and abet, banned abortions. Per [a 2021 report by the National Association of Criminal Defense Lawyers](#), general state criminal laws regarding complicity may also be used to expand liability to those who aid and abet now-unlawful abortions. Similar to the *Sharp* litigation, additional challenges may arise to assess whether enforcement of



these more general criminal laws would also violate the freedom of expressive association under similar circumstances.

Disassociation: In [Slattery v. Hochul, 61 F.4th 278 \(2d Cir. 2023\)](#), a crisis pregnancy center (The Evergreen Association, Inc.) challenged a New York state law prohibiting employers from “taking adverse employment actions against employees for their reproductive health decisions.” Evergreen argued that the law burdened its freedom of expressive association by preventing the organization from disassociating with persons who do not share anti-abortion views, undermining the organization’s religious and moral message. Reversing the trial court’s decision on this issue, the Second Circuit Court of Appeals found that the law could severely burden Evergreen’s right to expressive disassociation, forcing the organization to employ individuals acting counter to its mission. The court dismissed Evergreen’s other First Amendment challenges, determining that the law did not violate speech or free exercise protections.

II. Freedom of the Press


The [freedom of the press](#) protects journalists and news media from government censorship. Like all First Amendment rights, these protections are not absolute, particularly when journalists obtain their information unlawfully. Beginning in 2013, the Center for Medical Progress, and anti-abortion activist group, plotted to secretly record and subsequently share videos taken inside Planned Parenthood clinics. In *Planned Parenthood v. Newman*, 51 F.4th 1125 (9th Cir. 2022), the Ninth Circuit Court of Appeals [rejected](#) the Center’s appeal of a jury verdict finding that it broke state and federal laws, including fraud, wiretapping, and conspiracy. The judges concluded there was no First Amendment concern resulting from the jury’s verdict because journalists are still subject to federal and state law. The Center [intends to appeal to the Supreme Court](#) to the extent the appellate decision “unconstitutionally authorizes tort claims against journalists who publish truthful information.”

III. Freedom of Speech

Freedoms of speech allow individuals to express their political views and other ideas, as well as commercial messages, without fear of governmental retaliation or punishment. Though the reach of the First Amendment is broad, [not all forms of speech are protected](#). Obscenities, defamation, false statements, and true threats of harm exemplify unprotected speech.

Defamation: On February 24, 2023, the [Texas Supreme Court decided](#) that an anti-abortionist’s Facebook posts constituted protected speech, rather than defamation. In his posts, the Defendant accused three reproductive rights groups of engaging in criminal activities, namely murder, and urged their punishment under local ordinances. Defamation involves the expression of false statements of fact. In *Lilith Fund for Reproductive Equity v. Dickson*, No. 21-0978, 2023 WL 2193586 (Tex. Feb. 24, 2023), the court reasoned that the posts were not false statements of fact because the tone was “exhortatory, not factual”; in essence, the statements constituted opinions, rather than facts. The court emphasized the importance of free speech principles, protected by both the First Amendment and Texas state law. It noted how the U.S. Supreme Court has clarified that “unpopular and even reprehensible speech” is protected, and acknowledged the “chilling effect that defamation lawsuits have” on individuals who lack the resources to litigate.

Elected Official Speech & Retaliation: In *Warren v. DeSantis*, No. 4:22cv302-RH-MAF, 2023 WL 345802 (N.D. Fla. Jan. 20, 2023), Florida State Attorney Andrew Warren [sued](#) Governor Ron DeSantis after being suspended over his pledge not to prosecute those seeking abortions or gender-affirming care. Warren argued that his suspension violated First Amendment guarantees protecting elected officials’ freedoms to express views on policy and prohibiting retaliation for engaging in protected speech. In January 2023, [a federal district](#)



[court decided](#) the suspension violated the First Amendment and state constitutional protections, but still ruled in favor of Governor DeSantis, as Warren would have been suspended regardless of the First Amendment violation. Warren appealed to the Eleventh Circuit Court, which [granted](#) a motion to hear the case in early May 2023.

Academic freedom: In 2021, Idaho passed [House Bill 220](#), a law which applies to public schools and universities, among other entities, and prohibits the use of public funds to [provide or promote](#) abortions. In September 2022, pursuant to concerns about the law post-*Dobbs*, [the University of Idaho warned employees](#) about potential criminal liability for promoting abortion or contraception. The University guidance also cited [Idaho Statute 18-603](#) which prohibits advertising medications to prevent conception or induce abortion. The University eventually attempted to [walk back their guidance](#), clarifying their own policies had not changed, but that their intent had been to recommend caution due to state laws on abortion. No legal challenges have emerged yet addressing the guidance, but legal issues may still arise in Idaho and other states with similar statutes.

IV. Religious Freedom

Freedom of religion ensures that individuals can practice their chosen religion, or no religion at all. The [free exercise clause](#) prevents unjustified government interference with religious exercise, while the [establishment clause](#) prohibits government from establishing or favoring any specific religion. Many religious groups [argue](#) that state abortion bans violate free exercise and establishment clause protections, or that bans violate state Religious Freedom and Restoration Act (RFRA) laws, which prohibit governments from substantially burdening religious exercise without sufficient justification. Interestingly, [many states with restrictive abortion laws also have strong, long-standing religious freedom protections](#) via state constitutional guarantees or RFRA. Plaintiffs have taken advantage of these protections in abortion-hostile states to bring challenges against abortion bans.

In *Satanic Temple v. Texas*, No. 22-20459 (5th Cir. Dec. 5, 2022), the Satanic Temple, a nontheistic religious organization, seeks to block Texas state laws limiting abortion access under free exercise of religion and free speech protections. After the district court denied the Temple's request, it promptly appealed to the Fifth Circuit Court of Appeals, where the case is currently pending. [The Temple argues](#) that its members consider abortion a "personal moral decision" that "lie[s] uniquely within the realm of religion." It also identifies abortion as a religious ritual protected by the Constitution. [The Temple further asserts](#) that the First Amendment "must protect a minority religion from laws rooted in the holy texts of an adverse majority."

In *Generation to Generation, Inc. v. Florida*, No. 2022 CA 000980 (Fla. Cir. Ct. June 16, 2022), a Jewish synagogue filed [a lawsuit](#) seeking to block the state's 15-week abortion ban in violation of Florida constitution's establishment and free exercise clauses as well as Florida's RFRA. According to plaintiffs, the abortion ban codifies a "particular religious view about abortion and when life begins." The law impedes the practice of Judaism, the synagogue argues, because Judaism permits abortions, and even requires a mother to abort a pregnancy to protect herself. [Other religious leaders](#) have also joined the Jewish congregation's lawsuit.

Finally, in [Anonymous Plaintiffs 1–5 v. Medical Licensing Board of Indiana](#), No. 49D01-2209-PL-031056 (Ind. Super. Ct. Dec. 8, 2022), the American Civil Liberties Union and a Jewish group in Indiana [sued](#) on September 8, 2022 to block the state's abortion ban, arguing that it violates Indiana's RFRA. They contend that the abortion ban impedes their own and others' sincere religious beliefs, explaining that many religious practices run counter to the state's abortion ban. On December 8, 2022, a superior court judge agreed, [blocking the law's enforcement](#). A [similar case](#) was also filed in Kentucky on October 6, 2022 under that state's RFRA.



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Robert Wood Johnson Foundation

Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.