

## Freedom of Religion on Campus: Recent Supreme Court Decision Opens Door for More Religious Expression

Webinar

August 3, 2022

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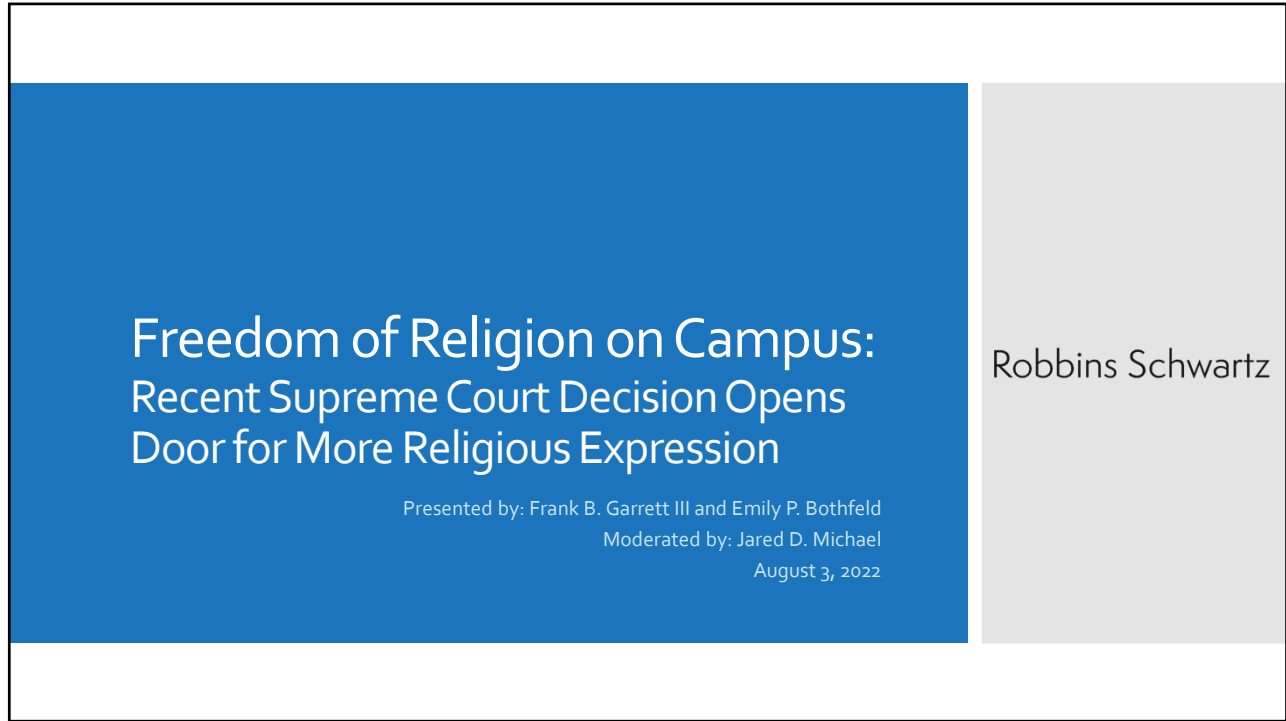
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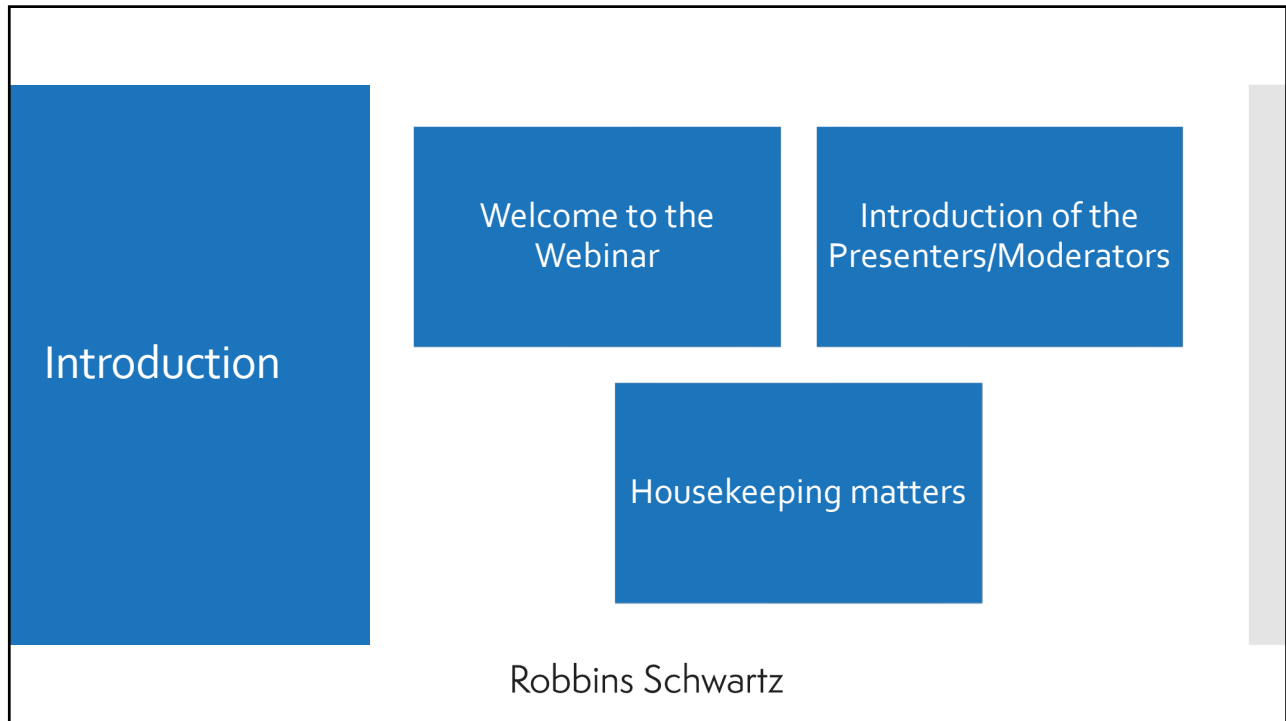
The slide features a blue background on the left and a light gray background on the right. The title is centered in the blue area, and the presenter's name is in the gray area.

# Freedom of Religion on Campus: Recent Supreme Court Decision Opens Door for More Religious Expression

Presented by: Frank B. Garrett III and Emily P. Bothfeld  
Moderated by: Jared D. Michael  
August 3, 2022

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The slide shows a list of agenda items in blue boxes on a white background. The items are arranged in a vertical sequence from top-left to bottom-right.

- Introduction
- Welcome to the Webinar
- Introduction of the Presenters/Moderators
- Housekeeping matters

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

## Hypotheticals: Scenario #1

- As students are making their way into a classroom, a faculty member silently prays at her desk five minutes before the beginning of a classroom lecture.
- Based on your understanding of the First Amendment, do you believe Scenario #1 is permissible?
  - a. Yes, because the First Amendment permits employees to pray at any time during the workday.
  - b. Yes, because the employee is not fulfilling employee-related duties, is not pressuring others to join in, and is not speaking in their capacity as an employee of the institution.
  - c. No, because the employee is acting in their official capacity, fulfilling employee-related duties, and is coercing others to join-in.
  - d. No, because prayer by employees of government-funded institutions is never permissible, while they are on-the-clock as an employee.
  - e. I don't know. That's why I'm here.

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## Hypotheticals: Scenario #2

- In another classroom down the hall, a different faculty member takes attendance, states to the class "let us begin class with a short prayer" and then proceeds to say a Christian prayer aloud at the lectern before beginning her lecture.
- Based on your understanding of the First Amendment, do you believe Scenario #2 is permissible? Why or why not?
  - a. Yes, because the First Amendment permits employees to pray at any time during the workday.
  - b. Yes, because the employee is not fulfilling employee-related duties, is not pressuring others to join in, and is not speaking in their capacity as an employee of the institution.
  - c. No, because the employee is acting in their official capacity, fulfilling employee-related duties, and is coercing others to join-in.
  - d. No, because prayer by employees of government-funded institutions is never permissible, while they are on-the-clock as an employee.
  - e. I do not yet know enough about the subject to even guess.

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Public Prayer on  
Campus—Pre  
*Kennedy*



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The First  
Amendment  
Applied to  
Public  
Institutions

The First Amendment:

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

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## The First Amendment Applied to Public Institutions

Public colleges and universities are considered governmental entities.

Public educational institutions must adhere to the First Amendment's **free exercise** and **establishment** clauses.

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## Pre-Kennedy Supreme Court Decisions on Campus Prayer

### *Engel v. Vitale*, 370 U.S. 421 (1962)

#### Facts

- Daily prayer required in public NY school:
  - *Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and Our Country.*
- Student participation is optional.
- Parents of ten students sued.



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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer

***Engel v. Vitale*, 370 U.S. 421 (1962)**

Holding

- School district's practice violated the Establishment Clause of the First Amendment by having a daily prayer, a religious activity.
- Even where the school allows students to be silent or not participate, there is still indirect coercive pressure to conform when the power, prestige and financial support of government is placed behind religion.

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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer

***Lee v. Weisman*, 505 U.S. 577 (1992)**

Facts

- Providence School Committee had long-standing practice of inviting members of the clergy to give invocations at graduation ceremonies.
- In 1989, a rabbi was invited to pray at the middle school graduation. He stated the following:
  - *O God, we are grateful to You for having endowed us with the capacity for learning. . . . We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion.*
- Weisman, a middle school student, and her father sued over the school's practice.

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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer



***Lee v. Weisman, 505 U.S. 577 (1992)***

Holding

- Rabbi's prayer amounted to state-sponsored and state-directed religious exercise in a public school, in violation of the First Amendment.
- Court reiterated its concern from Engel that prayer exercised in public schools carries a risk of indirect coercion.
- Still, offense alone of a few people does not amount to a violation.

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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer

***Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)***

Facts

- Prior to 1995, an elected student chaplain delivered a prayer over the P.A. system before each home varsity football game.
- Two families in the school district sued, alleging the prayer violated the First Amendment's Establishment Clause.

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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer

***Santa Fe Independent School District v. Doe,***  
**530 U.S. 290 (2000)**

Holding

- Student-led, student-initiated invocations on school property, at a school sponsored event and over the school's P.A. system before the games was not private speech and involved both the perceived and actual endorsement of religion.
- "[A]n objective student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval".

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Pre-Kennedy  
Supreme Court  
Decisions on  
Campus  
Prayer

***Santa Fe Independent School District v. Doe,***  
**530 U.S. 290 (2000)**

Holding

- Even though students had the ultimate choice on whether to have a student hold the invocation, the District's decision to hold the election was attributable to the State.
- It didn't matter that football games are a voluntary extracurricular event, unlike a graduation ceremony.



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Pre-Kennedy  
Federal Circuit  
Court  
Decisions on  
Campus  
Prayer

***Tanford v. Brand*, 104 F.3d 982(7th Cir. 1997)**

Facts

- Invocation at non-mandatory graduation ceremony held at Indiana University.
  - “. . . . *We ask this in the name of our common god. Amen.*”
- Option to attend afternoon ceremony where no prayer would be given.
- Several students and faculty sued.

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Pre-Kennedy  
Federal Circuit  
Court  
Decisions on  
Campus  
Prayer

***Tanford v. Brand*, 104 F.3d 982(7th Cir. 1997)**

Holding

- Prayer at the graduation not a violation of Establishment Clause.
  - Court highlighted voluntary nature of ceremony, maturity of attendees, and option to attend secular afternoon ceremony.
  - Also pointed to the 155 year tradition of having an invocation and benediction at the College’s Commencement Ceremony.



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Pre-Kennedy  
Federal Circuit  
Court  
Decisions on  
Campus  
Prayer

***Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003)**

Facts

- State Military College sponsored a daily supper prayer at mess hall dinners
- Mess hall was only true dining option
  - Though not technically required to attend mess hall dinners, those meals had been pre-paid, and cadet's only other options were vending machines, eating with faculty, or ordering pizza.
- Cadets were required to remain standing and silent during the prayer, but were not obligated to recite the prayer, close their eyes, or bow their heads

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Pre-Kennedy  
Federal Circuit  
Court  
Decisions on  
Campus  
Prayer

***Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003)**

Holding

- Supper Prayer a violation of the Establishment Clause.
  - Court looked to prior decisions, including Lee and Santa Fe for proposition that institutions cannot coerce religious participation
  - Emphasized the degree of control that exists in at a military college and coercive impact that has on students, relative to other college students.
  - Court rejected proposition that prayer here was supported by history or tradition, noting that military colleges and institutions of higher education did not exist at the country's founding.

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## Pre-Kennedy Court Decisions on Campus Prayer

### Pre-Kennedy Guidance on Campus Prayer

- Recognition of the role of indirect coercion in an Establishment of Religion Claim.
- Employees' prayer or religious activity on campus does not automatically violate the First Amendment's Establishment Clause.
- Public employees' First Amendment religious freedom rights at work are not necessarily surpassed by the educational institution's First Amendment Establishment Clause concerns.

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## Supreme Court's Decision in *Kennedy v. Bremerton School District*

June 27, 2022



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## Kennedy: Factual Background

Joseph Kennedy was a Bremerton high school football coach who instituted a practice of praying at the 50-yard line at the conclusion of each football game.

Kennedy initially prayed alone on the field, but eventually, several if not most of the student athletes joined in the prayer.

Kennedy also led the team in prayer during locker room pre-game events and occasionally gave motivational speeches that were religious in nature.

Concerned with violating the First Amendment's Establishment Clause, the school district directed Kennedy to stop his prayer activity and any other prayers or religious inspired speeches.

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## Kennedy: Factual Background

- Kennedy agreed to stop his locker room prayers and religiously motivated speeches but refused to stop praying at the 50-yard line.
- Kennedy, through his attorney, rejected the district's offer to let him pray at a less public location, stating that because of his sincerely-held religious beliefs, he felt "compelled" to offer a "post-game personal prayer" at midfield.

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## Kennedy: Factual Background



- The district eventually suspended and ultimately declined to rehire Kennedy.
- In explaining the rationale for its decision, the district criticized Kennedy for engaging in “public and demonstrative religious conduct while still on duty as an assistant coach.”
- Kennedy filed a lawsuit claiming the district violated his First Amendment rights to free speech and the free exercise of religion.
- Both the District Court and Court of Appeals denied Kennedy’s request for an injunction requiring the district to reinstate him.

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## Kennedy: Holding

- Kennedy appealed to the Supreme Court, which ruled in his favor finding that the district’s actions violated Kennedy’s First Amendment rights.
- The Supreme Court rejected the school district’s position that the Establishment Clause of the First Amendment required it to stop Coach Kennedy’s 50-yard line prayer.

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## Kennedy: Legal Analysis

- The Court began its analysis by first examining whether Kennedy's prayer was private speech.
- Kennedy argued that he simply sought to engage in a sincerely held religious exercise by giving "thanks through prayer" briefly and by himself on the football field.
- The school district argued that it was required to stop the prayers to avoid state-endorsement of religious activity and to protect students from coercion.
- If the Court determined that Kennedy's speech was private, the Court would need to examine these "competing" interests of the parties.

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## Kennedy: Legal Analysis



### *Pickering* Balancing Test

1. Determine whether the employee is speaking "pursuant to his official duties" or instead is speaking as a private "citizen addressing a matter of public concern."
2. If the employee is speaking as a private citizen on a matter of public concern, can the employer show that its interests outweigh even the employee's private speech rights?

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## Kennedy: Legal Analysis

### Applying the *Pickering* Test – Part 1

- Kennedy's speech was private speech, not speech on behalf of the district.
  - Made outside of his coaching duties.
  - Not instructing or coaching players at the time.
  - Coaches appeared to be "off-the-clock" during this postgame period.
- The district's argument that because Kennedy was a coach, and with the authority conveyed by that position, he remained "on duty" for the school, even after games, was rejected by the Court as an "excessively broad description".

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## Kennedy: Legal Analysis

### Applying the *Pickering* Test – Part 2

- Because Kennedy was speaking as a private "citizen on a matter of public concern," the burden shifted to the district to show it had a compelling reason to stop Kennedy's speech.
- The Court found that the district did **not** establish a compelling reason, relying (at least, in part) on the following:
  - The district never actually endorsed Kennedy's speech and there were no complaints that it did.
  - The Establishment Clause is not automatically violated whenever an educational entity "fails to censor private religious speech."
  - There was no evidence of coercion or pressure on students to join the prayer.

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## Kennedy: Legal Analysis

- The Court did not outright reject the argument that concerns regarding an Establishment Clause violation could qualify as a compelling state interest.
- Additionally, the Court's decision reaffirmed that conduct or situations which **seeks to coerce** someone into prayer would violate the Establishment Clause.



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## Hypotheticals Revisited: Scenario #1

- As students are making their way into a classroom, a faculty member silently prays at her desk five minutes before the beginning of a classroom lecture.
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## Hypotheticals Revisited: *Scenario #2*

- In another classroom down the hall, a different faculty member takes attendance, states to the class “let us begin class with a short prayer” and then proceeds to say a Christian prayer aloud at the lectern before beginning her lecture.
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  - e. I do not yet know enough about the subject to even guess.

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## Additional Considerations



- Avoiding an Establishment Clause violation would be considered a compelling state interest—meaning a college could regulate an employee's speech even when they are acting as a private citizen.
- For example:
  - A football coach announcing before practice on a regular basis that it would be great to see the athletes in church on Sunday and punishing or withholding playtime from those who refuse to attend.
  - A supervisor suggesting that her direct-reporting employees attend a prayer breakfast before work one day and giving lower performance evaluations to those who did not attend.

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## Additional Considerations

- The Kennedy decision should not be interpreted to mean public educational entities must now always allow employees to pray on campus.
- **When a public employee is acting pursuant to and within the employee's official duties, the employer has the right to regulate their speech.**
- To determine whether an employee is acting pursuant to their official duties in this context, a factual inquiry is required—not just reliance on the job description for the employee in question.

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## Final Takeaways and Recommendations



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## Final Takeaways and Recommendations

- Review your institution's policies and procedures governing speech and/or religious expression on campus.
- Assess job descriptions and language regarding employees' supervisory responsibilities for students beyond the classroom or extracurricular activities.
- Add or strengthen language stating that expression of employees on private time is not college endorsed.
- Concerns regarding students or other employees being coerced or pressured to join in religious expression should be based on evidence, not speculation.

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## Questions & Answers

Questions may be asked using the Q&A function.



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# Robbins Schwartz

## **FRANK B. GARRETT III**

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Frank B. Garrett III represents public and private employers in all aspects of employment law, including defense of complaints and charges of unlawful discrimination, wrongful termination, sexual harassment, civil rights violations, employee discipline and termination. Frank also counsels and provides training to employers in the following areas: ADA and FMLA compliance, avoiding claims of unlawful discrimination and harassment in the workplace: evaluation and discipline of employees, and diversity in the workplace.

Frank practices regularly in both state and federal courts at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law at both the state and national levels.

He is an active member of the American Bar Association and Illinois Council of School Attorneys.

### **AWARDS**

Illinois Leading Lawyer, Government and Regulatory-Related  
Illinois Leading Lawyer, Employment and School Law  
Illinois Super Lawyers

### **RECENT PUBLICATIONS**

Contributing Author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (1996, 1999, Supp. 2001, 2005, 2010, 2012, 2015, and 2021)

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit,"  
*Chicago Daily Law Bulletin* (2017)

"First Amendment Protections Get Broader for Government Employees,"  
*Chicago Daily Law Bulletin* (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims,"  
*Chicago Daily Law Bulletin* (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision,"  
*Chicago Daily Law Bulletin* (2015)



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Education Law  
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J.D., DePaul University  
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Supreme Court of the  
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Trial Bar of the U.S.  
District Court for the  
Northern District of Illinois

U.S. District Court for the  
Northern District of Illinois

U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Southern District of Illinois

Supreme Court of Illinois

“Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution,” *Inquiry & Analysis*, National School Boards Association’s Council of School Attorneys (2013)

#### **RECENT PRESENTATIONS**

*A Review of Important New Laws Impacting Illinois School Districts*, Illinois Association of School Boards (January 2022)

*Sexual Violence and Harassment on Campus*, Illinois Community College Trustee Association (June 2021)

*Responding to COVID-19 Related Employee Accommodations and Leave Requests*, American Association of School Personnel Administrators (October 2020)

*Workplace Liability in the Post Pandemic Era*, Large Unit District Association (June 2020)

*Debunking Some Common Employee FMLA Leave Myths*, IASPA Annual Conference (January 2020)

*Legal Updates for Illinois Community College Chief Student Services Officers’ Meeting*, Illinois Community College Student Services Officers (June 2019)

*Legislative Update: A Review of New Laws Affecting Illinois Community Colleges*, Illinois Council of Community College Presidents Retreat (September 2019)

*Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes*, Illinois GFOA Annual Conference (September 2019)

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American Bar Association,  
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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

### RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

### RECENT PRESENTATIONS

*Legal Gymnastics in the Age of COVID and Other Challenges*, Illinois Council of Community College Presidents Retreat (January 2022)

*Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance*, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)

*Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices*, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

*A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline*, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)



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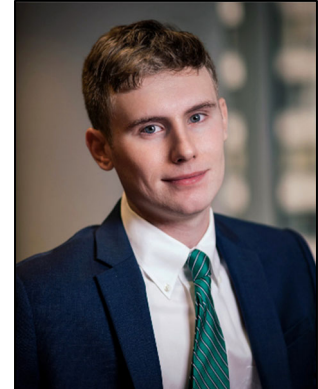
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Jared represents school districts, community colleges, and private corporations in all matters relating to commercial transactions, real estate, and construction—handling both the transactions themselves as well as any litigation which may arise in relation to those transactions. In addition, Jared also works with clients in several emerging practice areas, including data privacy compliance and election law.

While in law school, Jared was an associate editor of the *Notre Dame Journal of Law, Ethics & Public Policy*. He also worked on a number of matters relating to appellate law and state legislation.

### **RECENT PUBLICATIONS**

*Protection or Suppression? Reevaluating the Constitutionality of Voter ID Laws in Light of New Empirical Evidence*, 34 *Notre Dame J. of L., Ethics, & Pub. Pol’y* 395 (2020)



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