Freedom of Religion on School Grounds: Recent Supreme Court Decision Opens the Door for More Religious Expression

Webinar

August 11, 2022

Frank B. Garrett III
fgarrett@robbins-schwartz.com

Emily P. Bothfeld
ebothfeld@robbins-schwartz.com

Aaron J. Kacel
akacel@robbins-schwartz.com

Chicago
55 West Monroe Street, Suite 800
Chicago, IL 60603
p 312.332.7760
f 312.332.7768

Champaign
301 North Neil Street, Suite 400
Champaign, IL 61820
p 217.363.3040

Collinsville
510 Regency Centre
Collinsville, IL 62234
p 618.343.3540

Lisle
550 Warrenville Road, Suite 460
Lisle, IL 60532
p 630.929.3639

Rockford
2990 North Perryville Road, Suite 4144B
Rockford, IL 61107
p 815.390.7090

Freedom of Religion on School Grounds: Recent Supreme Court Decision Opens Door for More Religious Expression

Presented by: Frank B. Garrett III and Emily P. Bothfeld
Moderated by: Aaron J. Kacel
August 11, 2022

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Introduction

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

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Hypotheticals: *Scenario #1*

As students are making their way into a classroom, a teacher silently prays at her desk five minutes before the beginning of a classroom lesson.

- 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 teacher 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 lesson.

- 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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Employee and Student Prayer Pre-*Kennedy*

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The First Amendment Applied to Public Schools

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 Schools

- Public schools 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 School 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 School 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 School 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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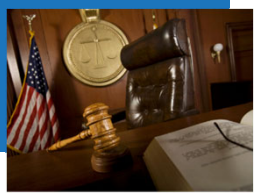
Pre-*Kennedy* Supreme Court Decisions on School Prayer



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 School 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 School 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 School 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* Supreme Court Decisions

Pre-*Kennedy* Guidance on School Prayer

- Recognition of the role of indirect coercion in an Establishment of Religion Claim.
- Employees' prayer or religious activity on school grounds 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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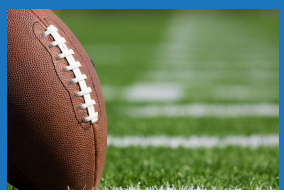
Kennedy: Factual Background



- 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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Additional Considerations

- Avoiding an Establishment Clause violation would be considered a compelling state interest—meaning a school 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 school grounds.
- **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 school district's policies and procedures governing speech and/or religious expression on school grounds.
- 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 district 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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@RSchwartzLaw

Frank Garrett | @FGarrett_RS

Emily Bothfeld | @EBothfeld_RS

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FRANK B. GARRETT III

PARTNER, CHICAGO
312.332.7760
fgarrett@robbins-schwartz.com

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)

PRACTICE AREAS

Education Law
Labor & Employment Litigation

EDUCATION

J.D., DePaul University College of Law

B.A., Oberlin College

ADMITTED TO PRACTICE

Supreme Court of the United States

U.S. Court of Appeals for the Seventh Circuit

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)

ORGANIZATIONS

American Bar Association, Section on Labor and Employment

Chicago Bar Association

Illinois Council of School Attorneys

EMILY P. BOTHFELD

PARTNER, CHICAGO

312.332.7760

ebothfeld@robbins-schwartz.com

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)

PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

J.D., *with honors*, George Washington University Law School

B.S., *cum laude*, Vanderbilt University

ADMITTED TO PRACTICE

U.S. Court of Appeals for the Seventh Circuit

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

Supreme Court of Illinois

ORGANIZATIONS

Trustee, Associated Colleges of Illinois

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

AARON J. KACEL
ASSOCIATE, CHICAGO
312.332.7760
akacel@robbins-schwartz.com

Aaron counsels' employers on various aspects of labor and employment law, including internal investigations, employee discipline, labor relations, workplace policies, and state and federal labor and employment law matters under the Illinois Human Rights Act, Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Occupational Safety and Health Act, Uniformed Services Employment and Reemployment Rights Act, Title VII, and other laws.

Aaron represents employers in litigation and before administrative agencies including the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, the U.S. Department of Labor, and the Illinois Department of Labor.

Aaron also provides training to employers on internal investigation best practices and avoiding charges of unlawful discrimination and harassment in the workplace.

Prior to joining Robbins Schwartz, Aaron served as in-house employment law counsel for the Cook County Sheriff's Office. He has previously worked for the City of Chicago and a large, international law firm. During law school, he served as Managing Executive Editor of the Northwestern Journal of Law & Social Policy and President and Founder of the Northwestern Labor & Employment Law Society.

PRACTICE AREAS
Labor & Employment

EDUCATION
J.D., Northwestern University Pritzker School of Law

B.A., Washington University in St. Louis, *magna cum laude*

ADMITTED TO PRACTICE
U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS
Member, Associate Board, Lawyers for the Creative Arts

Chair, Labor and Employment Committee, Young Lawyers Selection

Chicago Bar Association

Chair, Vice Chair, Secretary, Board of Directors, About Face Theatre