AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

TO: **Interested Persons**
DATE: **September 2022**
FROM: **A. Eric Johnston**

RE: ***Kennedy v. Bremerton School District*** **– Another School Prayer Case**

Since SCOTUS first removed school sponsored prayer from public schools in 1962 (*Engel v. Vitale)*, there has been a continual debate over what religious activity is allowed. The latest is the case of *Kennedy v. Bremerton School District*, decided June 27, 2022 by SCOTUS, permitting a public school football coach to privately pray on the football field following games. This renewed the debate. *Kennedy* brings a long needed rational understanding of the interplay between the Free Exercise and the Establishment religion clauses of the First Amendment to the U.S. Constitution. We, as well as others, have long referred to a "tension" between the clauses, but SCOTUS now recognizes the better approach is that they compliment each other. The majority opinion was written by Justice Gorsuch and joined by Chief Justice Roberts and Justices Thomas, Alito, Barrett and Kavanaugh. Justices Sotomayor, Breyer and Kagan, as expected, dissented relying on the old tension argument and that the Establishment Clause trumps the Free Exercise Clause every time an argument arises.

The basic facts are that public high school coach Joseph Kennedy, a Christian, knelt at mid field after games to offer quiet personal prayer. While there were hearsay arguments that students were coerced to join him, there was no evidence of that and his limited quiet prayer took place while students, parents, teachers and others were engaged in other personal activities following the football games. The school found he violated the Establishment Clause and fired him. The lower courts upheld the decision.

Because this activity involved the Free Exercise and Free Speech Clauses of the First Amendment, overlapping constitutional rights, any rule burdening them must survive "strict scrutiny." This means that the school must show its restrictions on the coach's protected rights serve a compelling interest and are narrowly tailored to that end. Also, the court found the school's orders to Kennedy were neither neutral nor generally applicable to other public-school employees. Consequently, strict scrutiny has applied and the school could not carry the burden. The court pointed out that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. See, *Tinker v. Des Moines Indep. Comm. School Dist. (1969).*

Because Kennedy was a public-school employee his activity might involve "government speech." There must be a balancing of competing interests concerning what is said and its consequences. Kennedy had previously discontinued religious prep talks to the team and similar activities. The court accepted his speech as private and not government speech, even though he was on public school premises.

One of the most important things this case did is review the *Lemon v. Kurtzman (1973)* case which has been used for decades to determine whether an activity is an establishment of religion. The opinion said "this court long ago abandoned *Lemon…"* This is a clear signal for lower courts to also abandon the *Lemon* test. It was a subjective test which permitted federal courts to find any activity on public property to be a violation of the Establishment Clause, as the lower courts had done here.

Kennedy provides long needed guidance to government employers to protect employee's religious speech. Federal judicial tests have long punished any religious speech on public property enabling the ACLU, FFRF and others to threaten public schools with expensive lawsuits. This should diminish the magnitude of that threat and protect both teachers and students who wish to exercise their rights of speech and religion on public school premises.

This case does not resolve the debate over prayer before public high school football games. *Santa Fe Independent School District v. Doe (2000)* still stands as the rule that a school official cannot organize a way for students to circumvent the proscription. *Jager v. Douglas County School District (C.A.11,1989)* remains the Eleventh Circuit precedent for not permitting ministers to give an invocation over public school PA systems before football games. Whether or to what extent the rules in those cases may be changed by SCOTUS depends on future cases. It is unlikely SCOTUS will expand the free speech or free exercise rights to permit school resources to be used to promote a religious activity. However, we believe SCOTUS is more likely to permit student religious activities, just as it did for Coach Kennedy. The good decisions in which we were involved are *Chandler v. James (1997) (Chandler I) and Chandler v. James (1999) (Chandler II)* which protect public school student religious speech. Student private speech on public school premises is not without restrictions, but *Kennedy* demonstrates the court is now more likely to "compliment" those Free Exercise rights, rather than to permit the Establishment Clause to overrule them.

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