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U.S. SUPREME COURT EMPHASIZES RELIGIOUS LIBERTY IN SCHOOL CASES

Among the typical flurry of cases issued at the end of its session in June 2022, the U.S. Supreme Court included two very important cases affecting how the religious freedom clauses in the First Amendment of the Constitution will be applied to educational institutions. One dealt with prayers led by a public school coach at a football game; the other concerned state financial assistance to students choosing to attend private religious schools. In both cases, the results were determined by the same 6-3 vote, clearly evincing the ideological division on the Court on these issues. Together, these cases illustrate a major shift in the way the federal courts attempt to resolve religion-based disputes in the schools.

The First Amendment contains two clauses aimed at imposing governmental neutrality toward religion. The Free Exercise Clause guarantees freedom of religious belief and prohibits discrimination based on those beliefs. The Establishment Clause limits governmental support of religious institutions or practices. Sometimes these constitutional provisions work in tandem, as when government attempts to mandate religious practices. At other times, the two clauses appear antagonistic, as might be seen in these most recent cases. The net result here has been a tipping of the scales more toward free exercise and away from previous anti-establishment principles.

In *Kennedy v. Bremerton School District*, a Washington state football coach was disciplined for not ceasing his practice of leading public prayers on the field immediately after games. The Court ruled that this violated the coach's right to individual religious liberty. In this particular case, the majority and the dissenting justices seemed to interpret the facts very differently, with the majority stating that the prayers were "brief, quiet, and personal" without being coercive of the student athletes. It was emphasized that, while the

coach was on duty, his activities were not so controlled that he would not have been permitted to engage in other non-work related activities, such as making personal phone calls, checking text messages, or socializing. To permit secular personal activities but not religious ones, then, violated his Free Exercise rights. The dissent, on the other hand, included pictures of Kennedy leading large numbers of students in the middle of the football field and described Kennedy as a public employee regularly incorporating a public communicative display of his religious beliefs into a school activity, a conclusion which would have implicated the Establishment Clause had it prevailed.

But what is more important than the facts or even the outcome in this particular case is that the Court used the occasion as an opportunity to emphatically reject some of the traditional standards for court review of religious exercises in the public schools. Since the 1971 case of *Lemon v. Kurtzman*, the Court has often, though not always, said that a public school practice violates the Establishment Clause if (1) it has a religious purpose, (2) it has a predominantly religious effect, or (3) it

fosters excessive entanglement between government and religion. Later cases also ruled that the Establishment Clause prohibits governmental practices which endorse particular religious beliefs or which coerce participation in religious practices. In still other cases, however, the Court has focused on a historical approach, looking to whether the challenged conduct was common-place and accepted at the time of the adoption of the First Amendment in order to determine whether or not it would be a precluded activity under the Establishment Clause. The Court in *Kennedy* made it clear that neither the 3-part *Lemon* test nor the endorsement test should be the standard for review. Rather, the First Amendment religion clauses should be interpreted “by reference to historical practices and understandings” in order to discern what the Founding Fathers intended by the language of the First Amendment.

It may be unclear how this standard will be applied in future cases, where the practices at issue may have no historical analogy. It is possible that the vitality of many long-standing precedents will now be in doubt. What is clear is that this Court will be much more tolerant of religious activities in the



public schools than has been true in the past.

However, based upon what the Court did expressly hold, we do offer these guideposts for future action in your District:

1. Employees are generally permitted to engage in non-coercive religious activities on school property even during the workday provided that non-religious and non-work related activities would be permitted during the same time frame. For example, an employee can say a prayer during a passing period or break where the employee would be allowed to make personal phone calls or otherwise fraternize with staff.
2. The mere fact that students or members of the public may be able to observe the employee engaging in a religious activity during the workday and/or on school property is insufficient standing alone to be able to restrict the employee's religious exercise. This is true even if some

people are offended or object to viewing the religious observation.

3. Employees are still restricted from requiring students to engage in religious activities or exercises.

We encourage you to reach out to one of our attorneys to assist you should any issue of this nature arise so that we can provide you with guidance and advice as to how to move forward.

In the other important First Amendment Free Exercise case, *Carson v. Markin*, the State of Maine had a program for high school students in sparsely populated areas without public high schools to be given tuition vouchers permitting attendance at out-of-district public schools or private schools, with the caveat that the private school must be “secular”. The Court ruled that the condition that the private school must be secular was an unconstitutional infringement of the students’ religious freedom. The Court reasoned that, while the state need not



provide benefits to private schools, once it does so generally, it cannot discriminate against religious schools.

The Carson decision follows two other Supreme Court cases in recent years which disallowed differentiation between religious and secular schools in state assistance to private schools. In a 2017 case, the Court had held that a state providing money for playgrounds to private schools could not exclude religious schools. Then in 2020, the Court applied the same result where the benefit was a state-based scholarship program for attendance at private schools. The Court in Carson declined to distinguish those situations, even though the Maine program was devised to ensure a free public education. What all these cases reveal is that the Court is no longer permitting states to use the Establishment Clause as a justification for distinguishing between religious and secular private schools. That is in stark contrast to many earlier decisions.

If you have any questions, please do not hesitate to contact one

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