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# A Review of First Amendment Rights for Students, Staff, and Schools

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## I. INTRODUCTION

The wave of social and political issues that have come up over the past few years have made it more likely that schools will have protests or political speech in the school environment. These types of protests or displays may lead to disruption in the learning environment, but schools must be cautious in responding to these issues, or in engaging in its own "speech." This presentation will outline the rights that students and staff members have under the First Amendment and discuss options for School Districts in responding to political speech.

## II. OVERVIEW OF FREE SPEECH

**A. First Amendment Text.** "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

1. **What purpose does it serve?** At its core, the Free Speech Clause was intended to assure a robust and unfettered exchange of ideas. In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the United States Supreme Court summarized the purpose of the First Amendment as follows: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

2. **Application to public schools.** Although the text of the First Amendment applies only to the United States Congress, by virtue of the incorporation doctrine and the Fourteenth Amendment, the First Amendment applies to the states and their political subdivisions, including public school districts and charter schools.

**B. Free Speech Rights Are Not Absolute.** The U.S. Supreme Court has identified several forms of speech that are not protected, including the following:

1. Speech that is intended to incite or incites imminent violence or lawless action (e.g. yelling "fire" in a crowded theatre or "bomb" on an airplane);

2. Speech that is defamatory;

3. Speech that constitutes a true threat;

4. Speech that constitutes "fighting words";

5. Speech that violates a copyright;

6. Speech that constitutes fraud;

7. Speech that is obscene (i.e. speech that appeals to the prurient interest, depicts or describes sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value);

8. Speech that is integral to criminal conduct;

9. Speech that invades the privacy rights of another; and

10. Speech that intentionally inflicts emotional distress.

**C. What Forms of Expression Constitute Speech?** Freedom of speech is not limited to verbal or written communications. It can apply to various forms of expression, including clothing, jewelry, buttons, and tattoos.

1. **Two-Part Test.** The following two-part test is used by the courts to determine whether expression constitutes speech: (1) whether the expression was intended "to convey a particularized message"; and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *See Spence v. State of Washington*, 418 U.S. 405 (1974).

2. **Silence as Speech.** Depending on the circumstances, a person's silence can convey a particularized message that is likely to be understood by those who observed it. In those circumstances, the individual's silence constitutes speech for purposes of the First Amendment.

**D. Political Speech and Association.** The First Amendment affords a high level of protection to political speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Any attempt to regulate political speech is subject to "exacting scrutiny" by the courts. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). As a result, a school district that seeks to regulate political speech generally must be able to prove that the regulation furthers a compelling interest and is narrowly tailored to achieve that result. *See id.*; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "Political association" is protected under the umbrella of political speech. *See Minnesota Fifth Congressional Dist. Indep.-Republican Party v. Spannaus*, 295 N.W.2d 650, 652 (Minn. 1980). Political association, the association with others "for the common

advancement of political beliefs and ideas," includes things like affiliating with a political party or joining a political group. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

## III. STUDENT SPEECH ISSUES

**A. Compelled Speech.** In line with the principle that an individual's silence may constitute speech, the government generally cannot compel an individual to speak or to express a particular viewpoint.

1. **Pledge of Allegiance.** The U.S. Supreme Court has held that a school may not require a student to recite the Pledge of Allegiance or to salute the American flag. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

2. **School-Sponsored Speech.** A school may be able to compel student speech or the expression of a particular viewpoint if the speech is school-sponsored. *See Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009). Speech is "school-sponsored" when the school affirmatively promotes, rather than simply tolerates it. Examples of school-sponsored speech may include student graduation speeches and student newspapers.

**B. Religious Speech.** Speech involving religious issues raises difficult issues because the First Amendment also protects the free exercise of religion.

1. **Two Standards.** Student speech involving religious issues may be regulated. There are generally two standards governing the legal analysis in this area.

   a. **Neutral and Generally Applicable Rules.** A general rule that does not specifically target religion is permissible, even if it impedes the free exercise of religion, so long as it is "rationally related to a legitimate government interest." *See, e.g., Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232 (10th Cir. 2009). This is the lowest-level of constitutional scrutiny.

   b. **Rules Targeting Religion.** In contrast, rules specifically targeting religion are subject to strict scrutiny and must be "narrowly tailored to advance a compelling government interest." *Id.*

## IV. THE FUNDAMENTAL FIVE U.S. SUPREME COURT CASES FOR STUDENT SPEECH.

**A.** ***Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).** The seminal case involving student First Amendment rights is *Tinker*. In *Tinker*, a group of students planned to object to the Vietnam War by wearing black armbands to school. Administrators became aware of the plan and adopted a policy that any student wearing an armband would be suspended until he or she returned without the armband. Three students were suspended pursuant to the policy. The Court established several principles regarding student speech:

1. **"Material and substantial disruption" standard.** The Court held that student speech and expression may not be restricted without evidence that engaging in the forbidden conduct would "materially and substantially interfere" with the educational environment or the rights of other students.

2. **Vague fear of disturbance is not enough.** In *Tinker*, there was no evidence that wearing the black armbands would cause a significant disruption at school. The Court ruled that a school district may not restrict a student's speech or expression merely to avoid the discomfort or unpleasantness that accompanies an unpopular viewpoint.

3. **Viewpoint discrimination is prohibited.** Another problem with the armband policy was that it singled out only one form of political expression. The Court noted that the record showed the school district had previously allowed students to wear other political items, including political buttons and an Iron Cross, which had been affiliated with Nazi Germany.

**B.** ***Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).** A student made a sexually suggestive speech nominating a fellow student for a student government position. The student referred to his preferred candidate with an "an elaborate, graphic, and explicit sexual metaphor." Many young students heard the speech. The student was suspended. The Court ruled the discipline did not violate the student's free speech rights.

1. **Students do not enjoy the same rights as adults.** The Court recognized that students in school do not enjoy the same speech rights enjoyed by adults in other settings and stated it is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." School districts may

thus impose sanctions on students in response to offensive and/or indecent speech.

2. ***Tinker* distinguished.** A key difference between *Tinker* and *Fraser* is that *Tinker* involved political speech, which is among the most protected types of speech. In addition, unlike *Tinker*, the speech in *Fraser* caused a material and substantial disruption in the educational environment due in part to the fact that it exposed minors to vulgar and offensive language.

**C.** ***Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).** School officials edited a student newspaper to remove articles concerning students' experiences with pregnancy and the impact of divorce on students. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Consistent with established practice, a principal reviewed proofs of the pages in question and objected because he believed pregnant students and divorced parents could be identified and because the content was inappropriate for younger students.

1. **No First Amendment violation.** The Court ruled that the principal did not engage in a First Amendment violation because the school had the right to exercise editorial control over the newspaper based on "legitimate pedagogical concerns."

2. ***Tinker* distinguished.** Again, the Court distinguished its decision from *Tinker*. This time, the Court noted that *Tinker* was not directly applicable because *Tinker* did not involve student speech that was affirmatively promoted by the school in the forum of a school-sponsored publication. The Court expressly stated that schools have the right to exercise editorial control over school-sponsored newspapers, theatrical productions, and other publications or productions that bear the "imprimatur of the school" based on a number of factors, including:

   a. The maturity level of the intended audience.

   b. Standards for grammar and writing quality (schools do not have to publish material that is ungrammatical, poorly written, poorly researched, or inappropriately biased).

   c. Prohibitions on lewd, vulgar, or offensive language.

   d. Concerns over student views being inappropriately attributed to the school.

**D.** ***Morse v. Frederick*, 551 U.S. 393 (2007).** In this case, students were out of school at a school-sponsored and sanctioned event, and a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. The banner read: "BONG HiTS 4 JESUS." The principal confiscated the banner and later suspended the student that refused to take the banner down. The student then sued the school district alleging a violation of his First Amendment right of expression.

1. **No First Amendment Violation.** The Court held that the student did not have a First Amendment right to wield his banner. The Court explained that deterring drug use by schoolchildren is an important interest and the "special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse." Thus, "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."

2. **Off-Campus Conduct.** The student attempted to argue he could not be subject to the authority of school officials because the banner was displayed across the street from the school and was not on school grounds. The Court rejected this argument, noting that the banner was unfurled at an event that took place during school hours and was sponsored by the school. School events and field trips off school grounds were subject to the school's rules for student conduct.

**E.** ***Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021).** In this case, a student posted two snaps to her Snapchat story after she did not make the varsity cheer team and was not selected for her preferred position in softball. The first showed her and a friend giving the camera the middle finger and included a caption stating, "F**k school f**k softball f**k cheer f**k everything." The second was blank and included a caption stating, "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" Another student saw the snaps, took photos of them, and distributed the photos to other students. One student who received the photos showed them to her mother, who was one of the coaches and reported it to the school district. Some students approached the coaches about the snaps and were visibly upset by them. Some students also discussed the snaps during a class taught by one of the coaches.

1. **School District's Disciplinary Action.** The coaches decided to suspend B.L. for the season. The school district's administration and the school board upheld the coaches' decision.

2. **Three Important Considerations.** The Court noted the following three factors are critical considerations when reviewing off-campus speech:

    a. Off-campus speech will normally fall within the zone of parental, rather than school-related responsibility.

    b. From a student's perspective, regulation of off-campus speech combined with regulation of on-campus speech would include anything a student ever says. This requires more skepticism of a school's efforts to regulate off-campus speech. Schools will face a "heavy burden" to justify intervention in any political or religious speech that occurs out of school.

    c. Schools have an interest in protecting a student's unpopular expression, especially when it happens off campus. The reason for this is that public schools are "the nurseries of democracy." The Supreme Court noted that democracy only works when there is a marketplace of ideas, including unpopular ones.

3. **The Court's Decision.** The Court ultimately determined that the school district could not discipline B.L. for her off-campus speech. The Court reached this determination for several reasons. It concluded B.L.'s speech was "pure speech," for which an adult would have strong protection under the First Amendment. The Court then considered, when, where, and how B.L. spoke. The fact that the speech occurred off-campus, did not identify or target the school or anyone from school, and was expressed through personal platforms (*i.e.*, through personal cell phone to private Snapchat friends) led the Court to conclude that the school district's interest in regulating that speech was diminished.

    a. The Court considered the school district's interest in regulating the speech. The school district's interest was described as "teaching good manners and . . . punishing the use of vulgar language aimed at part of the school community." The Court determined this "anti-vulgarity" interest was insufficient because the school district did not

stand in loco parentis (*i.e.*, it did not stand in the place of the student's parents while she was off-campus, on the weekend), and because the school did not make a general effort to prevent vulgarity outside of the classroom.

b. The Court also determined the snaps did not create a "substantial disruption," where the only evidence of disruption was that some cheerleaders were upset by the snaps and some discussed the snaps in a couple of Algebra classes.

c. The Court concluded that the impact on team morale was insufficient to justify discipline.

4. **Can Schools Still Discipline for Off-Campus Speech Following the *B.L. Decision*?** Yes. The Supreme Court left open the possibility that schools may regulate off-campus student speech in some scenarios, specifically noting that a school's regulatory interests remain "significant in some off-campus circumstances." It did not, however, set forth any bright-line rule for the regulation of off-campus student speech, indicating that a school's ability to regulate such speech will vary depending upon many factors. The Court identified several instances when it believed discipline for off-campus conduct may be justified including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers."

5. **Mahoney Applied: *Kutchinski as Next Friend to H.K. v. Freeland Community School District*, 2022 WL 3130218, (E.D. Mich. 2022).**

a. A student created a fake Instagram profile of one of his teachers while at home one weekend. He used his teacher's real name and took pictures off of the teacher's real Facebook page to make the Instagram profile more believable. He then gave the password to the Instagram page to two other students. All three students had the ability to allow people to "follow" the account as well as to post to the account. The two other students took this opportunity to make several posts on the Instagram account, some of which contained violent and sexually harassing content regarding current and former teachers and students. One post was of an image of a previous

student that had the caption "Glad this sicko is out of our school #aassualt #blessed." Another post was a picture of a female teacher at the school with the caption "Best sex in Pet Smart #14inches #thrabbing #raw;" this post also tagged the teacher's real account. The students also made two posts threatening a third staff member of the high school that directly tagged that staff member and a workout club that the staff member led at the school. News of this account spread through the entire school and led to many students asking the teachers that were tagged in the post and the teacher being impersonated about these accounts. This stressed out the teachers and even resulted in the female teacher crying in class.

b. **School Districts Disciplinary Action.** All three of the students involved in running the account were given an immediate 5-day suspension. The principal went on to seek expulsion, but the administrative hearing for the Plaintiff only resulted in a 10-day suspension.

c. **Court's Ruling:** The school did not violate the student's First Amendment rights. The court pointed out that *Mahanoy* applies to this case because the student's actions in creating and maintaining the account were off-campus speech. In *Mahanoy*, the court listed several types of off-campus behavior that may call for school regulation, including "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or other students." The court stated that the posts made in the Instagram account similar to the examples in *Mahanoy* of times when discipline may be appropriate for off-campus speech. The account specifically targeted and harassed a former unnamed student and three teachers. The court ultimately found that the off-campus nature of the student's speech did not outweigh the school's interest in protecting staff and students from severe, specifically targeted harassment and threats. The court also found that based on the reaction of the students and teachers to the account, it was reasonable that the Principal would forecast a substantial disruption under *Tinker*.

## V. SCHOOL DISTRICT EMPLOYEES AND THE FIRST AMENDMENT

**A. Free Speech Rights.** In oft quoted words, the U.S. Supreme Court has stated that neither students nor school district employees shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. However, the Supreme Court has also stated that "a citizen who accepts public employment must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Thus, some speech is constitutionally protected, but other speech is not.

1. **No adverse action for constitutionally protected speech.** A school district may not restrain or restrict the free speech rights of employees or applicants for employment by not hiring, disciplining, or taking other adverse employment action against an employee or an applicant for employment because of his or her constitutionally protected speech.

2. **May not make hiring decisions based on constitutionally protected speech.** A school district may not deny a candidate a position based on the candidate's constitutionally protected speech. *See Perry v. Sindermann*, 408 U.S. 593 (1972). In order for job candidates to succeed on a free speech claim, they must show that they engaged in protected speech and that they were not hired as a result of that speech. *Ruscoe v. Housing Authority of the City of New Britain*, 259 F. Supp.2d 160 (D. Conn. 2003).

3. **May discipline for speech that is not constitutionally protected.** A school district may regulate speech that is not constitutionally protected and may discipline employees for speech that is not constitutionally protected.

**B. When is Speech Constitutionally Protected?** To determine whether speech is constitutionally protected, courts engage in a three-step analysis.

1. **Step One: Was the speech pursuant to the employee's job duties?** The U.S. Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from discipline." *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Thus, speech that is uttered pursuant to an employee's official duties is not constitutionally protected.

2. **Step Two: Does the speech touch on a matter of public concern?** If the speech was not part of the employee's job duties, the courts will analyze whether the speech touches on a matter of "public concern." The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, "[i]f the speech does *not* touch on a matter of public concern, the inquiry is at an end and a court will not scrutinize the reasons motivating the employer's action." *Carey v. Aldine Indep. Sch. Dist.*, 996 F. Supp. 641, 646 (S.D. Tex. 1998); *see also Cliff v. Board of Sch. Comm'rs of City of Indianapolis,* 42 F.3d 403, 409 (7th Cir. 1994) (if speech is not a matter of public concern, the inquiry ends).

   a. As a general rule, school district employees, as citizens, have the right to personally comment on matters of public importance without restriction or reprisal by the district. *Id.* at 418-20; *see also Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) (holding that the First Amendment permits a public school to restrict a teacher's speech regarding matters of public concern only if the speech would harm the school's ability to operate efficiently or inhibit the teacher's ability to do his or her job).

   b. In determining whether speech touches on a matter of public concern, courts consider the following:

      1. **Whether the speech was made primarily in the employee's role as a citizen, or primarily in the role as an employee.** *Williams v. Alabama State Univ.*, 979 F. Supp. 1406, 1410 (M.D. Ala. 1997). "Issues do not rise to a level of 'public concern' by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and *not in his role as an employee* of the school district." *Kirkland v. Northside Independent School District*, 890 F.2d 794, 798-9 (5th Cir. 1989).

      2. **Whether the speech relates to a matter of political, social or other concern to the community.** Here, the employee's intent is critical. If the employee's intent was to further a purely private interest, then the mere

fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment. *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986).

3. **Whether the speech addresses only internal practices that are relevant only to the people involved.** If so, the employee speaks as an employee and such speech is not protected. *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). Accordingly, the airing of personal grievances by an upset employee generally does not raise a free speech issue. *Colburn v. Trustees of Indiana Univ.*, 973 F.2d 581, 585 (7th Cir. 1992); *Williams*, 979 F. Supp. at 1410.

3. **Step Three: Does the speech impair the operations of the district or the employee's ability to perform the job?** If the speech touches on a matter of public concern, the courts will balance the employee's right to free speech against the school district's interest in the effective functioning of its organization. *See Pickering v. Board of Educ. of Township High School District 205*, 391 U.S. 563 (1968). An employer may exercise greater control if the employee's conduct causes disruption and less control if the conduct does not cause disruption. Accordingly, a school district may prohibit an employee from speaking about issues of public concern if the school district can show that the speech would:

a. create disharmony in the workplace;

b. impede the speaker's ability to perform his or her job duties; or

c. significantly impair the working relationship with other employees who work closely with the speaker. *Kinkade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995); *see also Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986).

**C. Personal Political Activities.** During personal time, outside the duty day, employees (and school board members) may do any of the following, provided they do not use District resources:

1. Serve on political committees, including "Vote Yes" or "Vote No" committees;

2. Put "Vote Yes" or "Vote No" stickers, or other political signs, on the vehicles they drive to school;

3. Display political and referendum-related lawn signs in their yard;

4. Donate their own money to support or oppose any school district ballot question or school board candidate;

5. Participate in promotional phone-calling campaigns or "Get out the Vote" drives;

6. Write letters to the editor and blogs advocating passage or defeat of a referendum, candidate, or ballot issue. A school district may adopt a policy requiring that board members and employees who write letters to the editor state that they are expressing a personal view, not a view of the district, and that their personal view is not necessarily the same as the district's.

## D. Recent Employee Speech Cases

### 1. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

**a. Facts.** Joseph Kennedy was a high school football coach in Washington. Kennedy made it a practice to pray on the field at the conclusion of each game. His prayer took place after players and coaches engaged in a post-game handshake. Kennedy prayed by taking a knee at the 50-yard line of the field. Over time, players began joining Kennedy in prayer to the point that a majority of the team prayed with him after some games. Opposing players also participated at times. Kennedy also began incorporating short motivational speeches into his prayer routine, which included religious references. In addition to Kennedy's on-field prayer, his team separately engaged at times in pregame and postgame prayers in the locker room. This was part of a "tradition" that predated Kennedy's time as a coach.

Nobody complained about Kennedy's practices for approximately seven years. The record before the U.S. Supreme Court showed that the District became aware of his

practices when an opposing coach spoke positively about Kennedy's practices to a principal. This report prompted the superintendent to quickly intervene. The superintendent sent Kennedy a letter directing Kennedy to:

- Avoid any motivational talks with students that included religious expression, including prayer.

- Avoid suggesting, encouraging, discouraging, or supervising student prayer.

- Be "nondemonstrative (*i.e.*, no outwardly discernable religious activity)" if students are engaged in religious conduct to "avoid the perception of endorsement."

In response to the letter, Kennedy ended the "tradition" in which prayer would take place in the locker room and stopped incorporating religious references into his motivational speeches. He also stopped his practice of praying on the field immediately following one game, but later returned to the field to pray alone because he felt that he had broken his commitment to God by not praying immediately after the game. Kennedy then engaged an attorney and began asserting his right to engage in a personal, post-game prayer based on an argument that his sincerely held religious beliefs "compelled" him to offer a "post-game personal prayer" at mid-field.

Over the course of the next three football games, Kennedy continued to assert he had the right to offer a personal prayer at mid-field and continued to do so. The school district attempted to offer alternatives for him to pray after games in another location. The situation garnered significant media. After one game, players from the opposing team and community members joined Kennedy as he prayed. This prompted the school to issue notification that public access to the field was prohibited after games. Kennedy continued to pray on the field after two more games. He was joined by other adults after the third game.

The school district suspended Kennedy after he continued to pray on the field for a third time. The school district eventually non-renewed his coaching contract on the basis

that he failed to follow district policy regarding religious expression and that he failed to supervise student-athletes after games. Kennedy sued, asserting the school district violated his First Amendment rights to free speech and the free exercise of religion.

**b. Holding.** A majority of the justices on the Supreme Court ruled in favor of the coach, concluding the school district violated his right to engage in conduct that was "doubly protected" by the Free Speech and Free Exercise Clauses of the First Amendment.

1. The majority's analysis took a narrow view of the coach's conduct, characterizing his act of praying as a brief, quiet, personal religious observance that was considered private speech even though the parties in the lawsuit did not dispute that the coach was still on duty at the time he was praying. The majority noted that coaches were free to attend to personal matters, ranging from checking sports scores on their phones to greeting friends and family in the stands, during the postgame period when the prayers occurred.

2. The Court distinguished the coach's conduct from prayer that was not allowed in other cases because it found that (1) the prayer was not publicly broadcast or recited to a captive audience, (2) students were not expected or required to participate, and (3) none of the coach's students participated in the coach's prayer activities following his final three games.

3. The dissenting justices took issue with the majority's narrow characterization of the coach's conduct and discussed the overall situation as one in which it did not feel the coach's conduct could fairly be considered a brief moment of prayer by one person.

c. Moving forward, it is unclear exactly how courts will handle cases involving religious expression by public employees.

1. This case provides a wider opening for public employees to argue they are engaged in private speech

even when they are on duty. Only time will tell how much wider this opening will be.

2. Schools will need to be mindful of the fact that there is an unanswered question of whether religious speech is entitled to greater protection than other forms of employee speech under the balancing test traditionally used in employee speech cases.

3. Documentation is (and always has been) critical. This case underscores the importance of being precise in how conduct is described in personnel records. The Court's opinion noted that the school district's discipline letter did not allege the coach performed prayers with students, and it acknowledged that his prayers took place while students were engaged in other activities.

4. Schools are not expected to completely shield students from private prayer by employees. The court noted that "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society, a trait of character essential to 'a tolerant citizenry.'"

5. There continues to be a challenging standard for addressing the interplay between the Free Exercise and Establishment Clauses. In the school context, the "historical practices and understandings" standard now applied by the court seems to focus on whether there is a likelihood of coercion.

**2.** ***Clay v. Greendale School District*, 2022 WL 1443075 (E.D. Wis. 2022).** Clay was a part-time French teacher. One day, some student's in Clay's class returned from a school field trip that required them to be dressed up. Clay commented on the fact that they were all dressed up to which a student joked that they were going to a wedding. Another female student chimed in saying that a different female student was going to be her husband. Clay then commented to the student identified as the "husband" that he didn't know she was a boy. Multiple students responded to this comment that Clay was discriminating or that he cannot discriminate. Later that evening, using his district email account, Clay sent an email to the students

involved in the discussion to their district email. The email first mentioned how well they had all done in class and then went on to tell the students that he does not support same-sex marriage and that "it is best we respect one another's differences." As a result of this email students were uncomfortable going back to his class and parents complained.

a. **School District Disciplinary Action.** The District decided to terminated his employment. The District sent Clay a letter notifying him that the District considered the topics discussed in his email to be irrelevant to the conversation that occurred in his classroom that day, not aligned with District curriculum, and not related to pre-designated course content. Clay sued the school district alleging that the district wrongfully terminated him based on his religious belief and in retaliation of exercising his free speech rights.

a. **Court Ruling.** The Court held that the District had not terminated Clay due to his religious belief that same-sex marriage is a sin, rather the district terminated him due to his conduct. The email Clay sent did not explain why he is against same-sex marriage, only that he is. Additionally, religion did not come up once during the district's investigation. Furthermore, the email was not protected speech. The Court pointed out that Clay used his school email to send an email to the students' school emails, essentially making the students a captive audience. Moreover, his opinion on same-sex marriage was irrelevant to the class he taught. His speech was subject to district policies and as such he "has no First Amendment cause of action based on his . . . employer's reaction to the speech."

## E. Standards Regarding Free Exercise of Religion by Employees

1. **May a coach or advisor initiate a prayer or lead a team in prayer before a practice or competition?** No. The United States Supreme Court has repeatedly held that a school district may not invite or allow an employee or other adult to initiate or lead a prayer at a school sponsored event. *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that school may not invite a member of the clergy to deliver an invocation at a school graduation ceremony); *see also See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that

allowing student-led, student-initiated invocations prior to football games was coercive and unconstitutional).

2. **May a school district employee avoid Establishment Clause concerns by leading students in prayer outside of the regularly scheduled time for school?** No. School district employees may not use their position to advance religion. Applying the reasonable observer standard, a court would likely conclude that a school employee is using his or her position to advance religion by leading a prayer, even if the prayer occurs off school property and outside the regularly scheduled time for class. Of course, a school employee would not violate the Establishment Clause by saying a prayer in a forum, such as a church, that a large number of students in the teacher's class happen to attend on their own or with family.

3. **May a coach encourage students to regularly initiate a prayer at a school sponsored activity?** No. The U.S. Supreme Court has held that allowing student-led, student-initiated invocations before football games is coercive and unconstitutional. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *see also Doe v. Duncanville Independent School District*, 994 F.2d 160 (5th Cir. 1993) (holding that a junior high basketball coach violated the Constitution by leading his team in prayer before practice and games). In the *Duncanville* case, the Fifth Circuit stated that a school employee may not "lead, encourage, promote or participate in prayer with or among students during curricular or extracurricular activities, including before, during, or after school related sporting events." 994 F.2d at 163.

4. **May a school employee distribute religious flyers or other information promoting religion at school or a school sponsored activity?** No. Distribution of religious materials at school or a school-sponsored activity would have the primary effect of advancing religion and would, therefore, violate the Establishment Clause. Furthermore, a reasonable observer would conclude that by allowing a school employee to disseminate religious materials at school or at a school-sponsored activity, the school district is endorsing the information in the religious materials. Of course, if the school employee is attending a religious service in his or her personal capacity and the religious service is held in a school facility outside of school hours, the employee may fully participate in the service, which may include distributing materials to others in attendance at the service.

5. **May a school employee discuss religious beliefs with other employees during the duty day?** In general, one employee may privately speak to another employee regarding religion. Such speech is generally considered private speech, and should be treated the same as other non-disruptive private speech. *See Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807 (8th Cir. 2004) (holding that a school district's religion policy, which prohibited school employees from participating in religious programs held on school property, was unconstitutional because such employee participation constituted "private speech").

   a. School policies banning discussions between school employees about certain topics during non-class time may be invalidated as unconstitutional viewpoint discrimination. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1054 (5th Cir. 1985).

   b. However, public employees do not have the right to speak to other employees about religious issues when the message becomes coercive. *See Venters v. City of Dephi*, 123 F.3d 956, 970 (7th Cir. 1997) (holding that supervisor's religious speech was coercive where employee was repeatedly subjected to workplace lectures from her supervisor that she needed to be "saved" and that she faced damnation).

## VI. GOVERNMENT SPEECH

**A. What Is "Government Speech?"** "Government speech" is speech that is adopted and controlled by a governmental entity, including a public school district. In determining whether speech is "government speech," courts consider: (1) whether the governmental entity established the message; and (2) whether the governmental entity exercises control over the content and dissemination of the message. The government exercises control over the message when it exercises "final approval authority" over the message. *See Johanns v. Livestock Marketing Assn.*, 544 US 550 (2005).

**B. What is the Government Speech Doctrine?** The government speech doctrine is a relatively new concept created by the Supreme Court. This doctrine recognizes that the Free Speech Clause generally does not restrict a governmental entity from saying what it wants – with a few restrictions. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

**C. Restrictions on Government Speech.** Government speech may not violate the U.S. Constitution, including the Establishment Clause. Thus, a school district may not say what it wants about religion. Additionally, government speech may not violate federal or state law, including laws related to elections and political speech. For example, a school district may not say what it wants about political issues, referenda, and ballot questions because Minnesota law prohibits school districts from advocating for or against a referendum and limits government speech, including the use of public resources, to providing factual information about referenda.

**D. School Districts may Advance Certain Views Without Opening the Forum.** Although the government speech doctrine is still evolving, two federal courts outside our jurisdiction have applied the doctrine to school districts. The courts concluded that when a school district expresses a view, it does not open a public forum for private speakers to express their opposing views. In other words, a school district may exclude viewpoints that are contrary to the district's viewpoint and may decide who speaks on its behalf.

**1. *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583 (2022).**

a. **Facts.** This case involved a request to raise a religious flag outside of Boston City Hall. There were three flagpoles in a plaza outside of Boston City Hall. Boston flies the American flag on one of them, the Massachusetts flag on another, and the city flag on the third. Since at least 2005, Boston allowed groups to hold flag-raising ceremonies on the plaza. Participants could raise a flag of their choosing in place of the city flag and fly it for the duration of an event, typically for a few hours. Over the years, Boston allowed 50 unique flags to be flown on the third flagpole. Most of these flags were from other countries, but some were associated with groups or causes, such as the Pride Flag. The dispute in the case arose when an organization called "Camp Constitution" wanted to hold a flag-raising event to honor the "civic and social contributions of the Christian community." As part of this event, the group wanted to raise what it called the "Christian flag." Boston did not allow the group to raise the flag due to Establishment Clause concerns with flying a religious flag.

b. **Holding.** The Court considered whether Boston's flag-raising program was government speech. Under the

government speech doctrine, the government can choose what message it wants to communicate without having to allow competing viewpoints. In contrast, the government cannot engage in viewpoint discrimination when it is regulating speech by others.

1. The court reaffirmed the notion that the government has the right to speak and that the check and balance on government speech is through elections. However, the court noted that the boundary between government speech and private expression blurs when the government invites citizens to participate in a program.

2. Ultimately, the evidence in the case showed that Boston had previously given minimal review to previous requests. The employee who handled applications testified in a deposition that he had never previously asked to review a flag or requested changes to a flag in connection with approval for a flag-raising ceremony. He also testified that he had usually not even seen flags before events. There was also no record of other requests being denied. These were critical facts in the case because they showed that Boston did not control the flag-raising ceremonies in a way that would establish the messages on the flags reflected city-approved views or values.

3. Because the court concluded the flag-raising ceremonies were not government speech, the court concluded that Boston engaged in unlawful viewpoint discrimination by singling out the religious flag and not allowing it to be hoisted over city hall.

c. **Implications.** The government speech doctrine can still be used to justify displaying a particular message in a school as the school district's expression of its views without having to allow an opportunity for others to display competing messages. However, there must be meaningful involvement by the school district in the selection or crafting of the message. If schools open up areas for expression and allow for the display of messages or imagery by individual students or staff, religious content cannot be disallowed simply because it is religious in nature.

2. ***Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).**

a. **Facts.** The School Board of the Los Angeles Unified School District passed a resolution designating June as a time to focus on gay and lesbian awareness. Pursuant to that resolution, the school district issued a memorandum to staff stating that the District would provide posters and materials in support of Gay and Lesbian Awareness Month. The District issued a memorandum recognizing "that some of the materials can be controversial in nature" and explaining that the purpose of the posters was "to aid in the elimination of hate and the creation of a safe school environment for all students." With the principal's permission, high school staff members created a bulletin board inside the school building on which faculty and staff could post materials related to Gay and Lesbian Awareness Month in addition to the materials provided by the district office. The principal had ultimate authority over the content of the bulletin boards. The following are examples of the materials that were posted: a poster titled "The Civil Rights Movement;" a poster titled "Diversity is Beautiful;" a poster on Name Calling; a poster titled "What is a Family;" a bar/pie chart reflecting Statistics on Hate Crimes; a sheet of paper on "The Rainbow Flag;" and a sheet of paper explaining the gay and lesbian symbols.

b. **Plaintiff's conduct.** Robert Downs, a teacher in the high school, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board across the hall from his classroom titled "Testing Tolerance." In response to postings on other Gay and Lesbian Awareness bulletin boards within the school, Downs created a competing bulletin board titled "Redefining the Family." Included among the materials posted by Downs were a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and several excerpts, including statements that "60% of Americans hold the belief that homosexuality is immoral: that "most mainline religions in America ... condemn homosexual behavior."

c. **District's response.** The principal ordered Downs to remove his materials for two reasons. First, the principal found the

materials to be inconsistent with the purposes of the Gay and Lesbian Awareness month and the district's efforts to support diversity. Second, members of the school community found the materials were "disrespectful," "offensive," "upsetting," "objectionable," and "derogatory." In addition, the District's legal counsel informed Downs that the bulletin boards were not "free speech zones" and that he did not have the right to post materials of his choice. Downs then filed a lawsuit alleging violation of the First Amendment.

d. **Holding.** The Ninth Circuit Court of Appeals held that a public school may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance, if it so decides, and to restrict contrary speech from its employees at school. The court further held that because the government itself was speaking, the school district's regulation of speech does not need to be viewpoint neutral.

3. ***Burwell v. Portland School District No. 1J*, 2019 WL 9441663 (D. Or. Apr. 30, 2020) (unpublished).**

a. **Facts.** Parents who were strong proponents of the Second Amendment sued the Portland School District alleging that it violated the First Amendment by (1) by using public funds to promote gun control, (2) using public funds to organize anti-gun demonstrations and to connect students with anti-gun groups, (3) compelling students to participate in anti-gun demonstration and anti-gun activities; (4) creating an environment to "indoctrinate" students to advance a political objective

b. **Holding on compelled speech claim.** The Federal District Court of Oregon dismissed the compelled speech claim because the school district produced evidence showing that the demonstrations were not mandatory and that students could choose not to participate. Additionally, plaintiffs failed to show that any students faced punishment or other collateral injury for failing to express the District's "favored view" on gun issues.

c. **Holding on subsidized speech claim.** The court dismissed the case for two reasons. First, the complaint was "unclear as

to whether the complained of speech was that of defendants as a governmental entity or that of the third-party students." Second, citing *Downs v. Los Angeles Unified School District,* the court stated: "To the extent plaintiffs allege PPS unconstitutionally advocated for gun control even to the exclusion of contrary viewpoints by its own staff, schools may constitutionally advocate one side of a matter of public concern and restrict the contrary speech of its representatives."

## V. QUESTIONS?

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