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MEMORANDUM

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Prayer at Graduation And the First Amendment

Introduction

For the past several decades courts have had a hard time determining the way in which the First Amendment should be applied to such questions as the permissibility of student prayer by a valedictorian or salutatorian at a public school graduation or the permissibility of the use of a public school facility for a religious baccalaureate ceremony. Though legal matters are often very fact-specific, this memorandum seeks to provide some clarity to these issues.

First, this memorandum states the relevant text of the First Amendment to the United States Constitution.[1] Second, this memorandum addresses two specific public school First Amendment issues (raised above) based on the U.S. Department of Education's *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (or *Guidance*).[2] Third, this memorandum discusses the *Kennedy v. Bremerton Sch. Dist.* (*Kennedy v. Bremerton*) Supreme Court of the United States case and the way in which the Court explains and applies the First Amendment.[3]

The First Amendment[4]

The First Amendment to the United States Constitution states, in part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[5]

The first provision of this amendment is generally referred to as the Establishment Clause.[6]

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[1] U.S. Const. amend. I.

[2] *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, DEP'T OF EDUC., 2026-guidance-constitutionally-protected-prayer-and-religious-expression-public-elementary-and-secondary-schools-113182.pdf (Feb. 5, 2026) [hereinafter *DOE Guidance*].

[3] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) [hereinafter *Kennedy*].

[4] U.S. Const. amend. I.

[5] U.S. Const. amend. I.

[6] *Kennedy*, 597 U.S. at 512.

This clause, as interpreted by U.S. Courts, "forbids the government from establishing an official religion, . . . prohibits government actions that unduly favor one religion over another . . . [and] prohibits the government from unduly preferring religion over non-religion, or non-religion over religion."[7] The second provision of this amendment is generally referred to as the Free Exercise Clause.[8] This clause, as interpreted by U.S. Courts, "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs . . . ."[9] The third provision of this amendment is generally referred to as the Free Speech Clause.[10] This clause, as interpreted by U.S. Courts, "prohibits the government from suppressing or forcing conformity with particular ideas or messages."[11]

The U.S. Department of Education's *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*[12]

The *DOE's Guidance* addresses questions on religious expression and prayer at school events including graduation.[13] As the *DOE Guidance* explains, "[p]ublic schools may not sponsor or organize compulsory prayer at official events such as ceremonies, assemblies, graduations, or sporting events." And "no person—student, teacher, or otherwise—may deliver such prayers on behalf of the school or in such a way that attendance at the prayer is mandatory."[14]

However, *public schools must permit the participants in such events—including teachers and other school officials and employees—the individual right to engage in prayer, and to join one another in such prayer, provided they do not thereby coerce participation or speak on behalf of the school as an institution*."[15] Accordingly, "if a public school allows students to speak at assemblies, graduations, or other events based on neutral criteria, student-initiated religious remarks must be treated the same as other permissible speech."[16] If "a valedictorian wants to thank God in her graduation speech, she should be allowed to do so."[17] The student's speech "is not attributable to the school."[18] It should also be noted that schools cannot select student speakers on a basis that "disfavors religious perspectives and viewpoints."[19] If schools wish to do so, they can

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[7] *Establishment Clause*, CORNELL L. SCH. https://www.law.cornell.edu/wex/Establishment_Clause (last updated Nov. 2022).
[8] *Kennedy*, 597 U.S. at 512.
[9] *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).
[10] *Kennedy*, 597 U.S. at 512.
[11] *Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech*, CORNELL L. SCH. https://www.law.cornell.edu/constitution-conan/amendment-1/overview-of-content-based-and-content-neutral-regulation-of-speech (last accessed June 16, 2025); see also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (noting that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").
[12] *DOE Guidance*, *supra* note 2.
[13] *Id*. at Section C.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id*. (emphasis added).
[18] *Id*.
[19] *Id.*

make "make appropriate, neutral disclaimers to clarify that such speech is the speaker's and not the school's."[20]

***Kennedy v. Bremerton*[21]**

The following summarized facts and accompanying Supreme Court analysis in *Kennedy v. Bremerton*[22] provide the necessary First Amendment context to further understand the *DOE's Guidance* discussed above.[23]

> Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. *Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor.* The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.[24]

Clearly, the Supreme Court disagreed with the District's position "that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause."[25] According to the District, "Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in direct tension with the competing demands of the Establishment Clause. To resolve that mistaken clash, the District reasoned, Mr. Kennedy's rights had to yield."[26]

In response to the District's position, the Supreme Court noted,

> It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment . . . . A natural reading of that sentence would seem to suggest the Clauses have "complementary"

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[20] *Id*.
[21] *Kennedy*, 597 U.S. 507.
[22] *Id*.
[23] *DOE Guidance*, *supra* note 2.
[24] *Kennedy*, 597 U.S. at 512-514 (emphasis added).
[25] *Id*. at 532 (internal citations omitted).
[26] *Id.* at 532 (internal quotations omitted) (also noting that the "Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation 'trump[ed]' Mr. Kennedy's rights to religious exercise and free speech." *Id*. (internal citation omitted)).

> purposes, not warring ones where one Clause is always sure to prevail over the others.[27]

Nevertheless, the District (wrongly)

> began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorse[d]" religion . . . . On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer.[28]

In other words, "the District effectively created its own 'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,' placed itself in the middle, and then chose its preferred way out of its self-imposed trap."[29]

To defend its reasoning, the District relied on a legal approach that has long been "abandoned."[30] This approach "called for an examination of a law's purposes, effects, and potential for entanglement with religion . . . . In time, the approach also came to involve estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion."[31] As expressed above, the Supreme Court "long ago abandoned" this approach.[32]

The Supreme Court has also made clear "that the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based

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[27] *Id*. at 532-533 (citing *Everson v. Bd. of Educ. of Ewing*, 330 U. S. 1, 13, 15 (1947)).
[28] *Id*. at 533.
[29] *Id*. (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995)).
[30] *Id*. at 534 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).
[31] *Id*. (internal quotations omitted).
[32] *Id*. (noting that the Supreme Court referred to this approach as "*Lemon* and its endorsement test offshoot" and further explained that these "tests invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators. *Id*. (internal quotations omitted)). For example, in *Lee v. Weisman*, the Supreme Court of the United States addressed whether "including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment . . . ." 505 U.S. 577, 580 (1992). In affirming the United States Court of Appeals for the First Circuit's decision, the Supreme Court explained that "[n]o holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment." *Id.* at 599. In contrast to *Lee v. Weisman*, the United States Court of Appeals for the Fifth Circuit, in *Jones v. Clear Creek Indep. Sch. Dist.*, addressed whether the "School District's Resolution permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies . . . violate[d] the Constitution's Establishment Clause." 977 F.2d 963, 964-965 (1992). Here, the Fifth Circuit ruled that the *Lee v. Weisman* holding did "not render Clear Creek's invocation policy unconstitutional . . . ." *Id.* at 965. The Fifth Circuit further explained that, "[b]y attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different." *Id.* at 972.

on 'perceptions' or 'discomfort.'"[33] In other words, "[p]rivate religious speech cannot be subject to veto by those who see favoritism where there is none."[34] Hence, "[a]n Establishment Clause violation does not automatically follow whenever a public school . . . 'fail[s] to censor' private religious speech."[35]

Notably, the Supreme Court explained the following: "*this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.*"[36] The line then,

> that courts and governments must draw between the permissible and the impermissible has to accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers . . . . An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.[37]

The Supreme Court emphasized that, "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head."[38] Accordingly, the Supreme Court reversed the Ninth Circuit Court of Appeals decision.[39]

Conclusion

In conclusion, though First Amendment legal cases involving religious matters are often very fact-specific, this memorandum seeks to provide general guidance in response to the numerous inquiries we receive every year relating to the permissibility of student prayer by a valedictorian or salutatorian at a public school graduation. Hopefully, after reviewing this memorandum and the relevant First Amendment text, the *DOE's Guidance*, and the *Kennedy v. Bremerton* First Amendment case analysis, the reader has a better understanding of these issues. Please know that the ACLJ always stands ready to assist in such matters.

[33] *Kennedy*, 597 U.S. at 534 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)).
[34] *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995).
[35] *Kennedy*, 597 U.S. at 534-535 (internal citation omitted).
[36] *Id*. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (emphasis added)).
[37] *Id*. at 535-536 (internal quotations and citations omitted).
[38] *Id*. at 543.
[39] *Id*. at 544.

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