MEMORANDUM

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TEACHER/ADMINISTRATOR RIGHTS & RESPONSIBILITIES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion,[1] or prohibiting the free exercise thereof;[2] or abridging the freedom of speech,[3] or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[4] The Supreme Court has explained that "a natural reading of [the First Amendment] would seem to suggest the Clauses have 'complimentary purposes,' not warring ones where one Clause is always sure to prevail."[5]

There is widespread confusion regarding the rights and responsibilities of public school teachers and administrators under the First Amendment. Although "the First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" that does not "mean[] the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish."[6] "In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages."[7]

The purpose of this memorandum is to explain *general* legal principles when evaluating teacher rights and responsibilities under the First Amendment.

FIRST AMENDMENT PROTECTIONS OF RELIGIOUS EXPRESSION

The Supreme Court has explained that "the Constitution and the best of our traditions

[1] This first provision is generally referred to as the Establishment Clause.
[2] This second provision is generally referred to as the Free Exercise Clause.
[3] This third provision is generally referred to as the Free Speech Clause.
[4] U.S. Const. Amend. I.
[5] *Kennedy v. Bremerton School Dist.,* No. 21-418, slip op. at 20 (U.S. June 27, 2022).
[6] *Id.* at 15 (citing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)); *see also Lane v. Franks*, 573 U.S. 228, 231 (2014).
[7] *Kennedy*, slip op. at 15.

counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."[8] "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[9] In sum, "the First Amendment doubly protects religious speech."[10]

The Free Speech Clause

In order to determine whether a public school employee's speech is protected under the Free Speech Clause of the First Amendment, courts conduct a two-step analysis:

> The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," . . . the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech.
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> At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," . . . the First Amendment may be implicated and courts should proceed to a second step. . . . [where they] should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences."[11]

For example, in *Kennedy v. Bremerton School District*, a school district disciplined and ultimately fired a football coach for praying on the field after weekly football games. In examining whether Coach Kennedy's speech was protected under the First Amendment, the Court considered whether the speech (his prayers) took place within the scope of his official duties as a coach.[12] The Court concluded, "Mr. Kennedy has demonstrated that his speech was private speech, not government speech" because when he prayed, "he was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."[13] The Court held that the "timing and circumstances of Mr. Kennedy's prayers confirm the point."[14] As the Court explained further,

> During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight

[8] *Id.* at 1.
[9] *Id.* at 11 (citing *Widmar v. Vincent*, 454 U.S. 263, 269, n.6 (1981); *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 841 (1995)).
[10] *Id.*
[11] *Id.* at 15 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).
[12] *Id.* at 17.
[13] *Id.*
[14] *Id.*

> song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. *Garcetti*, 547 U.S., at 421. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.[15]

In contrast to *Kennedy*, in *Garcetti v. Cabellos*, the Court found that a public employee's work on an internal memorandum to a supervisor was essentially government speech, not private expression. "In reaching this conclusion, the Court relied on the fact that the prosecutor's speech 'fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case.'"[16] The Court determined that "the prosecutor's memorandum was government speech because it was speech the government 'itself ha[d] commissioned or created' and speech the employee was expected to deliver in the course of carrying out his job."[17]

In sum, specific factors, such as timing, location, and scope of employment, will be used by a court to determine whether the speech is protected under the Free Speech Clause. If the speech is protected, courts then apply a balancing test to decide whether restricting that speech was consistent with the First Amendment.

<u>The Free Exercise Clause</u>

The Free Exercise Clause protects the ability of those who hold religious beliefs to live out their faith in daily life through "the performance of (or abstention from) physical acts."[18] It protects against "official expressions of hostility" to religion, or application of principles or laws that are not "neutral" or "generally applicable" absent a compelling state interest that is narrowly tailored in pursuit of that interest.[19]

An employee raising a free exercise challenge "bears the burden of proving that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[20] The Supreme Court has explained that

> [a] government policy will not qualify as neutral if it is "specifically directed at . . . religious practice." . . . A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." . . . A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." . . .

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[15] *Id.* at 17-18.
[16] *Id.* at 16.
[17] *Id*. (quoting *Garcetti*, 547 U.S. at 422).
[18] *Id.* at 12 (citing *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990)).
[19] *Id.* at 13.
[20] *Id.* at 12 (citing *Smith*, 494 U.S. at 879-81).

> Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. . . .[21]

The Court has explained that the mere fact that an employee is on duty at the time of his/her speech does not categorically eliminate the First Amendment's protections.[22] Indeed, the Court expressly rejected one circuit's assertion that everything a teacher or coach says in the workplace is government speech that is subject to government control, and also noted that such a misinterpretation would improperly allow a school to "fire a Muslim teacher simply for wearing a headscarf or prohibit a Christian aide from praying quietly over her lunch in the cafeteria."[23]

In the *Kennedy* case, the Court held that the school district's policy prohibiting Coach Kennedy from praying on the field after games violated the Free Exercise Clause because it was neither neutral nor generally applicable. Importantly, the Court rejected the school district's claim that the First Amendment does not permit "an employee, while still on duty, to engage in religious conduct."[24] Coach Kennedy's conduct did not "involve leading prayers with the team or before any other captive audience;"[25] yet the school district still sought to regulate only his conduct. For example, during the time that Coach Kennedy prayed on the field, other members of the coaching staff were permitted to do things like visit with friends or take personal phone calls. The school district made no attempt to regulate any of the conduct by other members of the coaching staff and, as such, did not apply its policy in an evenhanded way.[26]

Accordingly, not everything that a teacher says or does in the workplace constitutes government speech or conduct. Although public schools may regulate "official" employee speech and conduct in an even-handed manner, any policy targeting religious expression or conduct that is not neutral and generally applied is suspect.

THE ESTABLISHMENT CLAUSE

While the Free Speech and Free Exercise Clauses protect private religious speech, the Establishment Clause has been interpreted to prohibit government-endorsed religious activities (at least in some circumstances). As such, when a public school teacher or administrator is acting within the scope of his or her official duties—such as instructing students during class time, or speaking at other events at which attendance is mandatory—the Establishment Clause limits the extent to which that individual may engage in prayer or other sectarian religious speech, as that religious activity would likely be viewed as having the government's approval.

There is, however, disagreement among courts regarding what the Establishment Clause does and does not permit. Until recently, and for more than forty years, Establishment Clause cases were often (but not always) evaluated using some form of the *Lemon* test (from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). This test called for "an examination of a law's purpose, effects, and potential

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[21] *Id.* at 14 (citations omitted).
[22] *Id.* at 18.
[23] *Id.*
[24] *Id.* at 14 (internal citations and quotations omitted).
[25] *Id*. at 13.
[26] *Id.* at 15.

for entanglement with religion,"[27] and involved a highly subjective inquiry into whether "a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion."[28] The result of this test, however, has been "chaos in lower courts, [leading] to 'differing results' in materially identical cases, and create[ing] a 'minefield' for legislators."[29]

In light of the "shortcomings" associated with the *Lemon* test, the Supreme Court has concluded that this test should be abandoned. In its place, the Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[30] From now on, "'the line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accord with history and faithfully reflect the understanding of the Founding Fathers.'"[31]

It remains unclear what conduct previously held to be unconstitutional under the *Lemon* test might be held constitutional under this new test. On the one hand, the Supreme Court has reiterated that "the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'"[32] On the other hand, the Court has made it clear that the Establishment Clause prohibits the government from coercing participation in religious activities, including but not limited to:

- "mak[ing] a religious observance compulsory;"[33]
- "coerc[ing] anyone to attend church;"[34]
- "forc[ing] citizens to engage in 'a formal religious exercise;'"[35]
- "inviting a clerical member to publicly recite prayer at an official school graduation ceremony;"[36] and
- "'broadcast[ing] a prayer over the public address system' before each football game."[37]

The U.S. Department of Education has provided further guidance as follows:

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the

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[27] *Id.* at 22 (citing *Lemon*, 402 U.S. at 612-13).
[28] *Id.*
[29] *Id.* (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69, n.3 (1995) (plurality op.)).
[30] *Id*. at 23 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)); *Am. Legion v. Am. Humanist Assn.*, 139 S. Ct. 2067 (2019) (plurality op.) (slip op. at 25).
[31] *Kennedy*, slip op. at 23 (quoting *Town of Greece*, 572 U.S. at 577) (other quotations and citations omitted).
[32] *Id.* at 22 (quoting *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001) (emphasis deleted)); *id* (noting that "an Establishment Clause violation does not automatically follow whenever a public school or other government entity 'fail[s] to censor' private religious speech") (quoting *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.)).
[33] *Id.* at 24 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).
[34] *Id.*
[35] *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).
[36] *Id*. at 29 (citing *Lee*, 505 U.S. at 580, 598).
[37] *Id.* (citing *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 294 (2000)).

> Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. *Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities.* Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.[38]

In sum, not all visible religious conduct by a teacher or coach should be deemed – without more – coercive and a violation of the Establishment Clause.[39] However, until further clarification is provided by courts applying the new test articulated in *Kennedy*, public schools and their employees should adhere to the principles in cases already decided. For more information, we encourage you to review the Department of Education's guide, which provides specific guidance on governing principles in various contexts relating to prayer and religious expression.

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[38] U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257, 3267 (Jan. 21, 2020), available at https://www.federalregister.gov/documents/2020/01/21/2020-00876/updated-guidance-on-constitutionally-protected-prayer-and-religious-expression-in-public-elementary (emphasis added).

[39] *Kennedy*, No. 21-418, slip op. at 28 (expressly rejecting the District's argument as well as the notion that "the only acceptable government role models for students are those who eschew any visible religious expression").