ALAN WILSON
ATTORNEY GENERAL

September 22, 2022

The Honorable Sandy McGarry
Member
South Carolina House of Representatives
404-A Blatt Building
Columbia, SC 29201

Dear Representative McGarry:

You have asked for our opinion regarding "what is allowed at a pregame for SC High School sporting events when sanctioned by a non-profit organization?" You further inquire whether "prayer can be stopped on school property if the event is sanctioned by a nonprofit organization?" Unfortunately, the decisions of the United States Supreme Court are currently unfavorable to prayer prior to a public high school football game.

Let me say at the outset that this Office strongly supports as a matter of policy a pre-game prayer. Such a non-proselytizing prayer reflects a longstanding tradition in South Carolina and nationwide. We believe that the Constitution does not forbid such tradition.

However, the United States Supreme Court is "the final authority in constitutional questions. . . ." Op. S.C. Att'y. Gen., 1992 WL 575678 (Nov. 19, 1992). According to the decisions of that Court, where the "government involvement with religious activity . . . is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school . . . [such activity] conflicts with settled rules pertaining to prayer exercises for students. . . ." Lee v. Weisman, 505 U.S. 577, 587 (1992).

In the above-referenced opinion of this Office, we attempted to distinguish Lee v. Weisman with respect to high school sports. We noted in the November 19, 1992 opinion that in Lee, which involved clerical members offering prayer as part of the official school graduation ceremony, the Court's decision "was narrowly drawn to address the specified factual situation." In addition, we stated that in Lee v. Weisman,

> [a] number of differences may be seen in the scenario of a prayer being offered before a football game involving public school teams: certainly attendance of students is not required or compelled in the usual sense, so that attendance is voluntary. The decision in Lee v. Weisman did not address prayer prior to football games. In fact, the Court expressly refused to do so, stating: We do not hold that every state action implicating religion is invalid if one of a few citizens find it

> offensive. . . . But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the state has in every practical sense compelled attendance and participation in an explicit religious exercise of an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Thus, in our 1992 opinion, we did not deem Lee v. Weisman to be sufficient authority to bar pre-game prayer at high school football games. Unfortunately, the Supreme Court held otherwise.

In 2000, the Court decided Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000). There, the Court concluded that a student-led, student initiated invocation prior to the District's football games was government speech, not private speech, was impermissibly coercive, and violated the Establishment Clause. Rejecting the argument that the invocations were "private speech," the Court held that "[t]he Santa Fe school officials simply do not "evince either 'by policy or by practice' any intent to open the [pregame ceremony] to 'indiscriminate use' by the student body generally." Instead, "the school allows only one student, the same student for the entire season, to give the invocation." Moreover, the invocation was made "subject to particular regulations that confine the content and content of the student's message. . . ." 530 U.S. at 303.

Thus, the Supreme Court held that the school could reasonably be seen as "endorsing" a religious message and that the speech was, therefore, "government speech," not private speech. According to the Court,

> [s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch, 465 U.S. at 688, 104 S.Ct. 1355 (O'CONNOR, J., concurring). The delivery of such a message – over the school's public address system by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as "private speech."

Id. at 309-10.

Next, the District argued that the pre-game prayer," does not coerce students to participate in religious observances." In the view of the District,

> . . . there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there really is no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

Id. at 310.

The Supreme Court rejected these arguments as well. In the opinion of the Court,

> [e]ven if regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. . . . Thus, nothing in the Constitution as interpreted by the Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular religious practice of prayer.

Id. at 312-13.

Critics of the Court's decision in Santa Fe abound and these critiques are well-reasoned. Chief Justice Rehnquist, Justice Scalia and Justice Thomas vigorously dissented in the Santa Fe case. The dissenting opinion noted that

> [t]he Court also relies on our decision in Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to support its conclusion, In Lee, we concluded that the content of the speech at issue, a graduation prayer given by a rabbi, was "directed and controlled" by a school official. Id. at 588, 112 S.Ct. 2649. In other words, at issue in Lee was government speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be private speech. The "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. (citations omitted).
>
> Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria – like good public speaking skills or social popularity – and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy would likely pass constitutional muster. See Lee, supra at 630, n. 8, 112 S.Ct. 2649 (SOUTER, J. concurring) ("If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Id. at 325-25 (Chief Justice Rehnquist, Justice Scalia and Justice Thomas, JJ., dissenting). In other words, the dissenters did not think that a pre-game prayer constituted an endorsement of religion by the school district.

Moreover, the Supreme Court denied certiorari in Elmbrook Sch. Dist. v. Doe, 573 U.S. 922 (2014). There, Justice Scalia and Justice Thomas wrote a critical dissent from that denial.

In that case, the Seventh Circuit had condemned as violative of the Establishment Clause the decision to hold high school graduation ceremonies at a nondenominational Christian house of worship. The dissenting Supreme Court Justices first noted that Town of Greece v. Galloway, 572 U.S. 575 (2014), [a case in which this Office submitted a brief] had "abandoned the antiquated 'endorsement test' which formed the basis of the decision below." In addition, the dissenting Justices in Elmbrook emphasized noted that

> . . . Town of Greece made categorically clear that mere "[o]ffense . . . does not equate to coercion" in any manner relevant to the proper Establishment Clause analysis. 572 U.S. at ___, 134 S.Ct. at 1826 (Opinion of KENNEDY, J.). "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views." Ibid. See also id., at ____, 134 S.Ct. at 1818-1819 (THOMAS, J., concurring in part and concurring in judgment) (same).

134 S.Ct. a 2284-85.

The dissenting Justices in Elmbrook were of the view that the Town of Greece case had changed the analysis previously used in Lee v. Weisman and Santa Fe. While we agree, a majority of the Supreme Court has not yet so held. The kind of coercion which the Establishment Clause forbids was not reflected in Lee or Santa Fe:

> [h]ere, the Seventh Circuit held that the school district's "decision to use Elmbrook Church for graduation was religiously coercive" under Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), and Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295, 687 F.3d at 854. Lee and Santa Fe, however, are inapposite because they concluded (however unrealistically) that students were coerced to engage in school-sponsored prayer. In this case, it is beyond dispute that no religious exercise whatever occurred. At most, respondents complain that they took offense at being in a religious place. . . .
>
> It bears emphasis that the original understanding of the kind of coercion that the Establishment Clause condemns was far narrower than the sort of peer-pressure coercion that this Court has recently held unconstitutional in cases like Lee and Santa Fe. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and financial support by force of law and threat of penalty." Lee, supra at 640, 112 S.Ct. 2649 (SCALIA, J., dissenting). See also Town of Greece, supra, at _____ - _____, 134 S.Ct. at 1817-1819 (opinion of THOMAS, J.).

Id. at 2285.

Finally, the dissenting Justices in Elmbrook stressed:

> [l]ast but by no means least, Town of Greece left no doubt that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. at ___, 134 S.Ct. at 1819. Moreover, "if there is any inconsistency between [a 'test' set out in the opinions of this Court] and . . . historic practice . . . the inconsistency calls into question the validity of the test, not the historic practice." Id., at _____, 134 S.Ct. at 1834 (ALITO, J., concurring).

Id.

In addition, in this past term of the Supreme Court, in Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022), the Court sustained the actions of a high school football coach who was terminated after he knelt at midfield after games to offer a quiet, personal prayer. He alleged that the school board violated his rights under the First Amendment's Free Speech and Free Exercise Clauses. There, the Court distinguished the coach's actions from the Lee and Santa Fe decisions:

> [m]eanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In Lee, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." 505 U.S. at 580, 598, 112 S.Ct. 2649. In Santa Fe Independent School Dist. v. Doe, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. 530 U.S. 290, 294, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The Court observed that, while students generally were not required to attend games, attendance was required for "cheerleaders, members of the band, and, of course, the team members themselves." Id. at 311, 120 S.Ct. 2266. None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline. . . .

Id. at 2431-32.

The decision which concerns you in particular is Cambridge Christian School v. Florida High School Athletic Assn., 2022 WL 971778 (M.D. Fla. 2022). There the Court addressed the situation in which a Christian school asked the Florida High School Athletic Association ("FHSAA") "for permission to broadcast a pre-game prayer over the PA system at the 2015 Final." FHSAA denied this request. The Court granted summary judgment to FHSAA, concluding that denial of the request was valid. According to the Court,

> [t]he issue before the Court is whether the First Amendment required the FHSAA to grant the teams unrestricted access to the PA system to deliver the prayer over the loudspeaker during the pregame. Thus, the questions to be answered are whether the

> inability to pray over the loudspeaker during the pregame of the State Championship's Final football game violated CCS's First Amendment rights to freedom of speech and free exercise of religion.
>
> . . . As discussed below, the Court concludes that the First Amendment does not apply because the speech at issue is government speech, but even if some portion of the speech is considered private speech, the Court finds no constitutional violation occurred.

Id. at * 4.

The Court in Cambridge Christian School relied in part on the Santa Fe decision, concluding that the speech over the PA system was likely "government speech." According to the Court:

> [t]he Court focuses its analysis on pregame speech delivered over the PA system at a State Championship Final football game hosted by FHSAA in a government-owned stadium. In so doing, the Court finds precedence in the Supreme Court's opinion in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000). In concluding the speech at issue was government speech in Santa Fe, the Supreme Court specifically considered "the pregame invocations." Id. Although Santa Fe was an Establishment Clause case, the threshold question was the same – whether the speech was government speech or private speech. In making its determination, the Santa Fe Court confined its consideration to speech over the PA system during the "pregame ceremony" during the public school's football game. Id. at 303 ("The Santa Fe school officials simply do not 'evince either by policy or practice' any intent to open the [pregame ceremony] to indiscriminate use, by the student body generally." . . . . The Supreme Court did not compare the pregame speech to speech occurring at other points during the game, such as during half time. Nor did the Court compare the football pregame invocations with speech occurring at other sports contests. Finally, the Santa Fe Court did not compare the pregame prayer over the PA system with speech written on banners, in programs, or by advertisers.

In upholding Coach Kennedy's midfield postgame prayer as constitutional, the Supreme Court in Kennedy, supra, analyzed the question of the prayer's validity in terms of whether the Coach's actions were government speech or private speech. There, the Supreme Court determined that the speech was private speech, finding that Coach Kennedy "was not seeking to convey a government-created message." 142 S.Ct. at 2424. Based upon all the facts and circumstances, the Coach was not "acting within the scope of his duties as a coach." Id. at 2425.

Thus, there is no question that with respect to the validity of a prayer, each situation will turn on its own facts and circumstances. As the Supreme Court recognized in Santa Fe, "[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 530 U.S. at 302. The Supreme Court concluded that the prayer of Coach

Kennedy was "private speech." Important in this analysis were historical practices. According to the Supreme Court in Kennedy,

> [i]n place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." Town of Greece, 572 U.S. at 576, 134 S.Ct. 1811; see also American Legion, 588 U.S. at ___, 139 S.Ct. at 2087 (plurality opinion). "'[T]he line'" that courts and governments "must draw between permissible and the impermissible" has to "'accord[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" Town of Greece, 572 U.S. at 577, 134 S.Ct. 1811 (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J. concurring)). 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.". . . .

572 U.S. at ____, 142 S.Ct. at 2428. In this regard, there is a body of authority of the opinion that a pre-game invocation before a high school football game is constitutionally valid. In Jager v. Douglas Co. Sch. Dist., 862 F.2d 824 (11th Cir. 1989), Judge Roney in dissent concluded that Marsh v. Chambers, 463 U.S. 783 (1983) [the predecessor to Town of Greece] went far in validating the pre-game invocation. According to Judge Roney, "[t]he ceremonial invocations that open public high school games in Douglas County are facially unconstitutional under Marsh. These invocations add solemnity and dignity to a public event, preserve a longstanding and widespread tradition and remind participants and spectators of the importance of high ideals and values, such as sportsmanship and fair play at an athletic event." 862 F.2d at 833 (Roney, J. dissenting). Certainly, with the decision in Town of Greece, Judge Roney's view is strengthened considerably.

Conclusion

The problem is that the Supreme Court decisions in Lee v. Weisman and Santa Fe have not been overruled. Clearly, these decisions have been undercut by Town of Greece and Kennedy v. Bremerton Sch. Dist. Nevertheless, unless and until the Supreme Court expressly overrules Weisman and Santa Fe, these decisions remain on the books. While we certainly are hopeful that the day will come when pre-game invocations at a public high school are expressly upheld by the Supreme Court, that day has not yet arrived. With the present makeup of the Supreme Court, that day may well come sooner rather than later.

Sincerely,

Robert D. Cook
Solicitor General