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## Case of the Month

### The First Amendment protects high school football coach's post-game prayers at midfield.

Joseph Kennedy, a high school football coach in the Bremerton School District, lost his job after he repeatedly knelt at midfield, in full view of spectators, to pray after football games. Players and others joined Kennedy at his invitation. The district asked Kennedy to stop the practice and offered alternatives, but Kennedy persisted, announcing plans to pray after the homecoming game in a letter to the district and in the media. His midfield prayer was joined by members of the public, who forcefully rushed the field to participate. Kennedy was placed on leave and then dismissed, prompting him to sue, claiming violation of his rights under the U.S. Constitution's [First Amendment Free Speech and Free Exercise Clauses](#). The district court granted summary judgment to the district. Kennedy appealed.

The Ninth Circuit Court of Appeals, deciding in favor of the school district, found that the U.S. Constitution's [First Amendment Establishment Clause](#) prohibited Kennedy's prayers. Supported by the public nature of Kennedy's practice as well as the pressure some players felt to join the prayer, the Ninth Circuit held that Kennedy's prayer was not private, but rather public speech of an overtly religious nature while carrying out his job duties. Kennedy appealed.

The U.S. Supreme Court reversed, holding that Kennedy's dismissal violated the Free Speech and Free Exercise Clauses. The Court overturned the test established by *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971), which required public educational institutions to avoid religious endorsement, instead referring to a "history and tradition" standard. The majority's description of Kennedy's prayer as quiet and personal differed from other accounts, finding that Kennedy's prayers represented private speech and admonishing that not everything teachers and coaches say in the workplace is subject to government control. Despite inconsistencies in the majority's description of the facts, Kennedy's right to engage in purportedly quiet prayer was protected by the First Amendment. [Kennedy v. Bremerton Sch. Dist.](#), 142 S. Ct. 2407 (June 27, 2022).

### Why is This Case Significant?

In *Kennedy*, the Supreme Court abandoned an established test for applying the Establishment Clause. Due to ambiguity in the new standard, colleges should review their policies on employee expression and seek counsel if necessary. The new framework may require a showing that religious endorsements by employees were explicit or coercive to defend disciplinary action. However, the majority's emphasis on facts that support the ruling in *Kennedy* limits the holding to similar circumstances.

### Highlights

New on [College eLaw](#):  
[Notice and Website Posting Requirements for Budget & Tax Rate Adoption](#)  
[Board Procedures & Resolutions for Adopting Tax Rate](#)  
[Community College Voter-Approval Tax Rate Elections in 2022](#)  
[Deadlines for November 2022 Community College Elections](#)

### Resources

[Texas Higher Education Coordinating Board](#)  
[Texas Legislature](#)  
[Texas Statutes](#)  
[Texas Attorney General](#)  
[U.S. Department of Education](#)

## The U.S. Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*.

Jackson Women's Health Organization sued Thomas Dobbs, the Mississippi health officer, among other officials asserting the state's Gestational Age Act, which prohibits nearly all abortions past 15 weeks of pregnancy, violated the U.S. Constitution right to abortion. The district court ruled in favor of the organization, reasoning that the Act does not comply with [Roe v. Wade](#), 93 S. Ct. 705 (1973), [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 112 S. Ct. 2791 (1992), and other U.S. Supreme Court precedent prohibiting laws that ban abortion before the fetus is viable outside of the womb. Dobbs appealed.

The Fifth Circuit Court of Appeals affirmed the lower court's ruling, holding that the Act was an unconstitutional prohibition on pre-viability abortion bans. In reaching its decision, the court referred to the unbroken line of U.S. Supreme Court precedent since *Roe* affirming the right to choose an abortion before viability. The court noted that states may regulate, but not outright ban, abortions prior to viability so long as they do not unduly burden the right to choose. Because the law at issue is an outright ban of abortions after 15 weeks, the Fifth Circuit declared it unconstitutional. Dobbs again appealed.

In a landmark decision, the U.S. Supreme Court found that the Act was constitutional, stating that *Roe* and *Casey* were wrong when they were decided. The Court gave five reasons for overruling *Roe* and *Casey*—the *Roe* and *Casey* courts misinterpreted the Constitution; the Court's reasoning lacked textual, historical, or precedential support; the rule imposed by *Roe* and *Casey* cannot be consistently understood and applied; *Roe* and *Casey* have led to the distortion of other areas of the law; and *Casey's* argument that people rely on the availability of abortions when they partake in intimate relationships was overbroad. Holding, therefore, that the U.S. Constitution does not protect a right to abortion, the Court returned to the people and their elected representatives the full authority to regulate or prohibit abortion. [Dobbs v. Jackson Women's Health Org.](#), 142 S. Ct. 2228 (June 24, 2022).

### Why is This Case Significant?

*Dobbs* resulted in near-complete bans of abortion procedures in some states, including Texas, with inconsistent and unclear exceptions. At issue in *Roe* was a [1925 Texas statute](#) criminalizing abortion, which was restored by the *Dobbs* Court's overturning of *Roe*, regaining effectiveness when the Texas Supreme Court [halted an injunction](#) against its enforcement on July 1, 2022. In 2021, the Texas legislature passed a new ban on abortions, [Texas Health & Safety Code chapter 170A](#), creating both civil and criminal penalties for performing an abortion and set to go into effect on August 25, 2022 as a result of *Dobbs*. That statute also expressly recognizes and reaffirms the earlier 1925 criminal abortion ban, and both statutes provide an exception only when the life of the mother is at stake. Finally, the 2021 law creating a private right of action in Texas for aiding or abetting an abortion may induce civil litigation by private actors, although community colleges are shielded from this remedy by governmental immunity, as discussed in TASB Community College Services' legislative update, *After the Legislative Session(s): Implementing Key Legislation at Your Community College* (Jan. 2022).

College personnel, students, and officials may be impacted by *Dobbs* and the laws galvanized by it as, for example, travel and recovery for out-of-state access to abortion services implicates employee leave policies, as well as student attendance and course load requirements that are integral to students' educational programming. College counseling and healthcare services will be affected, and policies related to student and employee discipline will likely require revision. Colleges should review with local counsel their policies, procedures, and academic and student services for all potential ramifications.



## From the Courts and the Attorney General

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### Business and Finance

Maine program providing qualifying parents secondary school tuition assistance violated the U.S. Constitution [First Amendment Free Exercise Clause](#) by permitting use of the funds only at secular schools. [Carson v. Makin](#), 142 S. Ct. 1987 (June 21, 2022).

University's request to stay an injunction prohibiting collection of out-of-state tuition from U.S. citizens while charging non-citizen residents without lawful status in-state tuition under Texas law was denied.<sup>1</sup> [Young Conservatives of Tex. Found. v. Univ. of N. Tex.](#), Civ. No. 4:20-CV-973-SDJ, 2022 WL 2328801 (E.D. Tex. June 28, 2022) (mem.).

[New York State law](#) permitting concealed carry only by individuals who have proper cause for doing so violated the U.S. Constitution [Fourteenth Amendment](#) by interfering with law-abiding citizens' right to carry, as protected by the U.S. Constitution [Second Amendment](#). [New York State Rifle & Pistol Ass'n, Inc. v. Bruen](#), 142 S. Ct. 2111 (June 23, 2022).

### Personnel

Twenty states, not including Texas, obtained a preliminary injunction prohibiting the

enforcement in those states of guidance documents issued by the Equal Employment Opportunity Commission and the U.S. Department of Education that assert protection from discrimination based on sexual orientation or gender identity under [Title VII of the Civil Rights Act of 1964](#) and [Title IX of the Education Amendments of 1972](#). [Tennessee v. U.S. Dept. of Ed.](#), No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).

### Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings<sup>2</sup> based on requests from Texas community colleges related to:

- Specified requests for proposals. Tex. Att'y Gen. [OR2022-18539](#) (June 28, 2022).
- Applicants for a specific position. Tex. Att'y Gen. [OR2022-19204](#) (July 1, 2022).
- Complaints and grievances filed against the requestor. Tex. Att'y Gen. [OR2022-19357](#) (July 7, 2022).
- Video recordings related to a specified incident. Tex. Att'y Gen. [OR2022-19628](#) (July 8, 2022).



## Recent Regulations and Guidance

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The Texas Higher Education Coordinating Board (THECB) announced its intention to engage in [negotiated rulemaking](#) to amend rules relating to the ApplyTexas Common Admission Application,, proposing representatives from Blinn College, Central Texas College, Collin College, North Central

Texas College, San Jacinto College, and Victoria College to serve on the committee.

THECB announced its intention to engage in [negotiated rulemaking](#) to amend the rule related to compliance with the state sexual misconduct reporting requirements and

<sup>1</sup> This case was summarized in the [April 2022 Community College Services Legal Update](#).

<sup>2</sup> Open record letter rulings are limited to the particular records at issue and the facts as presented to the attorney general. These rulings must not be relied upon as a previous determination regarding any other records or any other circumstances.

proposing representatives from Blinn College, Dallas College, McLennan Community College, South Texas College, and Victoria College to serve on the committee.

The Texas Workforce Commission (TWC) amended [regulations](#) addressing training programs funded under the federal [Workforce Innovation and Opportunity Act](#) (WIOA) to clarify requirements for WIOA eligible training providers.

TWC amended [regulations](#) addressing the federally-funded [Trade Adjustment Assistance \(TAA\) Program](#) employment and training services to conform to recent updates to the federal [TAA Final Rule](#).

As part of the [Bipartisan Safer Communities Act](#), the U.S. Congress created the Federal Clearinghouse on School Safety Evidence-based Practices to publish on the existing website [SchoolSafety.gov](#) recommendations to improve college and school safety and to identify grant programs that may be used to implement the Clearinghouse's recommendations.

The U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), to require that employers show that any required testing is job-related and consistent with business necessity consistent with the [Americans with Disabilities Act](#).



## In the News

The Texas Governor renewed the [disaster proclamation](#) issued for all counties in Texas due to the COVID-19 pandemic.

The Texas Education Agency is [requesting applications](#) from Texas community colleges to operate open-enrollment charter schools.

The Texas Workforce Commission (TWC) awarded South Texas College a \$204,058 [Jobs and Education for Texans \(JET\) grant](#) to purchase and install equipment for the college's Architectural and Engineering Design Technology program.

The Texas Comptroller created a new [Government Affairs and Programs Division](#) to streamline collaboration across multiple levels of government and the private sector.

[Presidential Proclamation](#) recognized the fiftieth anniversary of the Federal Pell Grant Program and its significant contribution to improving access to college education for all students.

The U.S. Department of Education's [proposed amendments](#) to the regulations implementing [Title IX of the Education Amendments of 1972](#) were published in the Federal Register; public comment is invited on or before September 12, 2022 via the [Federal eRulemaking Portal](#).