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July 2022

# CASE UPDATE: *KENNEDY V. BREMERTON SCHOOL DISTRICT* – HIGH SCHOOL COACH'S PRAYER DUALLY PROTECTED UNDER THE FIRST AMENDMENT

You may recall the August 2021 client update- *Between the First Amendment's Establishment Clause and Free Exercise/Speech Clauses, What Is A Public School District To Do With An Educator's Public Prayer?* [1] This case involved Coach Joseph Kennedy's battle in the courts to protect what he believed to be his First Amendment right to offer a quiet, personal prayer midfield after high school football games without reprisal. Coach Kennedy believed his rights should prevail over Bremerton High School District's concern of the risk of liability under the First Amendment's Establishment Clause for Coach Kennedy's "religious conduct" while on duty. Coach Kennedy's battle is over and, undoubtedly, his prayer answered.

While unsuccessful in the federal district court and before the Ninth Circuit Court of Appeals – which both determined the District's disciplinary actions (suspension and subsequent release) were justified under the Establishment Clause and "trump" Coach Kennedy's free exercise of religion and free speech rights, Coach Kennedy's (and his attorneys') persistence ultimately paid off with the Supreme Court, which ruled in Coach Kennedy's favor on June 27, 2022. In a 6 to 3 decision, the Court held: "The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression."[2]

*The Decision*

The Court's majority made clear that the facts supporting the decision were undisputed. The District admittedly disciplined Coach Kennedy *only* for his persistence in praying quietly, without student players, after three football games in October 2015. Prior to these three games, and at the District's written request, Coach Kennedy voluntarily discontinued other disputed religious activity; namely, the school tradition of pre-game locker-room prayers (which began before Coach Kennedy's involvement with the football program in 2008) and Coach Kennedy's post-game, prayer-like inspirational talks with student players.[3] At these three games, which formed the basis for his discipline, Coach Kennedy sought to engage "in a sincerely motivated religious exercise," "briefly and by himself," at midfield, "at the conclusion of each

[1] For a more complete discussion of the factual and procedural history of this case, please see the prior update, which is included with this update.

[2] *Kennedy v. Bremerton School District,* No. 21-418, 597 U.S. ___, 142 S.Ct. 2407, at p. 1.

[3] These activities do have the earmarks of entanglement and Coach Kennedy was well-advised by his attorneys to comply with the District's directives and cease the conduct, even though some of this conduct had been a tradition at the high school well before Coach Kennedy's time.

game." Based on these undisputed facts, the Court concluded District violated Coach Kennedy's free speech and free exercise rights by denying Coach Kennedy's request while allowing other secular activity to occur on duty after the game. The Court rejected the District's argument that Coach Kennedy's overt acts could be construed by a reasonable observer as school endorsement of prayer in violation of the First Amendment's Establishment Clause, noting that the "object" of the District's action was to suppress Coach Kennedy's personal prayer, as the District failed to produce any evidence of *actual* coercion of students. In balancing the District's interests against those of Coach Kennedy, the Court concluded:

> The absence of evidence of coercion in this record leaves the District to its final redoubt. Here, the District suggests that *any* visible religious conduct by a teacher or coach should be deemed — without more and as a matter of law — impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. [Citation to the dissent.] .... The only added twist here is the District's suggestion not only that it *may* prohibit teachers from engaging in any demonstrative religious activity, but that it *must* do so in order to conform to the Constitution.
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> Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. [Citation.] It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." [Citation.] We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way. [Citation.][4]
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> [¶ at pp. 30-31] In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should "trum[p]" the other two. [Citation, and internal quotes omitted.] But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. [Citation.] And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. [Citations.]

[4] Opinion, at pp. 28-29. In place of the old *Lemon* test (the reasonable observer's consideration of potential government endorsement), the majority re-emphasized that a "natural reading of the First Amendment suggests that the Clauses [Free Speech, Free Exercise, and Establishment Clauses] have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." Op., at pp. 20-21.

Before reaching the *Pickering-Garcetti* balancing test discussed above, the Court easily answered the question of whether Coach Kennedy offered his prayers in his capacity as a private citizen, or whether they amounted to government speech attributable to the District. Coach Kennedy's prayer offerings at the three games, that resulted in his suspension and later release from employment, were not "ordinarily within the scope" of his duties as a coach. His prayers did not "owe their existence" to his responsibilities as a public employee. The timing and circumstances – postgame when coaches were allowed to briefly engage in personal matters – confirmed that Coach Kennedy was engaged in private activity.

*The Dissent*

A summary from the dissenting opinion in this case is shared to show how complex First Amendment cases can be for school districts, most particularly at this time in our Nation's history. From the dissent's perspective:

> Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. *Ante,* at 22. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent. [Justice Sotomayor, with Justices Breyer and Kagan joining.][5]

*The Takeaway*

As mentioned in the earlier article, as this case was navigating its way to the Supreme Court for final decision, determining whether an employee's speech is private or public, and whether the employer's response to it is justified, is factually intensive and requires thorough legal analysis before adverse action is taken. As the decision connotes, this case came down to the facts, and primarily those facts conceded by the employer. Imposing discipline for solely private, religious speech is a dual violation of the First Amendment and can no longer be based on the mere perception of endorsement. Actual and real coercion of students (e.g., proselytization) is required.

*~Kelly A. Lazerson*



[5] Dissenting Op., p. 2