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Prayer at Midfield: Public Employee Speech and Religion

The Supreme Court's 2021 term is packed with major First Amendment cases for local governments, including: 1) whether distinctions between on/off-premises signs are content based and potentially the definition of "content-based" under the First Amendment (*City of Austin v. Reagan National Advertising of Texas, Inc.*); 2) government speech, forum analysis, and the Establishment Clause (*Shurtleff v. Boston);* and 3) whether the First Amendment restricts the ability of an elected body to issue a censure (*Houston Community College System v. Wilson*). The Court rounded out its First Amendment docket in January by granting certiorari in *Kennedy v. Bremerton School District,* an important public employee speech and religious liberty case.

In *Kennedy*, the Supreme Court will resolve the following questions: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection; and (2) whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the Establishment Clause nevertheless compels public schools to prohibit it. It is worth noting that the Petitioner and Respondent paint vastly different pictures of the facts in this case. The Petitioner's version, which can be gleaned by the question presented, portrays a high school football coach praying at midfield immediately after each game as conduct that is entirely private and quiet. The Respondent on the other hand, through both words and photographs, depicts a different set of facts, including that while praying, Kennedy was most often surrounded by players and his prayers were fully audible to those around him.[1]

Ordinarily, factual disputes of this magnitude would render a case inappropriate for certiorari. But the Court nevertheless granted the case, and it will likely be argued this term (as of this writing, oral argument has not been set). Although the case arises in the public school context, the Court's holding will have broad implications for all public employers.

Kennedy was an assistant football coach at a Washington State public high school who felt compelled by his religious beliefs to kneel and pray at the 50-yard line immediately after each game. At first, he did this by himself, but over the years, students would join him in the middle of the field while he knelt, said prayers, and gave motivational speeches involving religious themes. The group that joined Kennedy eventually grew to be the majority of the team. At least one parent complained to the principal that his son "felt compelled to participate" in the prayers, even though the student was an atheist, because he worried about his playing time.[2]

The school had a policy entitled "Religious-Related Activities and Practices." Pursuant to that policy, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities."[3] Additionally, according to the policy, "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity."[4] The school contacted Kennedy regarding what it indicated was a breach of this policy and told Kennedy that he was free to continue to engage in religious activity, but that activity should not interfere with his job responsibilities and should be "physically separate from any student activity, and students may not be allowed to join such activity."[5]

At first Kennedy complied with this directive, but shortly thereafter, he sent a letter from his attorney challenging it and indicating he planned to kneel and pray at the 50-yard line after the conclusion of the next game, and that he would allow students to join him.[6] Kennedy widely publicized his plan in a number of media outlets and interviews.[7] A Satanist religious group contacted the school district and indicated that it would conduct ceremonies on the field following football games if others were allowed to exercise their religious beliefs on the field after games.[8]

After the next game, Kennedy went to the 50-yard line and knelt and prayed with students, coaches, a state elected official, and other members of the public, who had apparently jumped the fence to get on the field, all joining him.[9] The principal described a chaotic scene after

Continued on page 34

Amicus *cont'd from page 33*

the game where students were knocked to the ground as members of the public jostled to get onto the field to pray with Kennedy.[10]

The school district then sent Kennedy a letter telling him that it would accommodate his religious exercise, providing several suggestions on how to do so in private, but that the school could not be perceived as endorsing it.[11] Kennedy's response was through the media indicating that the only outcome he would accept was allowing him to pray on the 50-yard line immediately after games.[12]

Kennedy's behavior resulted in significant disruption at the school, including the head coach ultimately resigning due to concerns about his own safety (resulting from public backlash at the school) and the principal indicating that they "could not supervise effectively" or "keep the kids safe" when the public sought to access the field with Kennedy.[13] The school sent Kennedy a letter indicating he had "failed to follow district policy," "his actions demonstrated a lack of cooperation with administration," he "contributed to negative relations between parents, students, community members, coaches and the school district," and he "failed to supervise student-athletes after games due to his interactions with [the] media and [the] community."[14] The district did not renew Kennedy's contract and he sued, alleging violations of both the Free Speech and Free Exercise Clauses of the First Amendment.

The Ninth Circuit applied *Pickering v. Board. of Education*. to his free speech claim and concluded that when he was engaging in the prayer activity, he was speaking as a public employee and not a private citizen.[15] The court concluded that because he was speaking as a public employee, his speech was not protected, and his behavior was therefore not insulated from discipline under *Pickering* and *Garcetti v. Ceballos*.[16] The court reasoned "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee."[17] The Ninth Circuit also concluded that even if Kennedy were speaking as a private citizen, the school district had an adequate justification under *Pickering* to treat him differently due to the school's Establishment Clause concerns.[18]

The Ninth Circuit also rejected Kennedy's Free Exercise arguments, finding that the district could satisfy strict scrutiny in this case.[19] (The school conceded that the rule was not neutral and generally applicable and therefore under *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), strict scrutiny would apply).[20] The court reasoned that a school's interest in avoiding Establishment Clause violations was a compelling interest and the policy was narrowly tailored because, according to the court, there was no other way to accomplish the objective, particularly given Kennedy's refusal to accept any accommodations offered by the school.[21]

This is the first public employee speech case the Court has taken in eight years and it is therefore significant for all local governments.[22] The Court has consistently recognized that the government is subject to fewer restrictions in the First Amendment context when acting as an employer rather than a Sovereign.[23] The reason for the distinction is that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[24] The Court in *Garcetti* also highlighted the inherent federalism and separation of powers concerns which would result from a contrary holding and create a "new, permanent, and intrusive role" for state and federal courts "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[25]

An area of concern for this case is the Petition's focus on job descriptions / duties. In terms of the free speech analysis, the first step in the case will be to determine if Kennedy was speaking as a private citizen on a matter of public concern or if the speech was related to his official duties, which would render it unprotected.[26] In concluding that the employee was not entitled to First Amendment protection in *Garcetti,* the Court reasoned that the employee's speech was as a result of his official job duties.[27] The Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."[28] Instead, the Court explained that the listing of a task in a job description is "neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."[29]

In his Petition for Certiorari, Kennedy argues that the district is "restrict[ing] employees' rights by creating excessively broad job descriptions."[30] Specifically, the Petition argues if the Court were to accept the district's claim that "demonstrative communication as a role model for players" is a job duty, then "there is nothing left of the First Amendment rights of" public employers.[31]

This issue has come up previously in this case. Kennedy had sought certiorari on his claims several years ago at the preliminary injunction stage and certiorari was denied. Though they agreed in denying certiorari due to factual disputes, Justice Alito, writing for himself and Justices Thomas, Gorsuch and Kavanaugh also homed in on the issue of job descriptions/duties and an overly broad reading of *Garcetti* as potential issues in this case. In criticizing the Ninth Circuit's decision denying the preliminary injunction, Justice Alito explained:

> According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and

coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.[32]

Justice Alito went on to explain that *Garcetti* should not be read to allow a public employer to "convert private speech into public speech by creating excessively broad job descriptions."[33]

When the Court denied certiorari at the preliminary injunction stage three years ago, there seemed to be four votes leaning toward Kennedy already. Even without counting votes, this case presents an uphill battle for the school district, particularly given the thorny Free Exercise issues that it presents that are interwoven with the speech issues. IMLA's position is focused on the employment speech context and trying to prevent the Court from expanding liability for local governments as employers. Additionally, as the Court pointed out in *Garcetti,* IMLA has concerns about the federalism implications with having judicial management over public employment issues. ML

Notes

1. Pictures of Kennedy's prayer practice that included most of the team can be found in the Respondent's Brief in Opposition, p. 4, 8, available at: https://www.supremecourt.gov/DocketDF/21/21-418/204295/20211207122626202_21-418%20BIO%20final.pdf
2. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010-11 (9th Cir. 2021)
3. *Id.* at 1011.
4. *Id.*
5. *Id.*
6. *Id.* at 1012.
7. *Id.*
8. *Id.*
9. *Id.* at 1012-13
10. *Id.* at 1013.
11. *Id.* at 1013.
12. *Id.*
13. *Id.* at 1013-14.
14. *Id.* at 1014.
15. *Id.* at 1016.
16. *Id.* at 1015-16.
17. *Id.* at 1015.
18. *Id.* at 1016-17.
19. *Id.* at 1020.
20. *Id.* at 1019-20.
21. *Id.* at 1020-21.
22. In *Lane v. Franks,* the Supreme Court held that truthful testimony under oath by a public employee is citizen speech entitled to First Amendment protections even if the content of the speech relates to information learned during the employment. 573 U.S. 228, 238 (2014).
23. *See* Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (explaining "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"); Waters v. Churchill, 511 U.S. 661, 671, (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign").
24. *Garcetti* 47 U.S. 410, 418 (2006).
25. *Id.* at 423.
26. *See Garcetti*, 47 U.S. 410, 421 (2006).
27. *Id.* at 421-22.
28. *Id.* at 424-25.
29. *Id.*
30. *See* Petition, p. 22.
31. *Id.*
32. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (Alito, J.).
33. *Id.*

Evolving Workplace *cont'd from page 9*

23. Occupational Safety and Health Administration, Department of Labor, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 FR 3928 (January 26, 2022).
24. U.S. Dep't of Labor, Occupational Safety and Health Administration State Plans, https://www.osha.gov/stateplans/ (last visited February 4, 2022).
25. 29 C.F.R. § 1902.3(d)(1) ("The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the [OSH] Act.").
26. See, e.g., 46 Minn. Reg. 789 (Jan. 3, 2022); Maine Dep't of Labor, Maine Board of Occupational Safety and Health to Meet on January 18 on OSHA's Emergency Temporary Standard Requiring COVID-19 Vaccination or Testing for Public Sector Employees, (Jan. 3, 2022) ("[T]he U.S. Department of Labor informed the Maine Department of Labor that its requirement will apply to public sector employers in Maine, including state, county, and local governments, and public school systems.").
27. Minn. Dep't of Labor and Indus., Minnesota OSHA suspends enforcement of COVID-19 Vaccination and Testing Emergency Temporary Standard, available at https://www.dli.mn.gov/about-department/rulemaking/minnesota-osha-rulemaking.
28. California Dep't of Indus. Relations, Revisions to the COVID-19 Prevention Emergency Temporary Standards (effective January 14, 2022) Frequently Asked Questions, https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.pdf.
29. S.B. 9, 2d Spec. Sess. (Ala. 2021) (codified in Ala. Code § 25-1-4).
30. *Id.*
31. H.B. 335, 3d Extra. Sess. (W. Va. 2021).
32. Assemb. B. 654 (Cal. 2021) (amending Section 6409.6 of the Labor Code).
33. *Id.*
34. Working for Workers Act, 2021, S.O. 2021, c. 35 – B. 27.
35. https://findstack.com/remote-work-statistics/