Supreme Court Rules in Favor of Football Coach Conducting Brief, Quiet, and Personal Post-Game Prayer on the Field

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On June 27, 2022, the United States Supreme Court ruled in favor of a high school football coach holding that the Free Speech and Free Exercise Clauses of the United States Constitution's First Amendment protected his personal and individual prayer on the field following three football games in October 2015. Overruling *Lemon v. Kurtzman*, the Court rejected Bremerton School District's (District) position that it was compelled to prohibit Kennedy's demonstrative prayer during a school activity to avoid its own violation of the First Amendment's Establishment Clause.

Background

Joseph Kennedy (Kennedy) coached football in the District from 2008 to 2015 and, following each football game, knelt at the 50-yard line to pray. Initially, Kennedy prayed alone, but over time, players and community members joined him. Kennedy also led prayers in the locker room and gave overtly religious speeches to players. In September 2015, however, the District directed Kennedy to limit his speeches to non-religious topics and to engage only in private, non-demonstrative prayer after spectators had left the stadium. While Kennedy discontinued the locker room prayers and religious speeches, he refused to stop praying at the 50-yard line after games. On three occasions in October, Kennedy prayed by himself on the field after each game while students were engaged in other activities. No District students joined Kennedy in prayer after those three games. Shortly thereafter, the District placed Kennedy on paid administrative leave due to his engagement in "public demonstrative religious conduct while still on duty" and because "reasonable students and attendees might perceive the district as endorsing religion" in violation of the First Amendment's Establishment Clause. The District specifically acknowledged that Kennedy had discontinued his previous practices of locker room prayer and religious speeches, but that he had failed to discontinue his publicly visible post-game prayers. Kennedy was not rehired for the following year. He sued the District arguing that the District violated his First Amendments rights under the Free Speech and Free Exercise Clauses.

The Court's Opinion

Considering only facts arising from the three October 2015 games and nothing prior, the United States Supreme Court held that the District had violated Kennedy's First

Amendment rights under both the Free Exercise and Free Speech Clauses because it disciplined Kennedy for private expression occurring during a time when coaches were permitted to engage in other secular activities, and the discipline arose from Kennedy's sincere religious practice and pursuant to a policy that was neither neutral nor generally applicable. The Court overruled *Lemon v. Kurtzman*—longstanding precedent framing judicial review of concerns over the establishment of religion by public agencies and their officials—and rejected the District's position that Kennedy's First Amendment rights must yield to the District's interest in avoiding what the District perceived as a possible violation of the Establishment Clause.

The dissenting justices disagreed with the majority's characterization of the facts and its interpretation of the application of the First Amendment to Kennedy's actions. The dissent outlined the broader facts of the matter including Kennedy's prior actions leading prayer on the field and in the locker room and his overtly religious speeches to players and would have found his actions, in their totality, violated the Establishment Clause.

Establishment of Religion

The Establishment Clause prohibits the government from acting in a way that endorses religion. Since 1971, courts have applied the "*Lemon* test," or offshoots from it, to analyze whether the purpose and effect of the government's actions constitute endorsement of religion and whether the actions at issue foster an excessive entanglement between government and religion.

The District applied the *Lemon* test to Kennedy's actions and determined that Kennedy's demonstrative prayer appeared to the reasonable observer as an endorsement of religion by the District. The Supreme Court disagreed with the District's determination and with the *Lemon* test itself, thereby overruling it. The Court held that independent prayer by a government employee in view of the public during a time in which secular activities were permitted does not in itself constitute a violation of the Establishment Clause.

The Court did not disturb other precedent precluding compelled or coercive religious observance, whether by overt acts or by operation of a captive audience. Here, however, based on the specific factual circumstances framed by the Court, it held that Kennedy's private and silent prayer, even in view of his players, was not coercive.

Free Exercise of Religion

The Free Exercise Clause guarantees citizens the right to freely exercise their sincere religious practices. Usually, the government may limit those acts only through a religiously neutral and generally applicable policy or rule. Here, it was undisputed that Kennedy's prayer was a sincere religious practice, and the District conceded that its rule requiring that Kennedy refrain from prayer was not neutral, as it specifically targeted a religious practice but not non-religious conduct. The Court therefore, having found no concern with Kennedy's conduct under the Establishment Clause, concluded that the District's discipline of Kennedy for his prayer activities violated the Free Exercise Clause.

Freedom of Speech

The Free Speech Clause prohibits the government from restricting private citizens' speech; however, in the context of government employment, employee expression may not always receive First Amendment protection. Consistent with precedent, the Court relied on its prior decisions in *Pickering* v. *Board of Education of Township High School District* and *Garcetti v. Ceballos,* and determined that the nature of Kennedy's expression was in his role as a private citizen, not in his capacity as a government employee. The Court reached this conclusion because Kennedy's prayers were not within the scope of his coaching duties nor pursuant to District policy, he was not seeking to convey a District message, he was not paid to produce the speech at issue, and the prayers were performed during a time when he was permitted to engage in personal activities, as was the case for other coaching staff. Therefore, the Court held Kennedy's speech was protected under the Free Speech Clause.

Takeaways

First, the *Kennedy* opinion affirms that private, non-demonstrative prayer by a school employee does not violate the Establishment Clause and is generally protected by the Free Exercise Clause, assuming other non-religious expression and activities are otherwise permitted by school staff during the same time period.

Second, while the *Lemon* test is no longer viable for analyzing Establishment Clause disputes, the holding in *Kennedy* does not diminish the constitutional principle that schools may not endorse religion nor coerce participation in religious activities. The *Kennedy* Court narrowly construed the facts in the case in holding that Kennedy was acting as a private citizen conducting a personal, brief, and quiet prayer. Notably, the Court *did not* consider Kennedy's locker room prayers, mid-field prayers involving students and members of the public, or overtly religious speeches in reaching its determination because Kennedy had discontinued those practices prior to his discipline. The Court also *did not* hold that an employee-led prayer would survive constitutional scrutiny.

Third, the Court's opinion does not overrule prior precedent where particular religious activities were found to be unconstitutional, including at graduation ceremonies or football games. For example, this case does not impact *Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County* (use of tax-supported property for religious instruction), *Santa Fe Independent School District v. Doe* (student-led and initiated prayer using a loudspeaker at football games), and *Lee v. Weisman* (prayers at school ceremonies). In each of these instances, the Court ruled that the challenged conduct was not constitutionally protected.

Finally, consistent with the trend of Supreme Court opinions relating to individual free exercise rights over the past several years, this case signals the Court's willingness to expand protection for personal religious expression. This said, each situation involving student or employee religious expression is fact-specific and should be analyzed by legal counsel in light of this decision and existing case law.

If you encounter a situation involving the free exercise of religion or free speech of employees or students, or if you have concerns regarding potential Establishment Clause issues, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also subscribe to our podcast, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

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Note, Lozano Smith previously addressed this case in our 2017 Client News Brief Number 58 and 2021 Client News Brief Number 20.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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